A **JAGDISHWAR SINGH AND ANOTHER**

v.

REGINAM

[SUPREME COURT, 1962 (MacDuff C.J.), 6th, 13th July]

B

Appellate Jurisdiction

Criminal law—evidence and proof—previous statement by witness inconsistent with his testimony—no credible explanation for discrepancy—failure of magistrate to consider conflict—Penal Code (Cap. 8) ss.132(b), 335(a), 346(a), 409—Criminal Appeal Act 1907 (7 Edw. 7, c.23) (Imperial) s.4(1).

C *Criminal law—misdirection—witness' evidence accepted in spite of unexplained conflict with earlier statement—other evidence on record insufficient to establish guilt—miscarriage of justice—Penal Code (Cap. 8) ss.132(b), 335(a), 346(a), 409—Criminal Appeal Act 1907 (7 Edw. 7, c.23) (Imperial) s.4(1).*

The appellants were charged *inter alia* with arson of a house they were occupying. One Jetta Saukar, the Principal witness against them, was proved at the trial to have made an earlier statement D to the police in conflict with the evidence he had given in court and he gave no credible explanation of the discrepancy. The magistrate failed to consider the effect of this conflict and accepted the evidence as given.

Held: 1. This amounted to a serious misdirection of himself by E the magistrate.

2. Though there was a certain amount of evidence other than that given by Jetta Saukar, it could not be said that without his evidence the magistrate would necessarily have regarded the appellants' guilt as established beyond reasonable doubt. There had therefore been a miscarriage of justice.

F Cases referred to: *R. v. Harris* (1927) 20 Cr. App. R. 144: *R. v. Cohen & Bateman* (1909) 2 Cr. App. R. 197; 73 J.P. 352.

Appeal from convictions by the Magistrate's Court.

K. C. Ramrakha for the appellant.

B. A. Palmer for the respondent.

G

MACDUFF C.J.: [13th July, 1962]—

The two Appellants were charged before the Magistrate, First Class, at Ba, with the following offences :

" *FIRST COUNT*

H *Statement of Offence (a)*

ARSON : Contrary to Section 346 (a) of Penal Code, Cap. 8.

Particulars of Offence (b)

JASODA BAI w/o Ram Singh and JAGDISHWAR SINGH s/o Ram Singh on the 12th day of June, 1961, at Yalalevu, Ba, in the Western Division, wilfully and unlawfully set fire to a house.

SECOND COUNT

Statement of Offence (a)

ATTEMPT TO OBTAIN MONEY BY FALSE PRETENCE : Contrary to Sections 335 (a) and 409 of Penal Code, Cap. 8.

Particulars of Offence (b)

JASODA BAI w/o Ram Singh and JAGDISHWAR SINGH s/o Ram Singh on the 13th day of June, 1961, with intent to defraud attempted to obtain from the ALBION INSURANCE COMPANY LIMITED, the sum of sixteen hundred pounds (£1,600) by falsely pretending that their dwelling house together with their personal household effects insured under Policy of Insurance No. FF12093 by the said ALBION INSURANCE COMPANY LIMITED, was destroyed when the said dwelling house and the said personal effects was set on fire by some unknown person.

THIRD COUNT

Statement of Offence (a)

GIVING FALSE INFORMATION TO A PUBLIC SERVANT : Contrary to Section 132 (b) of Penal Code, Cap. 8.

Particulars of Offence (b)

JASODA BAI w/o Ram Singh and JAGDISHWAR SINGH s/o Ram Singh on the 12th day of June, 1961, at Varoka, Ba, in the Western Division, did give to a person employed in public service to wit : D/Constable 238 ARJUN and D/Corporal 546 JAGNANDAN of the Fiji Police Force, information that some unknown person set fire to their house, knowing the same to be false and knowing it to be likely that the said D/Constable ARJUN and the said D/Corporal 546 JAGNANDAN may use their lawful power to the annoyance and injury to other persons. "

They were convicted and the 2nd Appellant was sentenced to twelve months' imprisonment on the first count, twelve months' imprisonment on the second count, and one month's imprisonment on the third count, the sentences to be served concurrently, while the 1st Appellant was sentenced to six months' imprisonment on the first count, six months' imprisonment on the second count, and one month's imprisonment on the third count, these sentences also to be served concurrently. Both Appellants now appeal against conviction and sentence, the grounds of appeal against conviction being that the verdict is unreasonable and cannot be supported having regard to the evidence.

