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# BABU RAM

*v.*

# REGINAM

B [COURT OF APPEAL, 1974 (Gould V.P., Marsack J.A., Henry J.A.), 23rd October, 4th November]

Criminal Jurisdiction

***Criminal law—practice and procedure—whether statement of judge concurring with the opinion of the assessors amounts to a decision under Criminal Pro-***
C ***cedure Code*** (Cap. 14) s.281(2).

*Interpretation—criminal law—Criminal Procedure Code* (Cap. 14) s.281(2)—*meaning of decision of the court.*

After the three assessors had given their opinions that the appellant was guilty, the judge said and wrote down, " it is an unanimous opinion with which I
D fully concur. "

It was submitted on appeal that this did not amount to a proper record of the conviction and the sentence was therefore invalid.

*Held* : 1. By Criminal Procedure Code (Cap. 14) s.281(2), it was only necessary for the decision of the Court to be written down. The judge had concurred with the opinions of the assessors that the appellant was guilty and,
E therefore, that was his concluded opinion—his decision. The sentence which he, thereafter, passed was valid.

2. The judge did not abdicate his true function in favour of the assessors who were there to advise and not to return a verdict. (*Joseph v. R.* [1948] A.C. 215 distinguished).

F *Per curiam* : It was always desirable, in the interests of complete clarity, for the trial judge to say that the accused was found guilty (or not guilty) of the offence charged, or the accused was accordingly convicted (or acquitted).

Other cases referred to :

*David Kio v. R. Fiji Cr. App.* No. 27 of 1966—(unreported).

G *Siru Luluakale v. R.* 8 F.L.R. 12.

*Bharat v. R.* [1959] 3 All E.R. 292 ; [1959] A.C. 533.

*Dover and Kent County Court In re* [1891] 1 Q.B. 725.

Appeal against conviction and sentence imposed in the Supreme Court for obtaining by false pretences.

H *K. C. Ramraka* for the appellant.

*Q. Bale* for the respondent.

Judgment of the Court (read by GOULD V.P.) : [4th November 1974]—

The appellant was, on the 20th of May 1974, sentenced in the Supreme Court at Lautoka to 21 months' imprisonment for the offence of obtaining goods by false pretences. A written notice of appeal entered by appellant in person, was against sentence only ; but at the hearing of the appeal, counsel for the appellant was granted leave, counsel for the Crown not opposing, to appeal against conviction on the following grounds :— A

1. The learned trial Judge erred in law and in fact in that he did not enter any proper record of conviction or acquittal, and the sentence is therefore invalid ; B
2. The verdict is unreasonable and cannot be supported having regard to the evidence.

The facts may be shortly stated. Appellant on the 28th May 1973, obtained from Popular Furniture Limited, Lautoka, building materials tyres and tubes of the total value of $1,529.10 for which he tendered a cheque in payment. The cheque was dishonoured ; and in fact all cheques issued by the appellant C from the 6th April 1973 onwards, to a total of 15, had been dishonoured by the bank on presentment. Some of the payees of the dishonoured cheques saw the appellant about the matter and he paid them out in cash. In his evidence the appellant stated that prior to the 28th May 1973, he had been informed that his cheques were being dishonoured, but " he did not believe them. " The assessors expressed the unanimous opinion that the appellant was guilty of the offence charged ; the learned trial Judge said that he fully concurred with D that opinion and passed sentence of 21 months' imprisonment.

In his argument on the first ground of appeal, counsel for the appellant referred to the actual words said by the learned trial Judge after the three assessors had given their opinions, which were all that the appellant was guilty. The Judge then said, and wrote down :—

" It is a unanimous opinion with which I fully concur. " E

He then heard what was said in mitigation in favour of the appellant and proceeded to pass sentence. In counsel's submission the learned trial Judge at that time gave no judgment convicting the appellant, and consequently the sentence he passed was invalid. Counsel's argument was to the effect that an accused person must be convicted by the Court before sentence can be passed upon him ; and the words used by the trial Judge on this occasion did not F amount to a conviction.

