SURJU RAJA

A

v.

REGINAM

[SUPREME COURT, 1978 (Kermode J.), 22nd March]

B Appellate Jurisdiction

Criminal Law—evidence and proof—admission of caution statement containing irrelevant and prejudicial material—effect of admission on assessment of credibility.

Apart from the complainant the only evidence against the appellant was of the contents of a caution statement, a copy of which was exhibited. The statement contained questions and answers relating to an entirely separate matter also under police investigation. In his judgment the trial Magistrate gave no indication whether in assessing the appellant's credibility he had disregarded that part of the statement.

Held: 1. The trial Magistrate had erroneously admitted evidence which was irrelevant and prejudicial.

D

2. It was impossible to be satisfied that the trial Magistrate had not allowed himself to be influenced by the inadmissible evidence in assessing the credibility of the appellant, accordingly the conviction was unsafe and would be quashed.

Cases referred to:

E *Taniela Veitata v. R.* 23 F.L.R. 294;

R. v. Simmonds 2 Cr. App. R. 303;

R. v. Duffy [1960] 3 W.L.R. 320;

R. v. Slender 26 Cr. App. R. 155;

F *Makin v. Attorney-General of New South Wales* [1894] A.C. 57;

R. v. Rhodes [1899] 1 Q.B. 77;

R. v. Fisher [1910] 1 K.B. 149;

Boardman v. Director of Public Prosecutions [1974] 3 All E.R. 887;

D.P.P. v. Kilbourne [1973] 1 All E.R. 461;

G

Yafasi Kayima v. R. 18 E.A.C.A. Rep. 288;

R. v. Pearson 8 Cr. App. R. 75;

Shani Ram & Ors. v. R. Fiji Cr. App. 34 of 77 (unrep.)

Appeal against conviction in the Magistrate's Court.

H *V. Parmanandam* for the appellant.

E. Gleave for the respondent.

Kermode J.:

The appellant was on the 14th October, 1977 convicted by the Magistrates Court, Suva of the offence of Obtaining Money by False Pretences from one Ponsami Naidu contrary to section 342(a) of the Penal Code. He was fined $200 in default 6 months' imprisonment and of the fine, $150 was ordered to be paid to the complainant as compensation. A

The appellant appeals against conviction and has raised six grounds of appeal but it is only necessary, in view of the decision I have come to, to consider the last ground which is as follows: B

> "That the Learned Trial Magistrate erred in law in admitting in evidence the Appellant's Statement to the Police on the 20th day of June, 1977, upon the ground it contained prejudicial matters."

The complainant gave evidence and the prosecution called one other witness, Detective Police Corporal Naicker, the investigating officer, who in addition to producing a note book kept by the complainant and two Bank of New Zealand withdrawal slips, also produced an unsigned record of an interview with the appellant after due caution, a photocopy of which, after being read to the Court, was tendered to the Court and was made part of the Court Record. C

The appellant gave evidence on oath denying the offence but called no witnesses. D

It is not necessary to refer to the facts disclosed by the evidence other than those facts necessary to consider the last ground of appeal.

The learned trial Magistrate in his judgment stated "the case is largely one of credibility". Apart from the complainant, Ponsami Naidu, the only other witness for the prosecution was Corporal Naicker who gave evidence about a cautioned statement he took from the appellant. This statement contained no admissions by the appellant in the nature of a confession. It was a denial of the complainant's allegations. E

Assessment of credibility was paramount and the outcome of the case depended entirely on whether the Magistrate believed the complainant or the appellant.

It is recorded in this statement that the witness sought to interview the appellant in regard to a complaint that the appellant had obtained from the complainant the sum of $205 by false pretences and also a complaint that he had obtained $129 cash from one Akuila Tevite also by false pretences. F

A photocopy of the statement was produced to the Court after the original was read in Court by the interviewing officer and became pages 10, 11, 12 and 13 of the Court Record. G

The statement which is a lengthy one records a number of questions and answers regarding the alleged receiving of money by false pretences from Akuila Tevite. The appellant was asked about no less than five amounts of money following a question in the following form:

> "Q, On Friday 25/6/76 at about 6 p.m. did one Akuila Tevite aproached you at your house and asked you if you were working for the lawyer Vijay Parmanandam and asked you to arrange with your lawyer to take out the sum of $1,040.00 from the Public Trustee belong to his brother who was still under 21 years of age?" H

A little later he was asked a series of question regarding five sums of money.

