

TEVITA NAIKASOWALU

v.

REGINAM

[SUPREME COURT, 1976 (Grant C.J.), 23rd April]

Appellate Jurisdiction

*Criminal law—practice and procedure—inconsistent statement made by prosecution witness—circumstances in which defence counsel entitled to sight of and use of a previous statement made by that witness.*

The Court set out the circumstances in which defence counsel was entitled to sight of and use of a previous statement made by a prosecution witness.

Cases referred to:

*R. v. Riley* (1866) 176 E.R. 868; [1866] 4 F & F 964.

*R. v. Wright* (1866) 176 E.R. 869; [1866] 4 F & F 967.

*R. v. Oyesiku* (1971) 56 Cr. App. R. 240; [1972] Crim. L.R. 179.

Appeal against conviction in the Magistrate's Court for defilement.

GRANT C.J.: [23rd April 1976]—

This is an appeal against the conviction of the appellant on the 13th January 1976 by Suva Magistrate's Court of defilement contrary to section 149(1) of the Penal Code. The grounds of appeal are based on discrepancies in the prosecution case and in the evidence of prosecution witnesses as compared with their previous statements, on the admission by the trial magistrate of a disputed confession made by the appellant, and of the use made by the trial magistrate of evidence of a Fijian ceremony.

It is quite clear from the record that the trial magistrate gave full consideration to the discrepancies and took them into account when arriving at his finding of guilt. They were not of the type to destroy the foundations of the prosecution case but were rather of the type to be expected in the circumstances of this case.

As to the disputed confession, the trial magistrate after holding a trial within a trial to determine its admissibility ruled that the confession was admissible, as he was perfectly entitled to do.

With regard to the Fijian ceremony, the trial magistrate drew an inference which, on the evidence, it was open to him to draw and there was no misdirection.

However I reserve judgment as during the hearing of the appeal counsel for the appellant asked for guidance as to the circumstances in which defence counsel is entitled to a sight of and use of a previous statement made by a prosecution witness.

A Where a witness whom the prosecution call or tender gives evidence on a material issue, and the prosecution have in their possession an earlier statement from that witness substantially conflicting with such evidence, the prosecution should make that statement available to the defence.

B If defence counsel's instructions are that the witness has made a previous statement inconsistent on a material issue but prosecuting counsel is of the opinion that there is no substantial inconsistency, defence counsel may apply to the court to have a sight of the statement. The statement should then be handed to the court by prosecuting counsel to enable the court to decide. If the ruling of the court is in favour of the prosecution the statement will be handed back to prosecuting counsel. Conversely, if the court rules that there is a material inconsistency on which defence counsel may wish to cross-examine, the court will have the statement handed to defence counsel with that portion duly marked.

C I might add that, if an accused person is unrepresented, and prosecuting counsel has in his possession a previous statement of a prosecution witness which substantially conflicts with his evidence on a material issue, it is the duty of prosecuting counsel to bring the statement to the attention of the court to enable the court, in the interests of the accused, to question the witness on the inconsistency if the court considers it proper so to do.

D The witness may be cross-examined on the material point in issue to which the inconsistency relates, and defence counsel may show the witness the previous statement and ask him whether he still adheres to the evidence he gave on oath in court, without putting the statement in evidence; but defence counsel will be bound by the witness's answer unless the relevant portion of the statement is put in as an exhibit.

E Consequently, if defence counsel wishes to use part of the previous statement of the witness for the purpose of contradicting the witness, defence counsel must produce same as a defence exhibit. Should he fail to do so he cannot in addressing the court claim that the statement does contradict the evidence of the witness (*R. v. Riley* (1866) 176 E.R. 868; *R. v. Wright* (1866) 176 E.R. 869).

F Where the previous statement of a prosecuting witness has been used by defence counsel in cross-examination, prosecuting counsel may re-examine the witness to clear up any ambiguities in the usual way; and if that portion of the previous statement on which defence counsel has cross-examined the witness has been taken out of context, or there is something else in the statement which modifies or explains that portion, prosecuting counsel may use the statement for the purpose of clarifying the matter. Prosecuting counsel may also make use of the previous statement of a witness, even where defence counsel has not cross-examined on it, for the purpose of repudiating a suggestion that the evidence of the witness is a late invention or reconstruction (*R. v. Oyesiku* (1971) 56 Cr. App. r. 240).

H The court has an overriding discretion to permit defence counsel to see the statement of a prosecution witness if the circumstances of the case so warrant, and it is always competent for the court to require the previous statement of a witness to be produced for its inspection and to make such use of the statement for the purposes of the trial as it thinks fit.

To conclude this aspect of the matter, I need only add that a previous statement made by a witness is not evidence of the truth of its contents except so far as it is verified and adopted by the witness as part of his testimony. **A**

The appeal is dismissed.

*Appeal dismissed.*

**B**