A

JAMES BRIJ BHAN SINGH AND OTHERS

v.

REGINAM

B

[SUPREME COURT, 1967 (Hammett J.), 23rd June, 10th August]

Appellate Jurisdiction

Criminal law—practice and procedure—case for defence closed—evidence called thereafter by direction of court—discretion wrongly exercised—Criminal Procedure Code (Cap. 9) s.136.

Criminal law—evidence and proof—witness called by court—case for defence closed—discretion of court—Criminal Procedure Code (Cap. 9) s.136.

C

At the trial of the three appellants in the Magistrate's Court on charges arising out of the forgery and uttering of two cheques, after the close of the case for the prosecution the appellants elected to call no evidence or make any statement. On completion of the closing addresses by counsel for the defence, the court adjourned, and on resumption the magistrate called for further evidence to be given by the Crown. At a later date further material evidence for the prosecution was in fact given, by the production of a number of exhibits showing specimens of handwriting.

D

Held: 1. The wide discretion given to a trial court by section 136 of the Criminal Procedure Code to call any person as a witness at any stage of the trial should not (unless there are exceptional circumstances) be exercised after the close of the case for the defence, unless something has arisen *ex improviso* which no human ingenuity could have foreseen.

E

2. The matter upon which the court had called for evidence did not arise *ex improviso* and there were no exceptional circumstances.

3. The evidence was improperly called, and as it was given weight by the magistrate in the case against the first appellant on the charges of forgery his conviction could not be sustained.

F

Cases referred to: *R. v. Tregear* [1967] 2 Q.B.574; [1967] 1 All E.R. 989: *R. v. Cleghorn* [1967] 2 Q.B. 584; [1967] 1 All E.R. 996.

Appeals against convictions by the Magistrate's Court. The judgment is reported only on the question of the court's power to call witnesses and only the portion of the judgment relevant to that matter is reproduced below. The court, upon consideration of the evidence, also allowed the appeal of the second and third appellants.

G

B. C. Ramrakha for the appellants.

H

Criminal Procedure Code (Cap. 9) s.136: "Any court may, at any stage of the inquiry, trial or other proceeding . . . . summon or call any person as a witness, ... and the court shall summon and examine . . . . . any such person if his evidence appears to it essential to the just decision of the case:"

T. U. Tuivaga for the respondent.

A HAMMETT J. (in part): [10th August, 1967]—

The three appellants were tried jointly in the Court below on a charge containing six Counts.

On the 1st Count the 1st Appellant was charged with forging a cheque for £68.2.0. On the 3rd and 5th Counts the 2nd and 3rd Appellants were B jointly charged with Uttering this cheque and Receiving the proceeds respectively.

On the second Count the 1st appellant was charged with forging a cheque for £185.0.0. and on the 4th and 6th Counts the 2nd and 3rd appellants were jointly charged with uttering that cheque and Receiving the proceeds respectively.

C The 1st Appellant was convicted on the 1st and 2nd Counts of Forgery and appeals against both convictions on eight grounds in Criminal Appeal No. 35 of 1967.

The 2nd Appellant was convicted on each of the 3rd, 4th, 5th and 6th Counts and the 3rd appellant on the 5th and 6th Counts. They both appeal against each conviction on three grounds in Criminal Appeal No. 48 D of 1967.

These two appeals were, with the concurrence of Counsel for all parties, heard together.

The 1st Appellant was a teacher at the Dilkusha Methodist Boys School and the 2nd and 3rd Accused were labourers doing work at the school at the material time. The School has a current account at the Bank of E New South Wales and its cheque book is kept in the Headmaster's office at the School. Cheques must be signed by any two out of three persons, namely the Manager of the School, Rev. Caleb, Mrs. Glanville and the Headmaster, Mr. B. Masih. Mr. Caleb was in the practice of signing a few blank cheques in advance and leaving them with the Headmaster who kept them in his office.

F On 24th and 28th June 1966 these two cheques for £68.2.0. and £185.0.0. respectively were presented at the Bank of New South Wales in Suva for payment and the sums due were paid in £10 notes to the nearest £10 and the balance in smaller denominations. The Bank Officers concerned were not able to identify the person or persons who presented them for payment.

On 4th July, 1966 when the Headmaster checked the school's bank G statement with his cheque butts he found the two cheque butts from which the two cheques had been torn were missing. On enquiry at the Bank it was discovered that whilst the signature of Mr. Caleb on each of the two cheques was genuine the signatures thereon of Mr. B. Masih, the headmaster had been forged.

