A

DAMODAR NAIDU & ANOTHER

v.

REGINAM

[COURT OF APPEAL. 1978 (Gould V. P., Marsack J. A., Spring J. A.), 13th July, 3rd August]

B

Criminal Jurisdiction

Criminal law—practice and procedure—information—amendment—effect of technical breach of procedure—Criminal Procedure Code (Cap. 14 *) ss.* 257(2), 257(3).

Criminal law—evidence and proof—lies told by an accused to the police—how far capable C *of being evidence of guilt—whether any relevant distinction between lies told in and lies told out of Court.*

Criminal law—practice and procedure—trial in the Supreme Court—Assessors—Judge overruling majority opinion—procedure to be followed—Criminal Procedure Code (Cap. 14*), ss.* 25(1), 251(2).

On appeal against conviction and sentence in the Supreme Court for Arson:

D *Held:*

1. There was a tendency to relax the technicalities of criminal pleading and the only really essential question was whether injustice had resulted.

2. Lies told by an accused might be evidence of guilt but are not themselves enough to support a conviction.

E

3. Where evidence of lies is not advanced by way of corroboration and where lies are first told out of Court and then repeated in evidence then there is no relevant distinction to be drawn but a proper direction by the Judge to the Assessors is always required.

4. Where the basic reason for a Judge overruling the opinion of the Assessors is F his own conclusion derived from the evidence then that is a reason complying with S. 281(2) of the Criminal Procedure Code. Whether the reason is adequate depends on all the circumstances of the case.

Cases referred to:

R. v. Gokal and Ram 56 Cr. App. R. 348

G *R. v. Radley* 58 Cr. App. R. 394

R. v. Harris 62 Cr. App. R. 28

R. v. Chapman [1973] 2 All E. R. 624

R. v. Boardman [1974] 2 All E. R. 958

Nawaz Khan v. R. [1967] 1 All E. R. 80

H *R. v. Wattam* 36 Cr. App. R. 72

R. v. Dehar [1969] N. Z. L. R. 763

R. v. Collings [1967] N. Z. L. R. 104

Broadhurst v. The Queen [1964] A. C. 441

Narend Prasad & Lum Sik v. R. Fiji Cr. Apps. 14 & 16/71 (unrep.)

Bharat v. R. [1959] 3 All E. R. 292

Ram Bali v. R. Privy Council Appeal No. 18/61 (unrep.)

Shiu Prasad v. R. F. C. A. Cr. App. 5/72 (unrep.)

Appeal against conviction and sentence in the Supreme Court.

S. M. Koya for the first appellant

K. C. Ramrakha and A. Singh for the second appellant

I. Khan for the respondent

Judgement of the Court (read by GOULD V. P.):

Damodar Naidu alias Dama the first appellant, was referred to as the second accused at the trial in the Supreme Court, whereas Shiu Raj Singh, the second appellant, was the first accused. We will continue to refer to them as the second accused and the first accused respectively. They were both charged with arson. When the trial in the Supreme Court opened Madhwan Naidu alias Madhi, a brother of the second accused, was the third accused.

There were four counts against the first and second accused. They all related to one fire and were identical except that each count charged the setting of fire in relation to a building in different ownership: thus count 1 alleged that they set fire to a building the property of R.B. Naidu & Sons Limited, count 2 a building the property of Helen Sue, count 3 a building the property of Akbar s/o Salamat and count 4 a building the property of Lum Yuen. There were then four conspiracy counts (counts 4—8) following the same pattern, in which the third accused was charged with conspiring with the first and second accused wilfully and unlawfully to set fire to a building the property of the same owners respectively. We are no longer concerned with counts 4—8 as the third accused was acquitted. Counts 1—4 were amalgamated (to use a neutral word) into count 1 (based on the same total particulars) in circumstances to which we will advert later, and the first and second accused were convicted on that count and sentenced, the first accused to 7 years' imprisonment, and the second to 10 years'. It is to be noted that these convictions were entered by the learned judge, in exercise of his undoubted powers to that end, although the unanimous advice of the assessors was for acquittal in each case. The first and second accused have brought these appeals against their convictions and sentences.

