EMORI KALOU TOLOI & OTHERS

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v.

REGINAM

[COURT OF APPEAL, 1976 (Gould, V. P., Marsack J. A., Spring J. A.), 10th, 11th, 23rd November]

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Criminal Jurisdiction

Criminal law—accomplice—doubt over witness' involvement as participant in crime—directions to assessors thereon—Court of Appeal Ordinance (Cap. 8) s. 23(1).

Criminal law—evidence and proof—confession—admission made for reasons unconnected with police questioning—whether such admission receivable in evidence. C

Criminal law—sentence—bank robbery—whether deterrent sentence warranted.

The appellants robbed at knife point two bank tellers of a large sum of money as they were boarding a taxi outside the bank. Some days prior to the robbery one of the tellers involved had discussed the plan with one of the appellant, but the teller had become scared and told the appellants to forget the plan. The appellants, nevertheless, decided to continue with the robbery on their own without inside help. The trial judge directed the assessors that there was no evidence that the teller was part of the gang, nor was he to be treated as an accomplice to the robbery, and this being so, his evidence did not need corroboration. D

Held: 1. The teller may not have been an accomplice in the strict sense of the word, but he was close to the periphery of the case and, in these circumstances, it would have been wiser for the judge to have exercised his discretion and to have warned the assessors of the dangers inherent in accepting the teller's evidence. *(Davies v. D.P.P.* [1954] A.C. 378 applied). The judge was not clearly in error but in any event the proviso in Court of Appeal Ordinance s. 23(1) would have been applied as no substantial miscarriage of justice had occured. E

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2. Mental worry induced by some source other than the police was not a ground for rendering inadmissiable a statement made to the police who had done nothing to contribute to the mental state of the person concerned. One of the appellants might have been worried as to his co-accused's reactions to his confession, but that was no ground for rejecting the confession; nor was there any inference to be drawn from the fact that after a confrontation between two of the accused, one made a statement of admission. G

3. Three of the appellants received 9 years imprisonment and the fourth 8 years. Although bank robbery of this type was an unusual occurence in Fiji, deterrent sentences should nevertheless be imposed, and the actual sentences were neither excessive nor imposed on the wrong principle.

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Other cases referred to:

R. v. Grondkowski (1946) 31 Cr. App. R. 116; [1946] K.B. 369.

R. v. Terry [1973] 2 N.Z.L.R. 620.

R. v. Isequilla [1975] 1 W.L.R. 716; [1975]1 All E.R. 77.
A *Pilley* (1922) 16 Cr. App. R. 138.
R. v. Prager [1972] 1 W.L.R. 260; [1972] 1 All E.R. 1114.

Appeal against conviction and sentence imposed by the Supreme Court for robbery contrary to section 326(1)*(b)* of the Penal Code.

B *S. M. Koya* with *M. Tappoo* for the appellants.
D. Adams for the respondent.

Judgment of the Court (read by Marsack J. A.): [23rd November]—

This is an appeal by the all four appellants against conviction of the offence of robbery entered in the Supreme Court at Suva on the 7th day of November 1975 and
C also against the sentence of nine years' imprisonment imposed on the first three appellants and eight years' imprisonment imposed on the fourth appellant.

The relevant facts as found in the court below may be shortly stated. On the afternoon of the 25th March 1975 two tellers at the Waimanu branch of the ANZ Bank at Waimanu Road, Suva, left the bank after it was closed and, each carrying a bag of
D money, went to a waiting taxi on the road. One of these tellers was Samisoni Mocevatu and his bag contained over $20,000 in cash. The other teller Narendra Kumar went first into the back seat of the taxi and Samisoni followed him. After he was seated in the taxi a masked man holding a knife came up, put the knife to the neck of Samisoni, snatched the bag of money which was on the seat and ran away. Three other men ran after him and all made off in the direction of Marks Lane. Later that afternoon three of the four appellants made their way first by rental car and
E then by outboard punt to a place called Vunidawa where the fourth appellant had a house. Later the police recovered some $6,600 from that vicinity including over $3,000 which the evidence showed had been wrapped in dalo leaves and thrown into the river by the third appellant when he was approached by a police officer. Although the money recovered could not be positively identified as part of that stolen from the bank, there was ample circumstantial evidence justifying the finding of the court below that it formed part of the currency stolen from the bank on the
F 25th March.

