ILIESA VULA WAQANITUINAYAU

v.

REGINAM

[COURT OF APPEAL, 1970 (Gould V.P., Marsack J. A., Tompkins J.A.), 14th, 27th July]

Criminal Jurisdiction

Criminal law—trial—assessors—nature of previous employment—whether might militate against impartiality—no objection taken in Supreme Court—objection sought to be taken on appeal.

Criminal law—assessors—opportunity for accused to object to appointment.

Criminal law—evidence and proof—confession—voluntariness—person in authority—Judges' Rules (L.N. No. 14 of 1967) Rule 6.

Criminal law—trial—summing up by trial judge—several counts—appropriate direction to assessors.

The appellant was tried on eight charges of fraudulent false accounting and three of fraudulent conversion arising out of the alleged misappropriation of funds of the Bua Provincial Council at a time when the appellant was an officer of that body. One of the assessors at the trial had for many years been Roko Tui Macuata, one had for a long period been a clerk with the Fijian Affairs Board and the third was employed in the Chief Accountant's office at the Treasury. On appeal against conviction Counsel for the appellant submitted that, by reason of the nature of their training, the three assessors would be inclined to interpret the evidence where possible against the appellant and would lack proper impartiality.

Held : 1. No such inference was justified.

2. Counsel for the appellant at the trial would, in accordance with practice, have seen the list of assessors and had full opportunity to object. No objection having then been made it was too late to seek to reopen the matter on such grounds on appeal.

A prosecution witness who gave evidence of an interview with the appellant was an officer whose duty it was to carry out routine inspections of the accounts of Provincial Councils.

Held : The finding of the trial Judge that this witness had held out no promise or inducement, and had in no way forced or intimidated the appellant into making admissions, was not open to challenge. *Quaere* whether such a witness was " charged with the duty of investigating offences " within the meaning of Rule 6 of the Judges' Rules.

Judges' Rules. Rule 6—Persons other than police officers charged with the duty of investigating offences or charging offenders shall, so far as may be practicable, comply with these Rules.

Observations on the desirability, where there are a number of counts in the indictment, of directing the assessors to consider each count separately, to distinguish carefully between the evidence on each count, and not to supplement the evidence on any particular count by looking at the evidence as a whole.

Cases referred to:

R. v. Muling [1951] N.Z.L.R. 1022.

R. v. Thompson [1893] 2 Q.B. 12; 69 L.T. 22.

Appeal from a conviction by the Supreme Court.

M. V. Pillay for the appellant.

T. U. Tuivaga for the respondent.

The facts sufficiently appear from the judgment.

Judgment of the Court (read by MARSACK J.A.): [27th July, 1970]—

This is an appeal against conviction on 8 charges of fraudulent false accounting by a public officer and 3 charges of fraudulent conversion of property, entered against appellant in the Supreme Court sitting at Suva on the 11th December, 1969. There is no appeal against sentence.

The grounds of appeal and additional grounds attached to the notice of appeal were prepared without the benefit of legal advice and are diffuse and difficult to follow. At the hearing of the appeal Counsel for appellant indicated that he would confine himself to three points which in his submission covered the grounds which appellant had attempted to set out; and Crown Counsel agreed that the appeal might properly proceed on this basis.

The three points put forward by Counsel for appellant, which it will be convenient to refer to as the grounds of appeal, were in these terms:—

(1) that the proceedings in which appellant had been convicted had not constituted a fair trial;

(2) that the evidence adduced was insufficient to establish an intent to defraud on the part of appellant;

(3) that the alleged confessions made to Emosi Boila had been improperly admitted in evidence, and if those alleged confessions were excluded there was insufficient evidence against appellant to support a conviction.

The first ground of appeal is based on the submission that the three assessors appointed to sit with the trial Judge were, because of their present appointments or of the positions they held in the past, biased against appellant. The assessors in question were Ratu Peni Vula Daunibau, who for many years had been Roko Tui Macuata; Luke Vuidreketi, who for a long period had been a clerk with the Fijian Affairs Board; and Joni Kado, who is still employed in the Chief Accountant's Office at the Treasury.