It is common ground that in the early hours of the morning of the 9th May, 1977, at Rakiraki, a block of shops and/or similar business premises was destroyed by fire. They faced on to the main street of the town and had domestic premises at the rear: they were close together though there was a lane at one point. A store, of which the second accused was the manager (he referred to it as R. B. Naidu's store, R. B. Naidu being his father) was at one end of the block and the fire commenced at the other end at "Tim's Restaurant" spreading rapidly. The first accused was also employed at Naidu's store. Further facts will emerge when the grounds of appeal are being considered.

A At the hearing of the appeal the second accused was represented by Mr. S. M. Koya, who had filed the notices of appeal on behalf of each accused. Mr. K. C. Ramrakha, however, represented the first accused, adopting some of the grounds filed by Mr. Koya and his argument thereon, and adding one further ground.

The first ground of appeal is taken on behalf of the second accused only and is that a submission of no case to answer, made at the end of the prosecution's case, ought not to have been rejected. Though a similar ground of appeal was included in
B the first accused's notice. Mr. Ramrakha did not pursue it, no doubt having regard to the fact that the evidence tendered and admitted against the first accused included a confession.

Mr. Koya summarised the evidence against the second accused thus:

(a) He was Managing Director of R. B. Naidu & Sons Limited, though the
C extent of his participation in the ownership was not clear.

(b) Some time before 1976 the Naidu premises were insured with the New Zealand Insurance Company Limited. In December 1976, the insurance on the building was increased from $16,000 to $50,000. There was insurance of $55,000 on the stock.

(c) About five days before the fire Rajendra Prasad, an insurance clerk in the
D New Zealand Insurance Company Limited, who was familiar with the two policies concerned, said that he was spoken to on the telephone by a person who said he was "Naidu" of R. D. Naidu & Sons, and who enquired when the policies were due and if the premiums had been paid. The person requested him to check to make sure the information was correct and the witness did so.

(d) The three accused were seen on the Naidu premises late on the night of the
E 8th with lights still burning, at a time when all three said in statements to the police they were in bed and asleep.

(e) After the fire broke out there was evidence that the second accused made little or no attempt to rescue his stocks. The witness Ahmed Ismail alias Babu was perhaps the main witness in this respect. At the request of the second accused he helped to shift a heavy safe. He then asked if second accused
F needed any more help, pointing out that the Naidu shop was not yet attacked and they could move the stock—the reply was simply "Thanks for helping with the safe." He pointed out a tractor tyre worth $300 which was on the verandah—the answer was "Just leave it." The same witness said that the second accused requested him to tell the police that he had seen the second accused put papers in the safe before moving it and he refused.

(f) There was evidence of lies told, in the main to the police, by the second
G accused. These included *(a)* an assertion that after dinner on the night of the fire he and his wife retired to bed—his wife was in fact staying elsewhere with her mother; *(b)* an assertion that the third accused had switched off the store's power plant at about 10.30 pm; *(c)* an assertion that he was unaware of the increase of the insurance cover on the building; *(d)* an assertion that the value of the stock and chattels on the premises on the night in question
H was approximately $96,500; there was some prosecution evidence of shortages of common goods on the night in question. Mr. Koya's argument was that these were the lies which were discernable on the evidence at the close of the prosecution case. We would add that the night of the fire was one on which a number of employees of the Naidu shop were away, as usual for the weekend.

The learned judge in ruling that the three accused had a case to answer did not go into detail, but merely said that he was satisfied that that was the case. In this court Mr. I. Khan, for the respondent, submitted that the second accused had not shown that no reasonable court could have convicted him, on the evidence as it then stood. We also are satisfied that the learned judge was not shown to have been wrong in his ruling, and this ground of appeal fails.

The second ground was that the learned judge erred in allowing a substituted indictment to be filed and in the observance of certain related procedural matters. After hearing a submission of no case to answer at the close of the prosecution case the learned judge said he was in some doubt whether there should be four counts of arson and four of conspiracy. After counsel had been heard the prosecution tendered an amended information concerning which the learned judge said—