There was evidence that on both 24th and 28th June all three accused H had access to the Headmaster's office at a time when the Headmaster was absent. One Mohammed Ali said that on the afternoon of 24th June he travelled on a bus from Suva to Nausori with the 2nd Accused who had £60 on him in £10 notes and some smaller change. He said the 2nd Accused told him that this was his own money which he had drawn from the Bank.

On 4th July a Police Officer went to the house where the 3rd Accused lives with his parents, where he found a total of £85.2.6. The 3rd Accused's mother claimed this as her own money which she said she had been given by her two sons. There was no evidence of where in the house this money was found and it was not possible therefore to say in whose possession it was at the time.

A

There was further evidence that the handwriting of the 1st Accused is similar to that on both the cheques but no handwriting expert was called to give evidence on this. No witness was able positively to identify the handwriting of these cheques as that of the 1st Accused.

B

At the close of the case for the prosecution Counsel for each appellant submitted there was no case to answer. These sumissions were overruled save that of the 3rd Appellant in respect of Counts 3 and 4. Each of the appellants then elected not to give evidence and none made an unsworn statement from the dock.

C

After hearing closing addresses from Counsel for the Defence the Court adjourned the hearing to 7th February 1967.

On the 7th February 1967 the learned trial Magistrate called for further evidence to be given by the Crown. On 27th February 1967 the additional evidence was given by Detective Sergeant Jag Nandan despite the objections raised by Counsel for the 1st Appellant.

D

This additional evidence called for involved the putting in in evidence of well over fifty written exhibits. These were apparently specimens of the hand-writing of some, if not all of the persons who were at the Dilkusha School who might have had access to the Headmaster's cheque book at the material time.

The record shows that Counsel for the 2nd and 3rd Appellants was given the opportunity to cross examine this witness called at this late stage of the trial by the Court. It does not however show that Counsel for the 1st Appellant, who had objected to this evidence being called at all and whose client was clearly affected by the evidence, was given the opportunity of cross examination.

E

In the course of his Judgment the learned trial Magistrate disclosed that he had examined, and drawn inferences from this examination of the specimens of the handwriting put in by the witness called by the Court after the closing addresses of Counsel.

F

The grounds of appeal of the 1st Appellant are largely complaints of the calling of this evidence by the learned trial Magistrate after the close of the case for the defence. The 1st Appellant also complains of the inferences drawn by the Court below from the handwriting evidence generally and of the comparison he made of the many specimens of handwriting admitted in evidence after the close of the case for the defence without any evidence thereon being given or called by an expert or someone familiar with the 1st Appellant's handwriting.

G

The provisions of Section 136 of the Criminal Procedure Code give a wide discretion to a trial Court to call any person as a witness at any stage of a trial. These powers are similar to those enjoyed by a trial Judge in England where two recent decisions have been given on the extent to which and at what stage of the trial they may properly be used. I refer to the cases of *R. v. Tregear* [1967] 1 All E.R. 989 and *R. v. Cleghorn* [1967] 1 All E.R. 996 where the authorities are fully discussed and reviewed.

H

It appears to be clear that, generally speaking, and subject to exceptional circumstances which may be present in any particular case, a Court
A should not exercise its power to call a witness in a criminal trial, after the close of the case for the defence unless something has arisen *ex improviso* which no human ingenuity can foresee.

In the present case the matter upon which the Court called evidence after the close of the case for the defence did not arise *ex improviso* and there do not appear to be any exceptional circumstances justifying the
B course that was taken.

But apart from that it is clear that the learned trial Magistrate himself examined these specimens of handwriting and without the aid of the evidence of a handwriting expert or of a witness familiar with the 1st Appellant's handwriting drew the conclusion that from similarities and dissimilarities of the specimens before him, that it was the 1st Appellant
C who wrote out the two forged cheques. It is clear from this that the learned trial Magistrate was not satisfied beyond reasonable doubt by, or did not accept that, the earlier evidence in the trial concerning the handwriting on these two forged cheques and its similarity to that of the 1st Appellant was sufficient to prove that it was the 1st Appellant who did in fact forge the signature of Mr. B. Masih.

D It is not possible therefore for me to say that without the evidence which was, in my view, improperly called at such a late stage, the Court below must inevitably have convicted the 1st Accused on the 1st and 2nd Counts.

For these reasons the appeal of the 1st Appellant against his conviction on the 1st and 2nd Counts must be allowed.....

Appeals allowed.