A

RANGAIYA & ANOTHER

v.

REGINAM

B

[SUPREME COURT, 1977 (Mishra J.), 14th October]

Appellate Jurisdiction

Criminal law—evidence and proof—perusal by magistrate of record of earlier trial relating to same incident—conviction quashed.

C

The principal prosecution witness had earlier been a defendant in a case in which the two appellants had given evidence for the prosecution. After the hearing of the second trial involving the appellants as defendants had been completed, the magistrate unilaterally had perused the record of the earlier hearing in order to discover a matter which was not apparent from the evidence heard in court.

D

Held: It was a fundamental principle that a magistrate must act on the evidence before him and not on outside information and must not embark upon an investigation of his own. It was a serious irregularity which would in normal circumstances warrant a new trial but in the instant case it was proper that the conviction should be quashed.

Cases referred to:

E

Gould v. Evans & Co. [1951] 2 T.L.R. 1189.
Athla Prasad v. Vidya Wati Appeal 35 of 1974—unreported.
Athla Prasad v. Vidya Wati. F.C.A. 35 of 1974—unreported.
Ex parte Schoffield: re Austin ex parte Green 70 Weekly Notes 112.

Appeal against conviction and sentence in the Magistrate's Court or causing grievous bodily harm.

F

MISHRA J.: [14th October 1977] —

On 25th July 1977 the appellants were convicted by the Magistrates' Court Suva of common assault contrary to section 276 of the Penal Code and each sentenced to imprisonment for six months.

They appeal against their convictions and sentences on various grounds of G **which the main one alleges as follows:**

> "That the learned trial magistrate erred in law in perusing the Suva criminal file no. 303 of 1975 when deliberating or considering the case Navua criminal case no. 162 of 1977 against each of the appellants. That though the court declared that it used that file for a limited purpose as a judicial record it is inherrently wrong in law to consider any evidence in a judicial proceeding H which is not on oath before the trial court itself. That the remarks made by another trial magistrate in that case no. 303 of 1975 in which both the appellants had given evidence were prejudicial to each of the appellants credit as that court had disbelieved both of them."

A The reason for this ground arose in this way. One Ahmed Khan, first prosecution witness in this trial, had been charged with a criminal offence wherein in two appellants, both police officers, gave evidence for the prosecution. Out of the same facts relating to the same incident arose the second trial wherein the two appellants were charged with causing grievous harm to Ahmed Khan. They were convicted of the lesser offence of common assault. The magistrate who had tried the charged against Ahmed Khan, quite properly disqualified himself from trying the B charge against the two appellants. The trial was then transferred to another magistrate.

Learned Crown counsel had obtained a certified copy of the record of the first trial which he used freely for the purpose of cross-examining the two appellants and other witnesses. As he did not require the production of the record to prove C anything, he did not seek to produce it as an exhibit. Learned defence counsel did not seek to have it put in evidence either. In the record of the present trial, the record of the earlier trial has, for some reason been marked for identification (M.F.I. 2). Learned counsel for the Crown who appeared for the prosecution at the trial, and who also appeared at the hearing of this appeal, stated that he himself did not ask the record to be marked for identification as he was using it for the purpose of cross-examination only. He retained the copy of the record. It did not D go in as an exhibit, as neither party wanted it in.

The following, however, appears in the learned magistrate's judgment:

> "(It must be stated that the court is now aware from a perusal of the judicial record in Navua case no. 303/75 (wherein the witness P.W.1 was charged) that the present prosecution arose from a direct reference of the matter by the E trial magistrate to the Director of Public Prosecutions rather than as a result of a complaint laid by P.W. 1 direct to the police)."

It is clear that, after he had completed the hearing, the learned magistrate was troubled by something to which he could find no answer in the evidence before him. He, therefore, decided to peruse the record of the earlier case in which the complai- F nant in this case had been the accused. He himself obtained it from somewhere, perhaps the Magistrates' Courts records office. What was in that record is not known to this court. It is enough to say that the learned magistrate who had heard the earlier case had considered it improper, for the purpose of a fair trial, that he should try this case. The parties, of course, did, as they were entitled to, make limited use of the record of the earlier trial at the hearing of this case but that was made in the presence G of the accused and the evidence adduced as a result of such use became part of the evidence in this case. Beyond that neither party wished to make use of the evidence given in the earlier case. Learned counsel for the Crown concedes that under the circumstances, in a Supreme Court trial, it would have been an irregularity for the whole record of the earlier trial to have fallen into the hands of the assessors.

H What then is the effect of the learned magistrate's action in perusing the evidence which was not taken before him in the presence of the accused and counsel during the hearing of the present case?

As Lord Denning M. R. said in *Gould v. Evans & Co.* (1951 2 T.L.R. 1189 at 1191): A

> "It is a fundamental principle of our law that a judge must act on the evidence before him and not on outside information: and further, the evidence on which he acts must be given in the presence of both parties or, at any rate, each party must be given the opportunity of being present."

Fiji Court of Appeal has also expressed disapproval of a judge, or a magistrate, embarking upon an investigation of his own outside the evidence adduced before him in the presence of the parties (see *Athla Prasad v. Vidya Wati* No. 35 of 1974). B

This principle will apply with much greater force in the circumstances of the present case where the policemen who had been prosecution witnesses in the earlier trial were now facing criminal charges arising out of the same facts. It was in my view essential that the magistrate trying this case should have confined himself to the evidence that the parties chose to place before him and refrained from perusing other facts presented, and inferences drawn, in the earlier case. (See also *Ex parte Schoffield: re Austin Ex parte Green 70 Weekly Notes* 112). C

I have, therefore, come to the conclusion that the learned Magistrate's action in perusing the record of the earlier case between the hearing and the judgment was a serious irregularity. D

What order should this court then make in such a case? Where there is substantial clear evidence, an appellate court would generally order a new trial. In this case the desirability of such an order seems doubtful. The two appellants were charged with act Intended to cause grievous harm contrary to section 255(a) and, alternatively, causing grievous harm contrary to section 258 of the Penal Code. Learned magistrate found that, on the evidence, neither of the two charges could be sustained. He, therefore, found them guilty of the minor offence of common assault contrary to section 276 of the Penal Code. E

Two proceedings have already taken place arising out of the same incident. Furthermore, before the appellants were granted bail pending appeal they had already served some part of their prison sentences.

In my view, there, without going into the merits of the other seven grounds of appeal, some of which deal with the inadequacy of the evidence, the proper order for this court to make would be merely to quash the conviction and set aside the sentence. F

It is so ordered in case of each appellant.

Convictions quashed. G