> "The Prosecution now tenders an amended information containing one charge of conspiracy and one only for arson showing that four 'sets of premises have been destroyed'.
>
> Defence counsel submits that this has completely altered the charge against the accused and that they should be acquitted.
>
> I cannot see how that arises. The evidence shows that these premises were destroyed; the charge has not altered the town, the area or the site on which the buildings stood. It has not altered the names of the victims except to substitute the name of Tim Young Sue for that of Helen Sue for one of the portions destroyed. The names of the persons merely help to identify the properties.
>
> I would not have thought it necessary to draft another two counts. All that was needed was to strike out counts 2, 3, and 4 the superfluous arson counts and counts 6, 7, 8 the superfluous conspiracy counts. The same guilty act had been charged four times.
>
> Defence counsel submits that findings of Not Guilty should be restored in those counts. But charges 2, 3 and 4 are not separate offences although drafted as such. They are in reality a repetition of the same charge. If one were to return such findings it would mean a rejection of the prosecution evidence that those buildings were burnt down as a result of a criminal act. One could then scarcely purport to rely on the same evidence for arson of an adjacent building. Accuseds 1 and 2 would be able to plead that they had been acquitted 3 times of the same charge.
>
> It is quite sufficient to strike out the superfluous and improperly added counts of arson and conspiracy.
>
> Section 123*(c)*(i) C. P. C. makes it apparent that it is not necessary to name the owner of the property as long as it is indicated with reasonable clearness, unless the name of the owner is needed for some specific type of offence.
>
> I allow the amended information to be substituted as an amendment of charges 1 and 5 of the charges in the original information and I order that charges 2, 3 and 4 (arson) and 6, 7 and 8 (conspiracy) be struck out. The charges to be numbers ONE and TWO."

It will be observed that what the learned judge ordered was an amendment of the information by a change in the particulars of count 1 and the deletion of counts 2-4.

The argument, which was relied upon for both first and second accused, was that such amendments can only be made under section 257(2) of the Criminal Procedure Code when the information is defective, that the amendment was made at too late a stage of the trial, that an opportunity should have been given for the recall of witnesses, and that the learned judge had not complied with section 257(3) which requires that a note of the order for amendment be endorsed on the information. It was also "highly desirable" that the accused should have been re-arraigned.

We were referred to the cases of *R. v. Johal* and *Ram* 56 Cr. App. R. 348 and *R. v. Radley* 58 Cr. App. R. 394, and Mr. Koya fairly conceded that in the light of these authorities there was a tendency to relax the technicalities of criminal pleading and that the only really essential question was whether any injustice had resulted.

As to the technical defects alleged in this case we note from the record that Mr. M. T. Khan, who appeared for the second accused in the Supreme Court, was granted a short adjournment to consider his position, with specific reference to whether any prosecution witnesses should be recalled, and on resumption, said there was no special course which he wished to take. There may have been a technical breach of section 257(3), but the order is on the record in the learned judge's handwriting. Rearraignment was perhaps desirable but in the circumstances was hardly more than a technical requirement. A complaint that in the new particulars a building was alleged to be the property of the estate of Tim Young Sue, does not carry weight in the light of section 123*(c)*(ii) of the Criminal Procedure Code which permits such descriptions as "Trustees". Mr Koya was unable to give a positive response when asked to state where any prejudice arose. The situation, in our opinion, corresponded closely with that described in *R. v. Harris* 62 Cr. App. R. 28 at 32, as follows:

> "As to the time at which the amendment was made, it may very well be that in very many circumstances an application to amend as late as the close of the case for the prosecution would be so likely to involve injustice to an accused person that such an application in many instances might be refused. In this case, we can see no injustice which could have resulted, and we feel really that Mr. Hordern had got pinpointed any specific injustice. He relied simply on the general proposition that an amendment at such a late stage must involve the question of injustice. We consider that it was an amendment which involved a more accurate discription of a representation by conduct and that could appropriately be made at the stage at which it was."

We did not ask counsel for the respondent to reply on this ground of appeal; and as we are satisfied that there was no injustice or prejudice, it cannot succeed.

Grounds 3 and 3A, not argued by Mr. Ramrakha, relate only to the second accused, and as argued were confined to ground 3A, which reads:

> "3(A) That the Learned Trial Judge having regard to all the circumstances of the case misdirected himself in law and wrongly convicted the Appellant on the basis only *first* that the Appellant had told *lies* to the Police in his statements made out of Court on a number of matters as set forth in his judgment at Pages 273 to 278 of the Record and *secondly* the Appellant told *lies to the Court in evidence* on a number of matters as set forth in his judgment at Pages 274 to 279 of the Record.

PARTICULARS

(a) At the trial the Prosecution did not adduce any direct evidence or confessional statement made by this Appellant to a person in authority or any circumstantial evidence leading to the inescapable inference that the Appellant was guilty of the offence with which he was charged.

