

IN THE SUPREME COURT OF FIJI  
Appellate Jurisdiction  
CRIMINAL APPEAL NO. 79 OF 1980

Between:

KAMINIELI NAVATU

APPELLANT

- and -

REGINAM

RESPONDENT

Appellant in person.  
Mr. M. Raza for the Respondent.

J U D G M E N T

I heard this appeal on the 18th September, 1980 when I noticed that the appellant, who was not represented, was sitting in Court between two warders. On making enquiries from him, he informed me he had been imprisoned last April for failure to pay the fines imposed on him by the Magistrate in respect of 4 of the 12 offences the subject of this appeal.

The appellant was convicted by the Magistrate's Court Tailevu on the 25th February, 1980 of 4 counts of forgery contrary to section 371(2)(a) of the Penal Code and 4 counts each of uttering a forged document and receiving money on a forged document. The further 8 counts arose out of the alleged forgery of 4 Australia and New Zealand Bank cheques for the sums of \$150, \$100, \$200 and \$230 drawn on the account of Farmers Agencies Ltd.

In respect of each of these 12 counts the learned Magistrate sentenced the appellant to 21 months imprisonment. All sentences after the first were ordered to run concurrently. He further ordered that all sentences

be suspended for 3 years.

On the 4 offences of receiving money on a forged document the Magistrate imposed the following fines :

Count 3 fined \$180 in default 6 months.

Count 6 fined \$130 in default 4 months.

Count 9 fined \$230 in default 6 months.

Count 1 fined \$260 in default 6 months.

The Magistrate ordered that out of the fines the said sums of \$150, \$100, \$200 and \$230 were to be paid to the Farmers Agencies Ltd. the complainant company. He allowed the appellant 28 days to pay.

On his failure to pay the fines totalling \$800 within the time specified, although the appellant had lodged notice of appeal against his convictions and sentences, he was arrested and imprisoned to serve a term of 22 months.

On the 19th September, 1980 as a matter of urgency I had the appellant brought before the Court again and quashed all 12 convictions and advised that I would give my reasons later for allowing the appeal against convictions and sentences.

In 1960, according to the evidence of the appellant given in the Court below, he and a Mr. Verrier formed the company, Farmers Agencies Ltd. They were the first directors of the Company.

An account was opened by the Company in the Australia and New Zealand Bank Ltd. in Suva but I do not know the date it was opened. On the 26th November, 1974 however, a new "Letter Opening Account-Company" document was signed by the then 3 directors of the company. Cheques were to be signed by them conjointly.

The 3 directors on that date, their positions and the manner they signed are recorded by the Bank as follows :

<u>NAMES</u>	<u>OFFICE</u>	<u>SIGNATURE</u>
CIRI JOSEVA	Secretary/Director	J.C. SENIU
ROKOTUIBAU ISEI	Director	ISEI ROKOTUIBAU
TABUALOTO PENI	Chairman	PENI TABUALOTO

Of particular significance in this case is Joseva Ciri's signature "J.C. SENIU" as recorded by the Bank, as his signature on each of the 4 cheques alleged to be forged by the appellant is "Josefa Ciri" a form of signature Josefa Ciri claimed he never used for signing cheques. He admitted however, that form of signature was used by him on all other occasions "outside the bank".

The appellant, in his evidence in the Court below, said that when he returned to Fiji from Australia in 1975 he learned that the three persons abovenamed were the signatories to cheques drawn on the company's account. In 1976 he took charge of the books of the company when he saw the company was in difficulties. He said he made enquiries from the Bank and found the company had no money and was in debt. On enquiring from the Bank about a truck once owned by the company he was informed it had been purchased by Nuku Club which still owed the company money. The appellant said the Bank suggested the club sell the truck which had been damaged and he told the club the sale money should come to the company.

The appellant said he prepared a letter (Exhibit 3) dated 14th June, 1977 addressed to the Nuku Club acknowledging that all debts owing by the club were settled on payment of the sum of \$1100 to the company.

Exhibit 3 has the full names of the 3 signatories recorded on the Bank Authority followed by their purported signatories. In addition the appellant added his full name followed by his signature. The appellant said that when he presented this letter to the other three persons for their signatures they complained they were working for nothing and he decided that if he received the \$1100 from the Nuku Club mentioned in Exhibit 3 he would give them something.

The appellant said he took the company's cheque book first to Peni Tabualoto and he signed 4 blank cheques (this was confirmed by Peni Tabualoto). The appellant then took the cheque book to Isei Rokotuibau and he signed all 4 cheques. This man, although summoned as a witness, was not called by the prosecution and there is no indication in the Record that he was offered to the defence for cross-examination.