In view of the fact that the offences of which appellant was convicted concerned the misappropriation of funds belonging to the Bua Provincial Council when appellant was a public officer of that body, it was strongly urged by Counsel for appellant that all three assessors would, because of the nature of the training they had received, be strongly inclined to interpret the evidence where possible against appellant, and for that reason would not be able to show the impartiality expected of assessors in criminal trials.

In our view no such inference can be drawn from the facts surrounding the present and past occupations of the assessors. In any event it is perfectly clear that appellant had ample opportunity of raising at or before the trial any objection

he might have had to all or any of the assessors. It was conceded by counsel that a list of proposed assessors is always handed to counsel for the accused before the trial, and no person to whom counsel has objected is appointed an assessor. Counsel for appellant had seen the list before the trial and took no exception to any names appearing on it. Appellant was present in Court when the assessors were called, and could even then, before they were sworn in, have submitted that one or more of them should not be appointed. He was, however, silent. Although in the additional grounds of appeal put forward by appellant personally he says " I did not agreed with the three gentlemen Assessors. I did not remembered also they were during the trial ", it is impossible to hold that he was in any way taken by surprise, or deprived of a reasonable opportunity to make any objection he wished to raise.

His present objection appears to us something in the nature of an afterthought. It cannot in our view be said that he has been in any way prejudiced by the manner in which the assessors were appointed. There had been full opportunity for any submissions he or his Counsel wished to make in this regard, but no advantage was taken of the opportunity so afforded. He cannot at this late stage have the question of the appointment of the assessors reopened. We affirm the principle that once a jury has been sworn in and has entered on its duties, no objection can be taken to its personnel on grounds such as those put forward in this case; and the same principle should be observed with regard to the panel of assessors. Accordingly there is in our view no merit in this ground of appeal.

The second ground is directed towards the sufficiency of proof of an intent to defraud on the part of appellant. Counsel for appellant readily conceded that many mistakes had been made and many irregularities had occurred; but he contended that these could reasonably have been attributed to a poor system of accounting and the lack of proper supervision.

It is in our view unnecessary to detail the evidence given on each of the charges for the purpose of showing what proof of an intent to defraud was given in each case. The summing-up by the learned trial Judge on this point is not open to criticism. He directed that fraudulent intent must be established beyond reasonable doubt; that the act alleged in each case must have been intentional and deliberate, without mistake and not the result of mere slackness or forgetfulness. By their unanimous verdict the assessors made it clear that fraudulent intent on the part of appellant had been proved to their satisfaction; and the learned trial Judge in his judgment fully endorsed that opinion.

Reference could perhaps be made to two matters put forward by the defence by way of answer to the evidence as to deficiencies in the accounts. The first of these relates to a claim by appellant that he could not explain what had happened without reference to his " official diary " or " official note-book ". In this regard it should be noted that no such books were produced at the trial, and no application was made by or on behalf of appellant for their production; although he said in evidenc that his personal records were left in the Provincial Office and he was denied access to them. Counsel's argument on this point was that although the making of entri s in the diary or note-book would not absolve appellant from the duty of making the appropriate entries in the proper books of account, yet his diary and note-book would at least show that he had not used the moneys for his own purposes; in other words that there was no intent to defraud.

At the hearing of the appeal Crown Counsel informed the Court that he had been unable to find any such books or even evidence that they had ever existed. It is we think at least doubtful if there were any such books; and there is no evidence of

their existence apart from appellant's unsupported statement. If Counsel for appellant had felt that any material favourable to appellant's case might have been found in the diary and note-book he could have, at the trial, pressed very strongly for their production. But no effort was made to have them produced; and we can find nothing on this point tending to weaken the inference of fraudulent intent which can properly be drawn from the rest of the evidence.