(b) That the Learned Trial Judge's finding that the Appellant's assertions or denials made by him either out of Court or in Court were lies did not in law amount to proof of guilt.

(c) Even if the alleged lies *out of Court* or *in Court* amounted to some incriminatory evidence, it could not in law provide either confirmation or corroboration of any independent evidence pointing to the guilt of the Appellant."

There is no doubt that the question of lies told by the second accused played a very important part in the case, and in the mind of the learned judge as indicated by his judgment. We refer to the judgment rather than to the summing up, as the latter was directed to the assessors who took a view contrary to that of the learned judge:

The following are extracts:—

"The accuseds were untruthful to the police and in evidence when they say that the store was unlighted after 10.30 p.m. or thereabouts."

.....

"The Accused 2 was lying to the police when he said that he was not around at 12 midnight or 12.30 a.m., and that the lights were not on until that time. He was untruthful when he said he was asleep when the fire broke out."

.....

"I am also satisfied that he untruthfully told P. W. 1 the insurance manager that his wife and baby were asleep on the premises at the time of the fire. It is a lie which he had told to the police on Wednesday 11/5/77 when he made his first statement Ex. P. 11."

.....

"In my view he told that lie to lend credibility to his statement in Ex. P. 11—that at 10 p.m. the shop was closed and he went to bed and was fast asleep by 11.00 p.m."

.....

"On 14.5.77 in Exhibit P. 12 the accused 2 again untruthfully declared to the police that Accused 3 switched off the power plant at about 10.30 p.m."

.....

"In evidence he untruthfully maintained that he went to bed betwen 10 p.m. and 11 p.m. and was asleep when the alarm of 'fire' was given."

.....

"P. W. 1 the insurance manager says he discussed the increase of insurance on the 'phone with someone who said he was Damodar Naidu. It is not conceiv-

able that a stranger should purport to instruct the insurance company to increase the insurance cover and should do so under the guise that he was accused 2 and that this should be followed up by the firm's cheque. Once again I find that accused 2 was untruthful. In my view his denial of knowledge of the enhanced insurance valuation was intended to conceal the existence of any financial motive for burning down the building."

.....

"There is yet another piece of information given by accused 2 in his statement Ex. P. 11 which he now retracts. He said that accused 1 was in his employ and had been for about 2 years and that he lived with accused 2. Accused 2 now says that he had said accused 1 had been with him for 2 weeks and not 2 years and that D/Corp. Raju refused to alter this when it was pointed out by accused 2. I regard that as yet another untruth in evidence from accused 2."

.....

"The accused 2 is an utter liar. He has lied on every aspect which could connect him with the fire and I do not simply mean that he has denied them, I mean that he has lied about them. He also lied to the police on similar aspects. He has even lied to the insurance manager P. W. 1."

It will be observed that the great emphasis in those passages was to lies told to the police though in most cases they were said to have been repeated in evidence. Mr. Koya sought to draw a distinction between lies out of court and lies told in evidence during court proceedings, basing himself on what was said in *R. v. Chapman* [1973] 2 All E. R. 624 at 629—

"Proof of a lie told out of court is capable of being direct evidence, admissible at the trial, amounting to affirmative proof of the untruth of the defendant's denial of guilt. This in turn may tend to confirm the evidence against him and to implicate him in the offence charged. But a denial in the witness box which is untruthful or otherwise incapable of belief is not positive proof of anything."

The learned judge relied upon the first part of that passage and there was an implied criticism of the second part in *R. v. Boardman* [1974] 2 All E. R. 958, 963. That is a question which has no relevance here for two reasons. The first we have mentioned—that the significant lies in the present case were first told out of court and later repeated in evidence—once it is accepted that such statements are in fact false the circumstance that they were repeated on oath in our opinion may ligitimately be regarded more as intensifying their adverse effect than otherwise. The second reason is that Chapman's case was concerned with evidence by way of corroboration in the rather technical sense it has acquired in the case of accomplices or in sexual cases. Mr. Koya submitted that the learned judge regarded the second accused as having given perjured evidence which made corroboration in the technical sense relevant. We regard this suggestion as having no merit.