The appellant said he then took the cheque book to Josefa Ciri and he signed all 4 cheques. The signature he used was "Josefa Ciri" and not "J.C. Seniu" as recorded by the Bank.

All cheques were signed in 1977 and were cashed between the 15th July and 25th August of that year.

I depart now from the story related by the appellant, which I have only referred to very briefly to refer to the prosecution case.

The first witness called by the prosecution was Mr. G.E. Peak, the accountant of the A.N.Z. Bank, who had worked for the bank for 19 years. He was shown the 4 relevant cheques with the 3 signatures thereon, "Josefa Ciri", "Peni Tabualoto" and "Isei Rokotuibau". He said the signatures were the same on all four cheques i.e. whoever signed "Josefa Ciri" signed that signature on all 4 cheques. He said the signatures on all cheques represented the same 3 people, except that the signature of Josefa Ciri varied from the signature held by the Bank. He sought to tender a photocopy of the record of the company's signatories to cheques but, on the application of the prosecution, he was released to return to the Bank to obtain and produce the original record.

Peni Tabualoto was then interposed as a witness but at this stage I do not propose to comment on his evidence as I intend to pursue the main reason for allowing the appeal namely, the unsatisfactory manner in which the prosecution and the Magistrate conducted the trial.

Mr. Peak, when he was recalled, produced the original record of the bank authority form showing the names of the persons authorised to operate on the company's bank account. He testified that any cheque withdrawing cash should bear the same signatures as appear in the specimen signature card. Of significance, as recorded by the Magistrate, this witness stated :

"Any variation in signature does not necessarily mean forgery. We normally investigate any variation. Strictly signatures should be the same as the specimen signatures."

Mr. Peak, when cross-examined, was again shown the 4 cheques and asked if the signatures thereon purporting to be Josefa Ciri's signatures were the signatures of Josefa Ciri. He answered that the signatures were not the same as in Exhibits 1 and 2 (Bank Authorities). He said the signatures of Peni Tabualoto and Isei Rokotuibau on all four cheques were the same as the specimen signatures held by the Bank.

Mr. Peak stated he had a photocopy of a letter dated 14th June, 1977 signed by Josefa Ciri, Isei Rokotuibau, Peni Tabualoto and Kaminieli Navatu (this is obviously a copy of exhibit 3). He said that Josefa Ciri's signature on that letter corresponded with the signatures on the four cheques.

At this point of the witness' cross-examination the record indicates that the Magistrate must have interposed a question, because the witness stated that the signature on the letter did not tally with Exhibits 1 and 2 and that Ciri's signature on M.F.I. 1, 2, 3 & 4 (the cheques) did not tally with signatures of Ciri on Exhibits 1 & 2. This was patently obvious as the cheques had "Josefa Ciri" and Exhibits 1 & 2 had "J.C. Seniu".

Mr. Peak said he took action and took the 3 complainants to the Police Station. He was accompanied by a Mr. Alipate Sikivou of the A.S.Z. Bank.

On the 25th July, 1978 the three complainants had made a written complaint which he produced. This complaint was handed to defence counsel. This document was not introduced into evidence as it should have been.

Mr. Peak referred to 4 signatures on this written complaint. He mentioned the top signature corresponded with exhibits 1 & 2. The record then is somewhat confused. It records "top signatures correspond with exhibits 1 & 2 other two - withdraw. Only two signatures".

Mr. Peak then went on to say that Josefa Ciri signed his name 4 times at the Police Station on a sheet of paper which the witness apparently sought to tender.

The Record shows that at this stage the prosecution objected and the Prosecutor's objection is recorded in these terms.

"Ciri is not on trial and as such his signature cannot be part of evidence."

Neither the written complaint nor the piece of paper was introduced into evidence by this witness. Later Mr. Alipate Sikivou identified a piece of paper which seems to have been the same piece of paper which was admitted as Exhibit C without objection. There could have been no more relevant evidence than the proved signatures of Josefa Ciri which the Record indicates were requested by Sgt. Mosese of the Police Station. The written complaint could also have been highly relevant.

I will not make any comment about the fact that the Magistrate upheld the objection other than to state that the defence was prevented thereby from establishing the applicant's defence that Josefa Ciri had in fact signed all the cheques.

The Record goes on to record that Mr. Peak then produced the original of the letter dated 14th June, 1977 which he said was "signed by Ciri and others" and stated :

"I made a brief investigation to my own satisfaction. I did not find any reason to report to the Police."