In the judgment of this Court in *David Kio v. R.* (Appeal No. 27 of 1966) it was held that :

" An inferential conviction is not a sufficient compliance with the law. The judgment must state unequivocally that an accused person is convicted, or at least that he is found guilty of the offence concerned ; otherwise G there arises the situation referred to by the Lord Chief Justice in *Joseph v. R.* [1948] A.C. 215 at page 220 : ' in the result the appellant has been sentenced by a Judge who has not convicted him. ' "

On the question of what constitutes a conviction counsel quoted the judgment of this Court in *Siru Luluakale v. R.* 8 F.L.R. 12, at page 14 :—

" The essence of the matter is that there should be a judgment of the H court pronouncing the accused person guilty, and when that has been done the accused has properly been convicted whether or not that precise word is used in the judgment. "

The authorities cited must, however, be considered in the light of the 1973 amendment to the Criminal Procedure Code. Under Section 154 of the Criminal Procedure Code it was laid down, *inter alia*, that every judgment in a criminal trial should be written by the presiding officer and should be dated and signed by the presiding officer in the Court at the time of pronouncing it. That was the law at the time when the two cases quoted were decided by this Court.

Under Section 12 of the 1973 amendment, however, it was provided that where the Judge's summing up of the evidence is on record—as it was here—it shall not be necessary for any judgment, " other than the decision of the Court which shall be written down, to be given, nor for any such judgment, if given, to be written down . . . " There is an exception that when the Judge does not agree with the majority opinion of the assessors, he shall give his reasons which shall be written down and pronounced in open court, for differing with such majority opinion. Finally it was enacted that the Judge's summing up and the decision of the Court together with, where applicable, the Judge's reasons for differing from the majority opinion of the assessors, should collectively be deemed to be the judgment of the Court.

It is to be observed that there was no change in the respective functions of the judge and the assessors. Under Section 281 of the Criminal Procedure Code as amended, the assessors are still required to state their opinions orally, and the Judge is not bound to conform to the opinions of the assessors. As is pointed out in *Bharat v. R.* [1959] 3 All E.R. 292, the role of the assessors in Fiji was (and it still remains) not to convict or acquit, but to give the trial Judge the aid of their opinions in making up his own mind. When therefore, the amended legislation requires that the decision of the " Court " be written down, clearly what is called for is the decision of the Judge after he has summed up and taken those opinions. To any extent that a judge treats assessors as a jury and treats and records their opinions as having the force of a jury's verdict, he is not writing down the decision of the Court as required by law. The force of the decision in *Joseph v. R.* (Supra) is just as great in this respect as previously.

In *Joseph's* case the Privy Council said at p.220, that there was no doubt that the learned Chief Justice treated the assessors as a jury and left to them the decision on all questions of fact. The Privy Council illustrated this by quoting the following passage from the Chief Justice's summing up :—

> " I remind you that, as Mr Prichard has truly said, the onus of proof in these criminal cases is on the Crown, and you should consider the case of each one of these accused separately, and you should not convict any of them unless you are satisfied beyond reasonable doubt that the crime has been brought home to him. And you will remember, on the subject of murder, that if they are to be convicted of murder you must be satisfied, not only that they took part in the shooting, but also that at that time they had the intention to cause death or grievous bodily harm. If you are not satisfied of that, none of them should be found guilty of murder. But if, on the other hand, you are satisfied that they did go in a party in common agreement to shoot up the store, that they were quite reckless whether they killed anybody or not, but that they had not formed any intention to kill, then your verdict should be manslaughter. "

Some passages in the summing up of the learned trial Judge in the present case bear a marked resemblance to phrases in the extract just quoted. For example :—

> " As it is said, you are the judges of the facts ; I am regarded as the Judge as far as the law is concerned. "

" If, when you have considered all the evidence given by both sides you are satisfied that the prosecution have proved their case then you will find the accused guilty. If you are not so satisfied then you will acquit the accused. "

" Unless you are sure of the accused's guilt you must acquit him and that is the burden which the prosecution carry. "

" You have to be sure of his guilt otherwise do not convict him. "