In our view the law applicable to the present case is that lies told by an accused may be significant evidence of guilt but are not of themselves enough to support a conviction: *Mawaz Khan v. R.* [1967] 1 All E. R. 80; *R. v. Wattam* 36 Cr. App. R. 72, 76. The following words from *R. v. Dehar* [1969] N. Z. L. R. 763, 765 are apt:

"The same principle applies in cases like the one before us, where the question is not one of corroboration at all, but it simply whether the lies may be added to a case insufficient without them, so as to support a verdict of guilt." A

Dehar's case makes no distinction between lies in Court and lies in the witness box and in that respect has been accepted in the later case of *R. v. Collings* [1976] N. Z. L. R. 104, 116, 117.

There is also the following passage from the judgment of the Privy Council in *Broadhurst v. The Queen* [1964] A. C. 441:— B

"Save in one respect, a case in which an accused gives untruthful evidence is no different from one in which he gives no evidence at all. In either case the burden remains on the prosecution to prove the guilt of the accused. But if upon the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt. What strength it adds depends, of course, on all the circumstances and especially on whether there are reasons other than guilt that might account for untruthfullness." C

We would add that in *Narend Prasad and Lum Sik v. Reginam* (Cr. Apps. 14 & 16 of 1971) this court said that there was no doubt that the fact that the accused person has told lies in the course of his statements to the police is a factor which may be taken into consideration by the jury in deciding whether or not to accept the accused's explanation of what had taken place. D

Evidence of this nature requires a proper direction by the learned trial judge. In *Dehar's* case it was pointed out (p. 765) that there could be a case where the rejection of an accused's explanation almost leaves the jury with no choice but to convict as a matter of logic, but this is not such a case. Here the learned judge in his judgment said: E

"As Lord Goddard said in *R. v. Young* [1953] 1 All E. R. 21 at 21, where a jury disbelieves an accused on oath and finds that he has given perjured evidence—they might conclude that he had good reason for so doing and regard him as guilty. I am satisfied that accused 2 has told deliberate lies upon oath which were calculated to mislead and to conceal the truth. I am not making the kind of error pointed out in *R. v. Chapman* [1973] 2 All E. R. 624 of concluding that the prosecution witnesses are truthful because I am satisfied that the accused is untruthful and that his untruths tend to corroborate the prosecution. I have found that the prosecution witnesses are in fact truthful and I have found that the accused is untruthful upon his oath. F

As pointed out in *R. v. Chapman* (supra), at 629: G

'Proof of a lie told out of Court is capable of being direct evidence, admissible at the trial, amounting to affirmative proof of the untruth of the defendant's denial of guilt. This in turn may tend to confirm the evidence against him and to implicate him in the offence charged.' "

The first quotation relates to lies in court, which as we have observed are largely merged in this case with lies told earlier, and the second to lies out of court. The last sentence of the latter relates to the function of the evidence as confirmatory of other evidence. Complementary to this is what the learned judge said to the assessors: H

"Accused persons may have reasons other than guilty knowledge for telling lies. An innocent person may tell lies out of sheer panic thinking that the actual truth could be misconstrued."

We do not think that the learned judge has been shown to have misdirected himself in this matter, but there remains for consideration a submission, akin to one made in *Mawaz Khan v. R.* (supra) and dealt with at p. 83. It is that there was an insufficient basis of circumstantial evidence apart from the lies, and, as we have observed, lies alone are not enough. It is true that one major aspect of the evidence derives most of its significance from the fact that the accused has lied about it. That is the fact that they were up and about at a late hour and shortly before the fire was first seen. Mr. Khan has argued that even without the lies it is evidence of opportunity, but though that is true, the weight to be attached to it is only a matter of comparison with similar opportunities enjoyed by other inmates of the block, who claimed to be asleep. There was evidence that the lights of the Naidu store were the only ones alight at that hour, and if it is accepted that they were up, others might be less likely to commit arson when they might be observed. There was evidence, however, of motive on the part of the second accused in the matter of insurance, and some not very cogent evidence that stocks had been run down. The attitude of the second accused at the fire is an important factor. There is evidence that, except for the safe, he made no attempt to salvage anything and refused offers of help from one Ahmed Ismail and from Constable Mahendra Prasad, at a time when salvage could have been made and articles were being saved from other premises. All of this in our opinion provides a sufficient basis of circumstantial evidence to entitle a court to have regard to and assess the weight of lies told by the accused. This ground of appeal fails.