Lengthy grounds of appeal were filed on behalf of each appellant but we do not find it necessary to set these out in detail. One preliminary point raised was that the application made by counsel at the hearing in the court below for separate trials should have been granted. In our view the learned trial judge correctly refused the
G application, applying the principle laid down in *Grondkowski* (1946) 31 Cr. App. R. 116:

> "Where the essence of the case is that the accused were engaged on a common enterprise it is right and proper that they should be jointly indicated and jointly tried."

Archbold on Criminal Law and Practice page 556.

H The main grounds which were argued by counsel for the appellant were set out in a series of documents handed to members of the court on the morning of the hearing. Although the original notice of appeal was filed on the 3rd December 1975 and

the case was called at two subsequent sessions of the Court of Appeal, no effort was made by counsel for the appellant to submit the grounds upon which most of his argument was based until it was too late for the court to give any consideration to these matters prior to the hearing. The court was however constrained to admit the further grounds of appeal, despite the justifiable objection by Crown counsel, in order to avoid yet another adjournment in a case which, in our opinion, had been allowed to drag on far too long. At the same time we must express our acute dissatisfaction with the procedure which had been followed in this respect by counsel for the appellant.

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At the conclusion of the case for the appellant this court informed counsel for the Crown that he need reply on only two points raised in the argument for the appellant:

1. Whether Samisoni Mocevatu ought to have been regarded as an accomplice and if so, the question of the adequacy of the summing up on that topic.
2. The admissibility and weight of statements deposed to as having been made by two of the appellants to the police.

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On the first point it is necessary shortly to outline the evidence given by Samisoni. This was to the effect that early in March 1975, he went to the house of the fourth appellant and they worked out a plan to rob the money from the Indian bank officer Narendra Kumar. The date suggested for the robbery was some ten days later namely, 17th March. The general plan was that one man was to push Narendra Kumar when he came out of the bank in the afternoon carrying a bag of money and the other man was to seize the bag and run away with it. About five days later, and before 17th March he met the fourth appellant again and told him to forget all about the plan. The fourth appellant agreed. The rest of his evidence gave details of the actual robbery which took place on 25th March. In cross-examination he said that he had changed his mind about the plan originally made with the fourth appellant because he was scared. The learned trial judge directed the assessors that there was no evidence that Samisoni was part of the gang responsible for the robbery on 25th March 1975 nor that he was in any way an accomplice in the robbery. He said that they must give their opinions in accordance with the evidence before them and not according to far-fetched hypotheses unsupported by any semblance of evidence. He went on to say that there was no legal obligation on the assessors to look for corroboration of Samisoni's evidence; but they might well conclude that it was in fact amply corroborated by the confession of the fourth appellant.

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The case of *Davies v. Director of Public Prosecutions* [1954] A.C. 378 as well as settling the law as to the classes of persons who may properly be regarded as accomplices, deals with the question of how it is to be decided whether a particular witness is to be treated as one. The appropriate passage of Lord Simonds speech is at pp. 401-2:

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> "But, it may reasonably be asked, who is to decide, or how is it to be decided, whether a particular witness was a 'particeps criminals' in the case in hand? In many or most cases this question answers itself, or, to be more exact, is answered by the witness in question himself, by confessing to participation, by pleading guilty to it, or by being convicted of it. But it is indisputable that there are witnesses outside these straightforward categories, in respect of whom the answer has to be sought elsewhere. The witnesses concerned may never have confessed, or may never have been arraigned or put on trial, in respect of the crime

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involved. Such cases fall into two classes. In the first, the judge can properly rule
A that there is no evidence that the witness was, what I will, for short, call a participant. The present case, in my view, happens to fall within this class, and can be decided on that narrow ground. But there are other cases within this field in which there is evidence on which a reasonable jury could find that a witness was a 'participant.' In such a case the issue of 'accomplice vel non' is for the jury's decision: and a judge should direct them that if they consider on the evidence that the witness was an accomplice, it is dangerous for them to act on his
B evidence unless corroborated: though it is competent for them to do so if, after that warning, they still think fit to do so."

In this case the learned judge's opinion was that there was no evidence of complicity against Samisoni, and he was clearly right in the sense that there was no evidence upon which Samisoni could have been convicted. Hence he took the responsibility of holding that Samisoni was not an accomplice. Yet we would not agree
C that the assessors would have been indulging in far-fetched hypotheses if they did not find themselves satisfied with Samisoni's statement that he had withdrawn from the plan. He had, according to his own evidence, been charged with conspiracy but the charge was withdrawn.