A The first such question was:

"Q. On 26/6/76 did you obtain $25 from Aquila Tavite?"

Four similar questions followed all specifying different dates and varying amounts.

B The inference to be drawn from the statement is that all five sums of money were alleged to have been obtained from Akuila Tevite and made up part of the total of $129 which was alleged to have been received by the Appellant by false pretences.

The nature of the caution administered to the appellant by the interviewing officer indicates that the appellant was being interviewed as to a complaint that he C had obtained money from Akuila Tevite by false pretences in an interview which also referred to an alleged complaint that he had obtained money from the complainant in the instant case by false pretences. The appellant was not charged with any offence in connection with the alleged obtaining of money by false pretences from Akuila Tevite. The statement does not indicate the nature of the false pretences which it was alleged the appellant made to obtain money from Akuila Tevite.

D There should have been two separate intereviews in respect of the two complaints or, if that was not in the circumstance practicable, evidence should only have been given as regards the interview relating to the complainant's complaint. The questions and answers regarding the investigation into Akuila Tevite's complaint were not relevant to the charge before the Court and, unless disregarded by the Magistrate, were prejudicial particularly in the instant case where credibility was so vital to a decision.

E Counsel for the Crown conceded that had the statement been admitted in a jury or assessor trial it could have had a prejudicial effect but he argued, referring to Grant C. J's. remarks in Cr. App. 124 of 1977, *Taniela Veitata v. R.*, that the Magistrate was a professional Magistrate and would not have been prejudiced by such a statement.

F The learned Chief Justice's remarks in Veitata's case were in reference to allegations of bias and prejudice where the trial Magistrate had heard a previous case against Veitata and was aware of his past record. The learned Chief Justice stated:

> "And it is long established law that a judge is in a very different position to a jury-
> man. Though in no sense superhuman, he has by his training no difficulty in
> G putting out of his mind matters which are not evidence in the case. This, indeed, happens daily to judges on assize." (per Lord Parker, C. J. in *R. v. Duffy* [1960] 3 WLR 320 at 325).

Veitata's case was quite different from the instant case. The possibility of prejudice in the instant case arises, not as a result of the trial Magistrate's prior knowledge of the accused, but as a result of irrelevant and prejudicial testimony being admitted H into evidence in the case which the Magistrate was hearing, which may have influenced the Magistrate.

R. v. Simmonds 2 Cr. App. R. 303 was a case which bore some similarity to the instant case. In that case a police suprintendent gave evidence of an interview he had had with the appellant before she was in custody and in the course of his evidence said: A

> "I cautioned her, and told her that complaints had been received quite recently from London and the North of England that she had again obtained goods by false pretences....."

Walton J. in a very brief judgment ruled the evidence admissible on the grounds that evidence of other similar offences was admissible for the purpose of showing intent. B

While Simmond's case bears some similarity to the facts in the instant case Corporal Naicker's evidence was not introduced to show intent. In the later case of *R. v. Slender* 26 Cr. App. R. 155 evidence of obtaining money by false pretence on another occasion was admitted by the trial Judge on the ground that it tended to prove an intent to defraud but the Court of Criminal Appeal held it should not have been admitted. This case would appear to have overruled *R. v. Simmonds* although not referred to in the judgment. C

The nature or number of the false pretences alleged as regards Akuila Tevite is not apparent from the evidence. There is also reference to some arragements to obtain money from the Public Trustee belonging to a minor which raises an inference of dishonesty. D

The general rule is that evidence tending to show that the accused has been guilty of other crimes or is of a generally fraudulent disposition is inadmissible as being irrelevant.

The principle was stated by Lord Herschell L. C. in delivering the judgment of the Judicial Committee of the Privy Council in *Makin v. Attorney General of New South Wales* [1894] A. C. 57. In a passage which is frequently quoted their Lordships said: E

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that he is a person likely, from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes, does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the act alleged to constitute the crime charged in the indictment, were designed or accidental, or to rebut a defence which would otherwise be open to the accused." F G

Had there been evidence in the instant case that the appellant had also obtained money from Akulia Tevite by a similar false pretence as that which induced the complainant to pay money to the appellant the evidence would have been admissible.