In amplification of that ground it was contended by Counsel for the Appellants that the learned Magistrate in finding the Appellants guilty relied almost entirely on the evidence of one Jetta Saukar, that he should have disregarded that evidence entirely, and without that evidence there was insufficient evidence on which he could convict.

In the lower Court the real issue was whether or not the two Appellants had wilfully set fire to the house they were occupying, the second and third counts not being separately argued since, in effect, conviction on those counts followed a finding in respect of the first count. Counsel before this Court adopted the same procedure. It is, therefore, only necessary, as far as this appeal is concerned, to consider the finding by the learned Magistrate on the first count.

Jetta Saukar was a near neighbour of the two Appellants. The material part of his evidence was that late in the evening of the 12th June, 1961, or early in the morning of the 13th June, 1961, he went outside his house and saw that the 2nd Appellant and her family had taken out of their house all their household goods and had put them under a mango tree and that he actually saw them putting the goods there. About half an hour later he saw the Appellants' house afire, went over to it, and on this occasion noticed that the Appellants' household goods were no longer in the place where he had seen them earlier. In cross-examination this witness admitted that two weeks after the fire he had made a statement to the police. The statement was read over to him in Court, he admitted that it was the statement he had made, and confirmed that it was true. The learned Magistrate did not, as he should have done, make the statement an exhibit. However the original statement has been made available to this Court.

In that statement Jetta Saukar made no reference either to the fact that he had gone out of his house or that he had seen the Appellants shifting furniture out of their house half an hour before the house was ablaze. On the contrary he said "I did not see Ram Singh's wife (the 2nd Appellant) before the fire stated in the house". It is conceded by Counsel for the Crown, and I agree, that the omission of such a material fact from his first statement to the police, in default of an acceptable explanation for such omission, is such that it amounts to a conflict with the evidence this witness gave later in Court. His explanation was to the effect that he did not tell the police constable everything in his first statement as he was busy looking for three cows that day and made his statement quickly. Such an explanation can only be regarded as fantastic and was certainly not one which could be accepted as reasonably explaining the omission.

It has been held that if a witness is proved to have made a statement, though unsworn, in distinct conflict with his evidence on oath, the proper direction to a jury is that his testimony is negligible and that their verdict should be found on the rest of the evidence — *R. v. Leonard Harris* (1927) 20 Cr. App. R. 144. In my view the omission was of a fact so material that Jetta Saukar's statement amounted to a conflict with his later evidence and his testimony should have been disregarded. The learned Magistrate failed to consider the effect of this conflict on the value of Jetta Saukar's evidence and, in his judgment, said "I believe and accept the evidence of Jetta Saukar that the furniture had been removed from the house of Jasoda Bai prior to the fire in that house". This, in my view, was a serious misdirection.

The effect of a misdirection was considered in *R. v. Cohen and Bateman* (1909) 2 Cr. App. R. 197 with reference to the application of

Section 4(1) of the Criminal Appeal Act. At p. 207 of the report, in delivering the judgment of the Court, Channel J. says :

> "There is such a miscarriage of justice not only where the Court comes to the conclusion that the verdict of guilty was wrong, but also when it is of opinion that the mistake of fact or omission on the part of the judge may reasonably be considered to have brought about that verdict, and when, on the whole facts and with a correct direction, the jury might fairly and reasonably have found the appellant not guilty. Then there has been not only a miscarriage of justice but a substantial one, because the appellant has lost the chance which was fairly open to him of being acquitted, and therefore, as there is no power of this Court to grant a new trial, the conviction has to be quashed. If, however, the Court in such a case comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or at all events no substantial miscarriage of justice within the meaning of the proviso, notwithstanding that the verdict actually given by the jury may have been due to some extent to such an error of the judge, not being a wrong decision of a point of law."

In the circumstances of the case at present under appeal there was a certain amount of other evidence to which Counsel for the Crown has drawn attention. I am unable to say, however, that without the evidence of Jetta Saukar the learned trial Magistrate would necessarily have come to the conclusion that the Appellants' guilt had been proved beyond a reasonable doubt. On the contrary I incline to the view that such other evidence would not have been sufficient. Accordingly there has been a substantial miscarriage of justice and the appeal must be allowed.

Since the prosecution, therefore, failed to prove the offence charged on the first count it follows that they also failed to establish the offences charged on the second and third counts. Convictions and sentences on all three counts of both Appellants are quashed.

Appeals allowed.