The Magistrate then apparently asked Mr. Peak a question as Mr. Peak is recorded as saying :

"Didn't consider necessary because it is quite common in this country for people to have one or more forms of signature."

It is quite clear from reading the Record that Mr. Peak, who was called as a prosecution witness and was treated as an expert on signatures, considered that Josefa Ciri had signed all four cheques.

The prosecution was then permitted by the Magistrate in re-examination to ask Mr. Peak questions which I can only view as an attempt by the prosecution to discredit Mr. Peak or to show his bias. The following extract from the Record indicates what I mean :

"Re-exam: Purpose for specimen signature is for comparison with document tendered.

Q: To safeguard interest of depositor and Bank?

A: Yes.

Q: If not complying strictly with this and money cashed and subsequently found different Bank tends to lose?

A: Yes.

Q: Look at MFI.5 was it in Bank's custody?

A: Yes. I tender it.

Court: Accepted as Exhibit 3."

The Magistrate himself questioned Mr. Peak about his experience and recorded Mr. Peak as saying "I am Accountant with the Bank. Whenever system required I compared signatures. I am well versed and experienced in comparing signatures. Experience spread over 19 years."

The unsatisfactory nature of the conduct of this trial however did not stop there.

When Josefa Ciri was called as a witness by the prosecution he was cross-examined about what had happened at the Police Station on the occasion he was taken there by Mr. Peak. He was shown a paper he was alleged to have signed at the Police Station and, after stating at first that he did not know if the signatures were his, then expressed his belief that they were. He admitted the cheques were produced at the police station and the signatures were compared.

The Record then shows the following question was asked of Josefa Ciri and his answer to it :

Q. Didn't you agree signature on cheques were yours?  
A. No. I did say there that signature I made resembles signature on cheque."

The proper basis was laid by the defence if it sought later to challenge this denial.

The defence called Mr. Alipate Sikivou the Bank Officer who accompanied Mr. Peak to the Police Station.

Mr. Sikivou stated the Bank had the original of Exhibit 3 on file. It showed the signature of Josefa Ciri thereon. He said it was shown to Josefa Ciri and he admitted it was his signature. He was then asked to sign his name 3 or 4 times on a piece of paper. Mr. Sikivou found the signatures were similar. He identified the piece of paper on which Josefa Ciri had signed and it was admitted as Exhibit C.

I return now to quoting from the Record to relate what then transpired :

Q: You then confronted Josefa Ciri with these signatures on Exhibits 4A to D and Exhibit 3 and Exhibit C?

A: Yes.

Q: What was his reply?

Raza: Objecting as being hearsay also prejudicial value. Outweighs probative value. Josefa Ciri is not the accused - not made in presence of accused. Not put to Josefa Ciri. If certain confrontation took place and if it did what was his reaction. Completely hearsay.

Maharaj: Admissible - made in presence of witness. Confronted with signatures. Defence case all along signatures was his put to him.

Court: Will disallow the question.

As a result of what Josefa said I told him we would not be paying out. I was brought in the while thing as interpreted. We were prepared to pay provided forgery is proved."

I have added the record of the further evidence of Mr. Sikivou as there can be no clearer inference in my view that Josefa Ciri on that occasion admitted the signatures on the cheques were his and he was told in clear terms by Mr. Sikivou that the Bank would not be repaying the money.

If the prosecutor in the Court below had been a police prosecutor I might not have been surprised at the objection to the defence evidence. However, a Crown Law Officer was the prosecutor. As for the Magistrate upholding the objection, I can only assume he did not properly consider the objection and may have been confused over the rule regarding previous inconsistent statements by a witness and the rule as to the finality of answers to collateral questions. As to the latter rule Lawrence J. as long ago as 1811 in Harris v. Tippet (1811) 2 Camp 637 after stating he would permit questions to be put to a witness for the purpose of trying his credit said:

"but when those questions are irrelevant to the issue on the record, you cannot call other witnesses to contradict the answer he gives. No witness can be prepared to support his character as to particular facts and such collateral inquiries would lead to endless confusion."

(Underlining is mine for emphasis).

As to the rule regarding previous inconsistent statements the common law position is now stated in section 4 of the Criminal Procedure Act 1865 (Imp.) which is as follows :

"If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceedings, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

Under section 22 of the Supreme Court Ordinance the Imperial statute, as to section 4 at least, has application in Fiji.