We do not say that the learned judge misdirected himself in this matter, but that he might have considered as a matter of discretion that it would be well to warn the
D assessors in the terms laid down in *Davies v. Director of Public Prosecutions.* The situation appears to have been exactly the one contemplated by the New Zealand Court of Appeal in *R. v. Terry* [1973] 2 NZLR 620 at 623, when, after discussing *Davies v. Director of Public Prosecutions* they said—

"Of course this does not mean that although in a particular case there is no requirement of the customary corroboration direction, it is not prudent for a
E Judge to warn of the dangers inherent in accepting the evidence of someone who though not an accomplice was close to the periphery of the crime. But that is always a matter for the discretion of the Judge."

However, the learned judge was satisfied with the evidence of Samisoni that a few days after his talk with the fourth appellant he became scared and asked the fourth appellant to do nothing further in the matter; in the learned judge's expres-
F sion, Samisoni 'got cold feet' and that the fourth appellant agreed to this.

The duty of the judge where the evidence of an accomplice is concerned, as laid down in *Davies'* case, is to warn the assessors that though they could give due consideration to the accomplice's evidence in deciding whether or not in their opinion the accused was guilty of the offence charged, it would be dangerous to do so unless that evidence were corroborated. Failure in that duty will result in the conviction
G being quashed even though there is corroboration, unless the proviso (in Fiji to section 23(1) of the Court of Appeal Ordinance) can be applied on the ground that no substantial miscarriage of justice has occured. We have not held the learned judge to have been clearly in error but, had we done so, we would have considered the case one proper for the application of the proviso. Samisoni's evidence did not go to the identification of or participation by any of the appellants. It probably strengthened
H the evidence generally against the fourth appellant, but he made a full confession in any event and there was ample other evidence against him. This ground of appeal must therefore fail, whatever view is taken of the evidence of Samisoni.

On the second ground it was argued by counsel for the appellant that the incriminatory statements made by the third and fourth appellants should not have been received in evidence. Although he concedes that this court must accept the finding of the learned trial judge that the police have not assaulted or otherwise put pressure on the appellants to induce them to make the statements, yet counsel for the appellants contends that some inducement must have been held out to them. For example: the third appellant, according to the evidence, told the police that he was very scared of the other people concerned, and asked if he could have police protection in the event of his "admitting all these things". The police officer concerned informed him that he need not be sacred as the police "are there to protect those whose lives are in danger". Much emphasis was laid by counsel for the appellants on the note written down by Detective Corporal Pauliasi at the police station immediately after the third appellant had made his confessional statment. This note read:

"broke down", "hooray, hooray", "happy, happy!"

In counsel's contention this clearly indicated that efforts had been made by the police to break down the third appellant who up till that stage had denied all knowledge of the robbery.

The learned trial judge gave full consideration to this contention in his ruling at the end of the voir dire that the evidence of the confession was admissible. The learned judge said:

> "Much issue was made of the excited reaction of D/Cpl. Pauliasi when the 5th accused admitted during the interview at Nausori Police Station his part in the ANZ Bank robbery. After the 5th accused made his confessional recital concerning the robbery, D/Cpl. Pauliasi found himselff jotting down on the piece of paper which he had been using to note the times of the various stages of the interview the words "broke down", "hooray, hooray", "happy, happy!". According to the defence this unashamed emotional reaction shows very clearly that the 5th accused had in fact been brutalized into agreeing to falsely confess to the robbery. It is said that the reaction of this police officer reflects the general rejoicing of the police in successfully breaking down the 5th accused by their intimidating and coercive methods of interview. Having carefully considered the matter, I find myself unable to accept the defence contention. D/Cpl. Pauliasi's reaction to the confession was so spontaneous and joyous that it could only have sprung from genuine surprise at the unexpected turn of events after the earlier rounds of frustration. In my view such a reaction and mode of its expression could not have emanated from one who had been party to brutal conduct and behaviour."

In our view the judge's ruling is sound and we cannot accept the argument that this evidence proves such pressure on the third appellant as to render his statement inadmissible.