The next ground, No. 3B, is taken on behalf of the second accused only. It reads:—

"3*(b)* The Learned Trial Judge erred in admitting in evidence the testimony of Prosecution Witness No. 1 to the effect that he discussed the increase of the insurance on the phone with someone who said he was *Damodar Naidu.* In addition the Learned Trial Judge erred in holding that the Appellant's denial of the knowledge of the enhanced insurance valuation (which valuation took place on 14th December, 1976—See Exhibit P. 1) was intended to conceal the existence of any financial motive for burning down the building."

As to the incident first described there can be no materiality in this. It is not in dispute that pursuant to the conversation with prosecution witness No. 1, Mr. G. A. Woolley, the building insurance was increased. Possibly the reference is intended to be to P. W. 3 Rajendra Prasad, clerk to the New Zealand Insurance Company Limited, who gave evidence that just before the fire he was telephoned by a person who said he was the second accused, enquiring whether the premiums had been paid. The learned judge left the matter of the identity of the caller to the assessors in this passage:—

"Prosecution Witness 2 did not claim to know accused 2. However if you believe Prosecution Witness 2 then you should consider whether the caller was accused 2. Who would be aware of the new insurance apart from accused 2 and the Bank of Baroda? If the bank manager wanted this information would he personate

accused 2? It is conceivable that some stranger telephoned the insurance company at Suva in the name of accused 2 and inquired about the firm's insurance? Accused 2 did not hold the policies; the bank held them as security for the firm's overdraft. Accused 2 says the bank paid the premium, the Bank of Baroda witnesses say that they forwarded the firm's cheque. The only way he could confirm that the insurances were valid would be to telephone the insurance company. Had accused 2 paid the cheque himself and received the policies he would not have needed to make a telephone call. It is a matter for your consideration: it is one of the links in the chain of evidence. Did accused 2 confirm just before the fire that the insurances were valid? Did he do so because he intended to burn the building in the near future?"

This we consider was a fair presentation of the matter to the assessors, making it clear that the identity of the caller was only a matter of inference.

The conversation with Mr. Woolley, and the second matter referred to on this ground of appeal are mentioned in a passage from the judgment which we have already quoted. Counsel suggested this court was in as good a position to draw inferences as was the learned judge. In the case of inferences from established primary facts that is generally so, but in this type of inference, the motivation of a party involved, much hinges on the view of the judge of the particular witness in the context of the whole field of evidence. We are not able to say that the learned judge fell into error as alleged in the ground of appeal.

The remaining grounds taken by Mr. Koya for the second accused (his argument being adapted by Mr. Ramrakha for the first accused) relate to the fact that in convicting the two accused the learned judge differed from the unanimous opinion of the assessors. They are numbered 4, 5, 6 and 6A but merely present different aspects of or arguments on the same question. In Fiji by section 281(1) and (2) of the Criminal Procedure Code the judge is required to sum up, and after the assessors have stated their opinions he must give judgment but in doing so shall not be bound to conform to the opinions of the assessors. Under an amendment to section 281(2) introduced in 1973, an abbreviated form of judgment is however acceptable, except as follows:—

".....except 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 be pronounced in open court, for differing with such majority opinion and in every such case the judge's summing up and the dicision of the court together with, where appropriate, the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for the purposes of this subsection and of section 155 of this Code."

Mr. Koya sought to make some point that a unanimous opinion of the assessors, which we have here, is not a majority opinion. This is pointless and in the context we disagree. The learned judge, as he was differing from the assessors, wrote a full judgment and in it he expressed his reasons thus:

"It will be noted that my judgment is contrary to the opinions returned by all the assessors in relation to accuseds 1 and 2.

I am not bound by their opinions and have not followed them because I regard them as being very contrary to the way in which the evidence points. It

may be that my summing up was somewhat lengthy and following a long trial there may be factors which the assessors have lost sight of."

The learned judge therefore complied with the requirements of the section.

The matter of giving reasons in such circumstances has been mentioned by the Privy Council on at least two occasions. It probably had its origin in the following words of Lord Denning in *Bharat v. R.* [1959] 3 All E. R. 292 at 294—

> "If the majority of them had given such an opinion (i.e. guilty of manslaughter instead of murder), the judge might possibly have accepted it in preference to his own. At any rate he could hardly have rejected it without saying why he did so."