It is of course quite usual to direct the assessors that they are the judges of the facts, as they are in arriving at their own opinions of the case ; but that direction is usually qualified by the further explanation which was absent in the present case, that the opinions of the assessors are not binding upon the Judge though he will naturally give them great weight. The sentences quoted above could certainly be taken to mean that it was the duty of the assessors to bring in a verdict of guilty or not guilty ; in other words to convict or acquit the accused. There, however, the resemblance between this case and Joseph's case ceases. The learned trial Judge did at least twice, later in his summing up, use such phrases as " before you can arrive at an opinion in this case " and " when you retire to consider you opinion. "

In Joseph's case the assessors actually returned a verdict, while here they were properly asked for their opinions, which were duly recorded. Further, in *Joseph's* case the Chief Justice did not say, as the learned trial Judge did here, " It is a unanimous opinion with which I fully concur ", or anything to the same effect.

We are therefore quite satisfied that the two cases are distinguishable and the learned trial Judge in the present case did not fall into the error of abdicating his true function in favour of the assessors. At the same time we would emphasise that care should be taken in summing up, not to direct the assessors in such a way as to give the impression that the power to convict or acquit, to enter a verdict of guilty or not guilty, lies in their hands.

We return now to the submission of counsel for the appellant that the words used by the learned trial Judge, " It is a unanimous opinion with which I fully concur, " do not amount to a " decision " which, under the Criminal Procedure Code as amended in 1973, is required to be written down. In Mr Ramrakha's submission the words used by the Judge amounted merely to saying that he thought as the assessors did. Certainly the words he used included that, but only as a means of conveying his own view and thereby putting on record the decision of the Court.

It is the " decision " which is required to be written down by the amended section of the Code—the word " judgment " is assigned a special meaning. In the context of a criminal trial the decision would normally convey a finding whether an accused person was guilty as charged or otherwise, but provided the meaning was clear, it would be for the Judge to choose his own words.

It is pointed out in Strouds's Judicial Dictionary, citing re *Dover and Kent County Court* [1891] 1 Q.B. 725 :—

" ' Decision ' is a popular word and not a technical word and means little more than a concluded opinion. It does not by itself amount to judgment or order. "

That of course is subject to the requirements of the context; but if that interpretation is adopted, then in our opinion it is clear that the statement made by the learned trial Judge can properly be considered a " decision. " The assessors unanimously expressed the opinion that the appellant was guilty of the offence charged; the learned Judge stated and wrote down, that he fully concurred. It was thus made clear that his concluded opinion was that the appellant was guilty of the offence. That is what he had decided. Accordingly, it can properly be held that he had written down the decision of the Court. That being so, he was entitled to pass sentence without any further formalities.

Although in our opinion the action of the learned trial Judge was a sufficient compliance with Section 12 of the 1973 amendment, we are not to be taken as approving this method of concluding a trial. In our view, it is always desirable in the interests of complete clarity that in such cases the trial Judge should say, " the Court therefore finds the accused guilty (or not guilty) of the offence with which he is charged " or " the accused is accordingly convicted (or acquitted) " or words to that effect.

Turning now to the second ground of appeal, we do not find it necessary to traverse the evidence in any detail. It was clearly proved that, prior to the issue of the cheque in question, all cheques, mostly for small amounts, recently issued by the appellant, had been dishonoured; and this was known to the appellant. The assessors were in our opinion thoroughly justified in concluding, as they in effect did, that when he paid over the cheque for $1,529.10 he had no reason to believe, and did not believe, that the bank would pay out on it. He was therefore properly convicted for obtaining goods by false pretences.

As to the appeal against sentence, we cannot hold that this was either wrong in principle or manifestly excessive. The crime committed was a serious one and its commission was deliberate. The maximum sentence fixed by law is five years' imprisonment and we cannot say that the sentence of 21 months' imprisonment in the present case was unjustified.

Mr Ramrakha had submitted a persuasive argument, but for reasons we have set out, the appeal, both against conviction and against sentence, must be dismissed.

*Appeal against conviction and sentence dismissed.*