In the course of his argument as to the admissibility of the statement generally, counsel for appellants cited the case of *R. v. Prager* [1972] 1 W.L.R. 260 which laid down that interrogation by police officers if carried on to the point of oppression may be held to have destroyed the will of the suspect who was being interrogated, and this prevented a subsequent confession from being treated as a voluntary confession. But no such oppression was proved in the present case. It may well be that

the third appellant was upset and that he was in fact frightened of the action which might be taken by the other persons involved. But that is no ground for rejecting the confession. As is said in *R.v. Isequilla* [1975] 1 W.L.R. 716 at p. 721:

> "Under the existing law the exclusion of a confession as a matter of law because it is not voluntary is always related to some conduct on the part of authority which is improper or unjustified."

In other words, mental worry induced by some source other than persons in authority—here the police—is no ground for rendering inadmissible a statement made to the police who have done nothing to contribute to the mental state of the person concerned. Here the findings of fact in the court below, which we accept, are to the effect that no undue pressure was put on the appellant by the police and consequently his statement was rightly admitted.

With reference to the oral statement made to the police by the fourth appellant, Mr Koya argued that this could not have been transcribed into Detective Sergeant Ashok's notebook at the time and place stated by the witness because of the spots on the notebook indicating that it had been written in the open in the rain. At counsel's request we have examined the notebook in question. There are certainly spots on several of the pages; but in our opinion it is impossible to draw, from those spots, the conclusion that the police witness was telling lies on oath as to when and where the statement was written out. Counsel in the Supreme Court suggested that the absence of smudges cast doubt on the authenticity of the interview with the fourth appellant. We do not follow this; Sergeant Ashok said in evidence that he thought it had been raining that morning and the spots were probably rain marks.

Mr Koya further contended that there had been 'confrontation' between third and fourth appellants; that the only purpose of confrontation of one suspect person with another is to strike fear in the suspect concerned; and that on the authority of *R. v. Pilley,* 16 Cr. App. R. at p. 138, a statement subsequently obtained from the person confronted would be inadmissible. We are however satisfied that there was no confrontation in the sense concerned in *R. v. Pilley.* There was no inference to be drawn from the incident referred to that the object was to obtain a confession from one or the other of them.

Counsel for the appellants referred also to the defence of alibi set up by the first appellant in his unsworn statement, and by the third appellant in his unsworn statement, at the trial. Counsel's contention was that where an alibi has been set up, there is a positive duty on the prosecution to call evidence to disprove the alibi and to rebut what had been said by the accused persons on that point. In our view, this is putting the obligation on the prosecution too strongly. The learned trial judge directed the assessors, when referring to the statement of the first appellant, that there was no onus on the accused person to prove his alibi; that it was the duty of the prosecution to satisfy the assessors beyond reasonable doubt that the first appellant took part in the robbery. He gave a similar direction expressly to the assessors in respect of the third appellant's alibi. In our opinion, the direction of the learned trial judge on the subject accurately set out the legal position, and the assessors should have been left in no doubt as to where the onus of proof lay with regard to the presence of the first and third appellants at the material time and place.

In our opinion there is no merit in the grounds upon which the appeals against conviction are based, and they are dismissed.

There remains for determination the appeal against the sentences of nine years' imprisonment imposed on the first three appellants and eight years' imprisonment on the fourth appellant. The learned author of *Thomas on Principles of Sentencing* says at p. 128:

> "It is probably a fair generalisation to say that robbery is considered by the Court to be the most serious offence in the criminal calendar. It was for an offence connected with robbery that the longest fixed term sentence for a single offence in recent years was upheld, and it is in this context that a policy in favour of deterrent sentences is most firmly and consistently maintained."

In his argument Mr Koya submits that different considerations would apply in the Fiji context, as in this country there are few if any organised crimes of this character. He also emphasises the fact that the actual violence used in this robbery was minimal. On this latter point it is accepted that no physical injury was caused to the bank officer concerned; but the threat of very serious injury was there when the knife was held to his throat. The fact that bank robberies are unusual in Fiji does not, in our opinion, eliminate the propriety of imposing deterrent sentences in such cases. As has often been said in this court, an appeal tribunal will not normally upset a sentence imposed by the trial court unless that sentence is either manifestly excessive or imposed upon a wrong principle. In cannot be said that either of those conditions apply in the present case. As a result, the appeals against sentence also fail.

The appeals both against conviction and against sentences are dismissed.

Appeals dismissed.