In *R. v. Rhodes* [1899] 1 Q. B. 77 where a prisoner was charged with obtaining eggs by false pretences in advertisements, evidence of obtaining eggs from other persons by similar false pretences was admitted. Where, however, the false pretences are not similar in kind evidence of the other offences is not admissible. (*R. v. Fisher* [1910] 1 K. B. 149). H

The principle was fully reviewed by the House of Lords in *Boardman v. Director of Public Prosecutions* [1974] 3 All E. R. 887, where it was held that in exceptional cases, evidence that the accused had been guilty of other offences was admissible if it showed that these offences shared with the offences which was the subject of the charge common features of such unusual nature and striking similarity that it would be an affront to common sense to assert that the similarity was explicable on the basis of coincidence. Lord Hailsham in Boardman's case at page 903 quoted from the speech of Lord Simon of Glaisdale in *Kilbourne* [1973] 1 All E. R. at 461 who was referring to Lord Herschell L. C. 's classic remarks in Makin's case—

> "The reason why the type of evidence referred to by Lord Herschell L. C. in the first sentence of the passage is inadmissible is, not because it is irrelevant but because its logically probative significance is considered to be grossly outweighed by prejudice to the accused so that a fair trial is endangered if it is admitted....."

The cases I have referred to were jury cases but in *Yafesi Kayima v. R.* 18 E. A. Court of Appeal Reports 288 the Court of Appeal for Eastern Africa in Cr. App. 177 of 1951 dealt with an appeal from the decision of a Ugandan Magistrate in a case where prejudicial evidence had been admitted by the Magistrate.

In their judgment at page 292 the learned appellant Judges said:

> "The learned Solicitor General has submitted that once the Magistrate was satisfied of the fact of possession in the appellant and rejected his denial a conviction must have followed and that the irrelevant evidence could not affect this decision although it might as he concedes affect the question of sentence.
>
> This view found favour with the learned Judge of the High Court on first appeal who says in his judgment:
>
> One of the ministers did say the accused injects people for venereal disease. This was irrelevant and if that statement was led by the prosecution it was improper. But this was not a trial by jury and I do not think the learned Magistrate could have been prejudice; nor I think could any Court after seeing what was in the bundle exhibited."
>
> "With respect we are unable to agree."

The appeal was allowed and the conviction quashed. The Court refused to entertain the Solicitor General's request for a retrial stating:

> "We were not prepared to do so in the circumstances of this case as the defect in the previous trial was not due to some accidental or unforeseeable cause but was due to what we feel justified in characterizing as a flagrant disregard by the prosecution of well known principles."

In the instant case there was not, apart from the complainant's evidence, any other evidence which tended to establish the offence. The case is one which depended on the Magistrate's assessment of credibility of the complainant and the appellant. He held the complainant was a witness of truth and he rejected the evidence of the appellant "in its entirety".

Courts have quashed convictions even in cases where there has been weighty evidence to establish the offence where hearsay evidence has been improperly

admitted. One such case was *R. v. Pearson* 8 Cr. App. R. 75 where the Lord Chief Justice at p. 77 stated: A

> "The Court has often pointed out that even if inadmissible evidence is given at the trial the appeal may be dismissed on the ground that there has been no miscarriage of justice; but so far as I can remember, in no case has the Court done so where there has been improper admission of substantial evidence."

In Cr. App. 34 of 1977 *Shani Ram & Ors v. R.* Stuart J. allowed an appeal where he B was in doubt whether the Magistrate in weighing the evidence was not influenced by hearsay evidence the Magistrate had allowed to be introduced.

I find it impossible to ascertain from the judgment whether the statement played any significant part in the Magistrate's decision to accept the complainant as a truthful witness and to reject the evidence of the appellant in its entirety. Had that part of the appellant's statement referring to Akuila Tevite's complaint about C obtaining money from him by false pretences been excluded or disregarded, as it should have been in my opinion, the result could have been the same. On the other hand the learned Magistrate may have had a doubt and acquitted the appellant. In the absence of any indication that the Magistrate disregarded such prejudicial irrelevant evidence I am in considerable doubt as to what effect such evidence had on the Magistrate's assessment of credibility. The Magistrate in his judgment stated: D

> "I find from the totality of the evidence before me, the demeanour of the witnesses and the nature of their evidence that the Prosecution Witnesses are witnesses of truth. I do not believe the accused and I reject his evidence in its entirety."

The use of the phrase "totality of the evidence" without qualification creates the E impression that the Magistrate considered all the evidence including the prejudicial evidence, and in these circumstances, and in the absence of any indication that the Magistrate disregarded those portions of the appellant's statement that do not relate to the offence charged, I do not think it would be safe to let the conviction stand.

The conviction is accordingly quashed, and the fine if paid is to be refunded to the appellant. F

Appeal allowed; conviction quashed.