A

JOHN LEVU

v.

REGINAM

B

[COURT OF APPEAL, 1971 (Gould V.P., Marsack J.A., Spring J.A.), 7th, 15th September]

Criminal Jurisdiction

Criminal law—evidence and proof—tendering by prosecution of statement by accused —practice where accused unrepresented—discretion of judge.

C

Criminal law—practice and procedure—accused not legally represented—procedure where statement by accused tendered in evidence by prosecution—judge's discretion—Penal Code 1963 (British Solomon Islands Protectorate) s.266(c) (i).

Where a statement by an accused person being tried by a judge alone is tendered in evidence by the prosecution, and the accused is not represented by counsel, the judge should ascertain whether the accused desires to object to the admission of the statement. How far the judge should go in explaining the law to the accused at that stage can only be resolved by the exercise of the judge's judgment and discretion having regard to the circumstances of the particular case and the level of education and general characteristics of the people who appear in his court.

D

E

Barmanand v. Reginam (1968) 14 F.L.R. 139, distinguished.

Hassan v. R. [1959] E.A. 800, referred to.

Appeal from a conviction by the High Court of the Western Pacific at Honiara.

F

K. C. Ramrakha for the appellant.

R. W. Davies for the respondent.

The facts sufficiently appear from the judgment of the court.

15th Deecmber 1971

G

Judgment of the Court (read by Gould V.P.) :

The appellant was convicted by the High Court of the Western Pacific at Honiara of the offence of embezzlement contrary to Section 266 (c) (i) of the Penal Code (No. 12 of 1963).

H

The appellant was employed as a rate collector by the Guadalcanal Council. In this capacity between the 14th March and the 4th May, 1971, he toured certain areas, collected moneys for which he issued receipts and which were kept in a cash box, the key of which was at all times

in his possession. When he returned to Honiara it was found that the money handed in by the appellant was short by the sum of $209.00 of the total amount shown by the receipts issued by him. He made no secret of the shortage and in a cautioned statement to the police he said that he had used the money for food and smokes.

On the appeal it was first contended that the conviction should not be supported having regard to the evidence, and the ground put forward as a basis for this submission was that the system under which the appellant worked should have been more fully explained to the High Court. It was not proved, it was suggested, that it was the appellant's duty to supply accounts and to pay over the proceeds intact; the possibility that he was no more than a civil debtor had not been eliminated. His frank disclosure of the shortage was referred to.

We are unable to accede to this argument. While greater detail might well have been given by the treasurer of the council, who gave the material evidence, his statement that the appellant was sent out to collect rates, that the appellant returned and handed in a sum $209.00 less than his receipts totalled, taken together with the appellant's admission that he had spent the missing money, forms a strong prima facie case. Some of the details to which counsel for the appellant alluded were supplied by the appellant himself when he gave evidence. He said that he was given an advance of wages to cover the time he expected to be on tour and had also an imprest account from which he paid expenses such as the cost of messengers. In our opinion, the evidence, taken as a whole was substantial, and this ground of appeal fails.

The second ground related to the statement which we have already mentioned, made by the appellant to the police, in which he made damaging admissions. Counsel contended that the question of the admissibility of this document should have been determined by the learned Chief Justice at a trial within a trial, and in this connection it is to be noted that the court was sitting without a jury or assessors.

When the statement was first tendered, the appellant, who had no counsel, did not object to it. The police officer concerned was Corporal Lapo and the relevant part of the record of the trial reads :—

> "On 13. 5. 71 at the Honiara police station in company with Cpl Anohere I interviewed the accused concerning a shortage of $209. I did not charge him at that stage. Later in the interview I did charge him with embezzlement. I then cautioned him. I then wrote down the charge and caution on a statement form. The accused elected to make a statement. I wrote down what he said. After that I read it back to accused. I used pidgin. He seemed to understand. I then asked if he wanted to make alterations or additions. He did not do so. Then he signed and so did I and Anohere as witness. (Acc shown statement — admits statement — does not object to admission). (Statement read Ex D)."

After the close of the case for the prosecution the appellant gave evidence on oath, was cross-examined about the statement and gave the following evidence —

"I admit I made a statement to the police. What I said to the police was not true. I lied to the police. I told the police what I said because they forced me. It was Cpl. Lapo (PW3) who forced me. There was also another policeman who forced me but I do not know his name. He was not a witness today. That is all. They forced me by asking me too many questions. They spoke to me too much about different things. They said I would be put in a cell for one week if I refused to speak. They did not say I would not be given food and water for that week. No one hit me. It was Lapo who said I would be put in the cell for a week if I did not speak. I say I am innocent. I did not say to the police that I was innocent because I was afraid. I say all my statement is untrue."

At the conclusion of his evidence the record reads —

"*Accused states :* I do not wish to recall Cpl. Lapo. I do not call any defence witnesses."

In argument on the appeal counsel referred to an earlier judgment of this court in the case of *Barmanand v. Reginam* (1968) 14 F.L.R. 139. It was there held, that although counsel had failed to object to the admissibility of a confession, the trial judge should have held a trial within a trial as soon as it appeared from cross-examination of police witnesses that the confession was going to be denied and that some circumstances of duress were alleged. That was a trial with assessors. Even in a trial before a judge alone a trial within a trial is the proper procedure where objection is taken to the admissibility of a confession. The authorities on the question are considered in the East African case of *Hassan v. R.* [1959] E.A. 800, where it was said, at p. 803, that in trials where an accused person is not represented by an advocate it is obviously only fair to the accused for the magistrate or judge, as the case may be, to ascertain whether he desires to take objection to the admission in evidence of a statement before admitting it.

In the present case, as appears from the record, the learned Chief Justice took that precaution, but counsel has argued that the appellant would not understand the niceties of the law on the subject and that further explanation should have been made. The question how far a judge should go in that respect is a difficult one and can only be resolved by the exercise of the judgment and discretion of the judge, having regard to the circumstances of the particular case and the level of education and general characteristics of the people who appear in his court. If a judge questions an accused at such a stage it could be said he was not entitled to do so: explanation of the law may or may not be understood or helpful. In the present case the learned Chief Justice had evidence before him that a caution had been given, the statement made and read back, and the appellant had been asked if he wanted to amend or to add anything. The appellant admitted the statement was his and had no objection to its admissibility. We are unable to say the judge was wrong in not going further at that stage.

When it finally emerged that the appellant was making allegations against the police the learned Chief Justice indicated his willingness to recall the officer concerned. Obviously this was to enable the appellant to put to him the allegations he was making. The record of the trial is

not a shorthand transcript and apparently consists of the judge's notes; we have no doubt that the learned judge would have told the appellant why he had offered to recall Corporal Lapo, though he did not note it. He had heard the appellant give evidence at some length and was in a position to assess his credibility. If at that stage of the proceedings he felt able to reject the allegations of the appellant as untrue (as he obviously did) without himself ordering Corporal Lapo back to the witness box, we could not say he was not entitled to do so.

The case is clearly distinguishable from that of *Barmanand* firstly because it was a case of a judge alone, secondly in the matter of the stage at which the objection to the statement became apparent, and thirdly as to the steps actually taken by the learned judge. We see no reason to order a re-trial.

The appeal in form included an appeal against sentence but it was not sought to support it in argument.

For the reasons given we dismiss the appeals against conviction and sentence.

Appeals dismissed.