In *Ram Bali v. R.* (Privy Council Appeal No. 18 of 1961—unreported) on appeal from this court, a similar situation occurred. At page 4 of the Record their Lordships said:

> "This was a strong course to take but there is no reason to think that the learned Judge did not pay full heed to the views of the assessors or to the striking circumstance that they were unanimous in favour of acquittal. Nor is there reason to think that he was unmindful of the value of their opinions or of their qualifications to assess the testimony of the various witnesses in a case of this nature.

In his summing up he had said that their opinions would carry great weight with him. The decision of the learned Judge was based upon his own emphatic conclusions in regard to the evidence.

> Their Lordships can discern no error in the approach of the learned Judge in arriving at his positive and affirmative conclusions: it is manifest that his acceptance of certain witnesses and his rejection of others made him satisfied beyond even 'the slightest shadow of doubt' of the guilt of the appellant."

Though the learned judge in the present case did not use the words "their opinions would carry great weight with him" he did emphasize the importance of the assessors forming their own opinions in this passage in the summing up:

> "I will in this summing up remind you of the salient features of the evidence. There is no point in my repeating everything that every witness has said although the nature of the evidence adduced necessitates a lengthy review. If you get the impression that I am trying to persuade you to adopt an opinion of my own you will be wrong. It is you individual opinions which are requred and you are not there to echo what you think may be the judge's opinion. I may contrast or compare the evidence of one witness with another: in so doing I will not be inviting you to accept or reject any particular testimony. I may point out what appear to be inconsistencies, or what may be corroboration of one witness by another or others, or the opportunities for witnesses to collaborate and concoct evidence as well as the lack of opportunity to get together for such a purpose. In so doing I am not inviting you to believe one witness in preference to another: I am merely giving you the benefit of my experience in assessing evidence."

The case we have referred to were prior to the 1973 amendment of the Criminal Procedure Code which reduced the requirement that "reasons" should be given into statutory form, but we do not consider that involved any alteration in principle.

In Fiji in the cases of *Narend Prasad* and *Lum Sik v. Reginam* (Cr. Apps. 14 & 16 of 1971) and *Shiu Prasad v. Reginam* (Cr. App. No. 5 of 1972) the approach in *Ram Bali's* case has been applied. Where the basic reason for the judge's differing is based on the evidence and upon his own emphatic conclusion thereon (as we are satisfied it was in the present case) that is a reason complying with the requirements of the section. Whether it can be challenged on appeal as being an inadequate reason may be another question, depending on all the circumstances of the case.

Returning to the grounds of appeal, Ground 4 alleges that the case depended on circumstantial evidence and that the assessors' opinion indicated that it was weak. We agree that in the case of the second accused the evidence was in the main circumstantial but was augmented by lies as the learned judge found. We are not of the opinion that the totality of the evidence was necessarily insufficient to support the learned judge's opinion of it. The case against the first accused was of course much stronger, because of the evidence of his confession.

Ground *5(a)* reads:

> "*(a)* The learned trial judge erred in not taking into account the rule of practice that the unanimous opinion of the assessors on matters of fact should not be disregarded."

There is no question of a rule of practice. The law on the subject is as we have stated it above and we respectfully endorse the words of the Privy Council in *Ram Bali's* case (supra)—"This was a strong course to take.....". That does not make it a wrong course. Ground *5(b)* is merely repetition on the subject of circumstantial evidence.

Ground 6 is expressed thus:

> "That the Learned Trial Judge erred in holding the view (which was expressed at the trial after the Gentlemen Assessors had tendered their opinions) to the effect that the Court had the experience in dealing with evidence for the last twenty (20) years, that the Gentlemen Assessors may be experts in their own fields, but the Court was better equipped in dealing with the evidence. The Learned Trial Judge was thereby in effect stating that the Gentlemen Assessors were disqualified or less qualified than the Learned Trial Judge himself in assessing credibility of witnesses or in assessing evidence on matters of fact adduced at the trial. As a result he had disabled himself from receiving any aid from the Gentlemen Assessors."

This ground should never have been put forward. The words alleged to have been used are not in the record and no attempt was made by the appellants to verify them. We are, however, indebted to counsel for the Crown, who was the only counsel appearing on the appeal who was also present at the trial, for the information that words on the lines of those appearing in the first sentence of the ground of appeal were said by the learned judge after judgment had been delivered: the context however, was one almost of apology, that they were not to feel badly about his having decided against their opinions. The innuendo that Mr. Koya sought to attach to those words, spoken after the task of both the assessors and the judge himself had been completed, that the learned judge had disabled himself for receiving the assessors' aid, was entirely unjustified and unfair.