The second matter concerns the admittedly false entry in the Bua Provincial Council cash book made by appellant and purporting to show that the sum of £55 received by him had been paid into the Bank to the credit of the Fijian Affairs Board, when in fact no such payment was made to the Bank. Counsel conceded that the entry in respect of the £55 was false, but submitted that the false entry had been made merely to cover up an accounting mistake and that fraudulent intent had not been proved. We have carefully considered the record of the evidence given at the trial in respect of this item and also the submission of Counsel made before us, and are satisfied that the learned trial Judge was fully justified in finding that appellant, being a public officer of the Bua Provincial Council, knowingly made this materially false entry and that " intent to defraud is the only possible inference to be drawn upon the whole of the evidence ".

In our view there was, in respect of each count, enough evidence upon which the assessors were entitled to find, as they did find, that the intent to defraud had been proved; and the learned trial Judge was in our opinion justified in reaching the same conclusion.

There is one aspect of the summing-up which may call for comment, although it cannot in our opinion affect the result of the appeal. Where, as here, an accused person is charged on a number of counts in the one indictment, the general principle to be observed is that, as is pointed out in *Garrow and Spence's Criminal Law*, 4th Edn., p. 297, the jury—or here, the assessors—should be specially directed as follows:—

(1) to consider each count separately;

(2) to distinguish carefully between the evidence on each count and the evidence on the other counts;

(3) not to supplement the evidence of any particular count by looking at the evidence as a whole.

As was said in *R. v. Muling*, [1951] N.Z.L.R. (C.A.) 1022 at p. 1028:—

> " It was important to direct the jury carefully and fully as to considering each charge independently of the others, and, as well, to warn it not to fall into the error of supposing that, where there are a number of charges made, in respect of none of which it might regard the evidence as sufficient if it stood alone, the partial weakness in respect of each may be cured by the fact that there are a number in that position."

In the present case it might have been better if the learned trial Judge had given an express direction that the assessors must, in respect of each count, consider the evidence directed towards that count only, ignoring any evidence given on any other count. In the course of his summing-up the learned trial Judge correctly states the *onus* of proof which lay on the prosecution in respect of each of the charges and he expressly says:—

> " You must consider separately in relation to each count the evidence relating thereto."

Although, as we have said, it might have been better if a more precise direction had been given on the lines set out in the passage quoted from *Garrow and Spence*, looking at the summing-up as a whole we are satisfied that the *onus* of proof in respect of each count was correctly explained to the assessors; and we can see no reason to interfere with the verdict of the Court below on this ground. In any event this did not form one of the grounds of appeal.

In his submissions on the third ground of appeal Counsel for appellant contended that the witness Emosi Boila was a person in authority, and had been so held by the learned trial Judge; that this witness had been charged with the duty of investigating an offence; and that therefore under the Judges' Rules he was bound to administer a proper caution before putting questions to appellant in connection with the apparent shortages in the Provincial account. The learned trial Judge however found that Emosi Boila was a person in authority " for certain purposes only ", and he had reservations as to whether Rule VI of the Judges' Rules would apply to this officer. These reservations were in our opinion justified. The officer in question was charged with the duty of carrying out routine inspections of accounts of the Provincial Councils; and we can find no evidence, or grounds for the inference, that he was " charged with the duty of investigating offences or charging offenders ". The finding of the learned trial Judge that Emosi Boila held out no promise or inducement to appellant, and in no way forced or intimidated appellant into making admissions, is in our opinion not open to challenge. The learned trial Judge found that the admissions made by appellant to Emosi Boila were entirely voluntary and he had good grounds for that finding.

Mr. Pillay cited the judgment in *R. v. Thompson* [1893] 2 Q.B. 12 in support of his argument. In that case, however, the facts were distinguishable in that there was some evidence of an inducment held out to the accused by the Chairman of the company by which the accused had been employed. The Chairman had told accused's brother that it would be better for him to make a clean breast of it. The principle to be applied is stated by Cave J. at page 15 in these words:—

> " If it (the confession) flows from hope or fear, excited by a person in authority, it is inadmissible."

As we consider that the learned trial Judge had ample grounds for his finding that Emosi Boila held out no promise or inducement to the appellant, and used no force or threats, and that the statement made to him was entirely voluntary, we can see no merit in this ground of appeal.

Accordingly we find that no ground of appeal put forward has been established and the appeal is dismissed.

Appeal dismissed.