Had the defence been allowed to develop its defence, and had established that Josefa Ciri had previously admitted that the signatures on the cheques were his, that would have been an admission by him as he was, as a director of the complainant company, one of the complainants. If this was not the legal position, then proof of the witness' previous inconsistent statement would have impugned his testimony under cross-examination.

In R. v. Hart (1957) 42 Cr. App. Rep. 47 Devlin J. stated the position in a case where a similar situation had arisen as in the instant case. He said at pages 49 and 50.

"Defending counsel cross-examined Cunliffe and put that statement to him, and he denied it. When Donovan went into the witness-box, defending counsel desired to ascertain from Donovan in chief what was the substance of the conversation, and the learned Common Sergeant refused to admit the evidence. The provision under which that evidence was sought to be made admissible is now contained in section 4 of the Criminal Procedure Act, 1865, which re-enacted the Common Law Procedure Act, 1854. Before that it had probably been the common law that, quite apart from any statute, questions were admissible - certainly in the ordinary common law courts - whereby if a witness gave evidence of a fact that was relevant to the issue (and that is important, because if the question merely goes to credit, he cannot be contradicted) it could be put to him that on some earlier occasion he had made a contrary statement to somebody else and, if

he denied it, that somebody else could be called."

There can be no doubt that the evidence sought to be introduced by the defence was vitally relevant, and on two occasions, due to objections by the prosecutor which the Magistrate quite improperly upheld, the appellant was prevented from establishing his defence.

Quite apart from the improper rejection of relevant evidence sought to be introduced by the defence the Magistrate in my view, failed to properly consider and evaluate not only the prosecution evidence, but also the evidence of the appellant and his witness.

I do not propose to unduly lengthen what is already too lengthy a judgment by pointing out all the defects in the judgment. I will however mention one or two of them.

The Magistrate purported to find certain facts the first of which was that the appellant went to PW.2, Peni Tabualoto, and got him to sign three cheques Exhibits 4A, 4B and 4C. The Magistrate had in his judgment recorded that PW2 had testified he signed all 4 cheques. He made no finding about PW.2 signing Exhibit 4D cheque No. 792554 for \$230. This is a highly significant omission.

PW2 was shown cheque No. 792554 and said "that bears my signature". In fact he at first admitted in evidence in chief signing all 4 cheques which were shown to him one at a time. He later said he did not sign Exhibit 4B.

It was a significant omission by the Magistrate because, in the alleged interview statement, Sgt. Solomoni put this question to the appellant.

"Q. The fourth cheque No. 792554. Josefa Ciri, Peni Tabualoto and Isei Rokotuibau, they all say that they did not sign this cheque and they did not know anything about withdrawing of money \$230.00. This means that you wrote their names and drew out the money \$230.00?"

A: Yes."

If all three directors in statements to the police had told the police they had not signed this cheque the prosecutor should in fairness to the defence have offered the defence Peni Tabualoto's statement for perusal.

As to this interview statement Sgt. Solomoni stated he interviewed the appellant after caution. The statement was challenged and the Magistrate held a trial within a trial.

The Record of this trial within a trial does not disclose that any caution was given to the appellant. Sgt. Solomoni said he interviewed the appellant on 13th December, 1978 from 9 a.m. to 1 p.m. He apparently read his record of the interview which he says the appellant signed. The Magistrate has recorded :

"Witness reads interview. Amendments in ink mine as interpreted."

The signed statement was not admitted into evidence and there is no way of checking whether the short record of the interview is complete and what the amendments were. Mr. Raza informed me from the bar table that the statement was in the Sgt.'s notebook which was handed back to him as it contained other entries. I find it very strange that an interview at a police station should have been recorded in a notebook and not on the Statement Form provided by the police and which must have been available.

The appellant had testified that the three signatories would not at first sign the cheques because they had never been paid by the company for what they had done and the appellant promised to give them \$10 each. The Magistrate found as a fact that the appellant paid Peni Tabualoto \$10 from one of the cheques he cashed.

Josefa Ciri in evidence in chief said that in 1977 he was asked by the appellant to sign a piece of paper - not a cheque and was told by the appellant that a sum of money was to be withdrawn from the Bank and that

money "was to be paid to us". He also said "I do not know how much but \$10 was given to me in cash. I expected cash from him". This was highly relevant evidence and was totally ignored by the Magistrate in his judgment.

The Magistrate stated that Josefa Ciri had denied the signature on Exhibit 3 was his and that he accepted Ciri's statement.

This is another instance of the Magistrate's failure to properly consider the evidence.