Having considered this matter in the light of the whole of the summing up and judgment we reject those grounds which are based on the decision of the learned judge to convict the first and second accused although the unanimous opinion of the assessors was to the contrary.

We come now to grounds of appeal argued by Mr. Ramrakha on behalf of the first accused other than those in relation to which he adopted Mr. Koya's argument; there are two. The first appellant's original Ground 3 reads:

"That the Learned Trial Judge erred

(a) in admitting in evidence relating to oral and written confessional statements made to the police before the trial; and
(b) in acting or in giving probative value to such statements."

The only argument Mr. Ramrakha could advance in order to support this is that by their opinions the assessors indicated that they were not satisfied that the first accused made the confessions. The learned trial judge first heard the evidence in the absence of the assessors and found that the confessions were not fabricated and were voluntary. His ruling is detailed and convincing and he maintained his view in his judgment. There can of course be no challenge to the ruling on admissibility and there is no way of knowing what the assessors' approach was to the question of weight. We do not find anything in this argument to refute the learned judge's view that the assessors had not appreciated the evidence. This ground fails.

Mr. Ramrakha's Ground 6*(b)* is:

"The learned trial judge misdirected himself on the onus of proof when he stated 'if the prosecution thought someone else was responsible for the fire do you think that they would prosecute the accuseds' and thereby there was a miscarriage of justice."

There is no doubt that this passage, taken in isolation, is a blemish upon an otherwise fair and impartial summing up. The context, which follows a reference to the second accused's plans for rebuilding, is:

"As the defence have pointed out Naidus' were not the only persons affected by that fire who wanted to re-build. Lum Yuen had plans to re-build but there is no information as to whether property was insured. Lum Yuen did not give evidence, but Siu Tin Fu Prosecution Witness 15 said that he and Lum Yuen shared some premises. Prosecution Witness 15 had also increased his insurance some months prior to the fire, but the amount involved was only $4,000 or so extra. In any event Lum Yuen's intentions do not help you much in deciding accused 2's motives. Prosecution Witness 15 was not cross-examined in any way about any plans to re-build. If the prosecution thought someone else was responsible for the fire do you think they would prosecute the accuseds?"

Whether the learned judge added the last sentence in a moment of aberration cannot be known; whatever he intended, the words are capable of meaning, as Mr. Ramrakha contends, that the prosecution were right in charging the accused persons. They would have checked on the others. If anything turned on this, it could have put at risk the conviction at least of the second accused, to whom the passage quoted applied rather than to the first accused. But regarded as a misdirection, it

clearly had no effect, as the assessors in acquitting both accused, did not act upon any implications the words might contain. Mr. Ramrakha, ackowledging this, submitted that the effect of the words was carried through to the judgment which began "I have considered the evidence in the terms of my summing up." We cannot accept that the use of this phrase implies that for the purpose of his judgment an experienced judge failed to distinguish the relevant facts and evidence. The judgment contains no reference at all to police investigation of the neighbouring owners and is clear as to what facts are accepted and which witnesses are believed. This final ground of appeal therefore also fails and the appeals of both accused against conviction are dismissed.

A

B

There are also appeals against sentence—ten years' imprisonment in the case of the second accused and seven in relation to the first.

For the first accused Mr. Ramrakha emphasized his age and junior position as an employee. The learned judge did not overlook either of these matters and noted that, according to his confession, he had hoped for a reward and a better position. For the second accused Mr. Koya submitted that arson on this scale and for similar motives was not a prevalent crime in Fiji. The case of *R. v. Shah* (S. C. 10/1957) was quoted, in which, in the year 1957 the accused had burned his own premises which were insured for £4,000; he was sentenced to four years' imprisonment. The case cannot be compared to the present in respect of the magnitude of the property loss in which innocent neighbours were involved, and, more important in our view, the risk to persons sleeping in the premises concerned or those adjacent. Reasons such as these induced the learned judge to pass a heavy sentence and we do not find ourselves able to say that it was either contrary to principle or manifestly excessive.

C

D

The appeals against sentence are also dismissed.

E

Appeals dismissed.