When Exhibit 3 was first put to Ciri in cross examination he stated he had not signed it. A little later he is recorded as saying "I think I wrote to Nuku Club. All of us signed letter to Club." He was then again shown Exhibit 3 which was a letter addressed to the Nuku Club and was asked this question.

"Q: Look at exhibit 3 and cheques  
(Court MPI 1 - 4) compare signatures.

A. My signature on exhibit 3 and MPI 1 - 4 are the same."

Although defence counsel argued strongly that the prosecution had not established "mens rea" the Magistrate in his judgment ignored this argument although "intent to defraud" was a necessary ingredient in all four forgery counts.

The appellant gave evidence on oath - a very detailed account about his efforts to salvage the company and his using money drawn from the Company's bank account for such purpose.

The Magistrate in his judgment in his brief reference to the appellant's evidence said :

" In his defence the accused tried to show that he had great concern for the Company and was very worried with the tight corner in which the Company got into and he devised ways and means of freeing it of those financial problems. Assuming that the accused did all that he states he did for the Company, but I find otherwise, the method he adopted leaves much to be desired. First of all, he had lost all traces of record of any transactions which he did for these purposes. He could not produce any receipts or record for payments, if any made by him, to pay off debts of the Company.

The accused has himself admitted that he cashed the cheques in question and utilized the sums he obtained on these cheques to buy cash crops and sell the crops; but what the accused did not do was to put any part of the proceeds of sale into the Company's accounts although he says that he paid the Company's debts. In the absence of any proof I do not believe the accused."

I need only point out that the appellant testified that he kept records in a cash book and books were with the police. The prosecution did not challenge this statement.

Had the Magistrate tested the appellant's evidence against the evidence of Peni Tabualoto and Josefa Ciri he would have found that the two prosecution witnesses confirmed sufficient of the appellant's testimony about running the company and paying its debts as to call for a closer scrutiny of the appellant's evidence before rejecting it.

The particulars of each of the forgery charges alleged the forgery of the cheque was "by endorsing thereon JOSEVA CIRI". The alleged signatures of Joseva Ciri were not endorsements on the cheques. A person endorses a cheque when he signs his name at the back of it or in a place provided for it in the front. A person who draws a cheque by signing it is the drawer and not an endorser of that cheque.

Then there is the very close similarity of the signatures which can be seen by comparing the signatures of Josefa Ciri, which were proved to be his, with the signatures purporting to be his on the cheques. The Magistrate ignored Mr. Peak's clear evidence that Josefa Ciri's signature on Exhibit 3 corresponded with the signatures on the four cheques. A comparison of the four signatures "Josefa Ciri" on Exhibit C with the signatures 'Josefa Ciri' on the four cheques leaves me in no doubt that the same person signed all eight signatures. The Magistrate said :

"The signature I find was well forged that even Ciri could not be blamed if he appears in doubt his own signature."

Mr. Peak was in no doubt at all that Joseva Ciri

signed all the cheques. While the Magistrate found as a fact that the appellant had forged the signature of Josefa Ciri on all four cheques it is abundantly clear that he came to that finding only by ignoring evidence adduced by the prosecution that not only supported the appellant's contention that Josefa Ciri signed all four cheques but also tended to establish his innocence.

A proper consideration of all the evidence should have resulted in the appellant being acquitted on all counts. My main reason for allowing the appeal however, is the improper rejection of highly relevant evidence that could have been favourable to the defence resulting in his acquittal.

I wish only to add a few remarks about the fines imposed by the Magistrate.

The Magistrate imposed four fines totalling \$800 and in default of payment of all four fines he was committed to prison for a total of 22 months.

The Magistrate did not consider the appellant's ability to pay \$800 within 28 days. He could not pay and the result was that he was sentenced to serve a term which would have exceeded the term of imprisonment the Magistrate imposed for forgery. Thomas in his "Principles of Sentencing" at p. 222 says :

"The importance of the offender's capacity to pay as a mitigating factor has been stressed in many cases. The Court has frequently stated that to impose a fine which is beyond the capacity of the offender to pay will merely lead to his committal to prison in default of payment for an offence for which a sentence of imprisonment was originally considered inappropriate."

The instant case was not an appropriate case in any event to apply section 159 of the Criminal Procedure Code and seek to compensate the complainant company.

I confirm that the appeal was allowed on 18th September, 1980 and that all convictions were quashed and that I ordered any fines if paid by the appellant, to be refunded to him.

(R.S. KERMODE)

J U D G E

SUVA,

October, 1980.