IN THE SUPREME COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA

Appellate Jurisdiction

Criminal Appeal No. 20 of 1980

Between:

1. JAI SINGH s/o Dharam Singh
2. HARBANS SINGH s/o Dachraj Singh

Appellants

- and -

REGINA Respondent

Mr. R.S. Shankar, Counsel for the Appellants
Mr. G. Grimmet, Counsel for the Respondent

JUDGMENT

The second appellant having withdrawn his appeal I am now concerned solely with the appeal of the first appellant. He, together with the former second appellant, was charged with two offences of conspiracy contrary to section 422(a) of the Penal Code. On Count 1, that they conspired to defraud Raj Gopal of the sum of $5.00 by falsely representing that they were in a position to obtain an early appointment for one Shiu Lingam to take a driving test; and on Count 2 that they conspired to defraud Subramani Gounder of the sum of $80 by falsely representing that they were in a position to obtain for Shiu Lingam a heavy goods vehicle licence without his having to take the prescribed test.

He pleaded not guilty, but after hearing evidence for the prosecution and sworn evidence from the appellant the magistrate convicted him on both counts and sentenced him to 15 months imprisonment on each count to run concurrently. He now appeals against both convictions and sentences. The facts are adequately set out in the magistrate's judgment. In view of the grounds of appeal filed it would be as well at this point to set out the provisions of section 422(a) of the Penal Code -

> "Any person who conspires with another to effect any of the following purposes, that is to say -
>
> a) to effect any unlawful purpose _____ is guilty of a misdemeanour."

Counsel for the defence raised an ingenious ground of appeal (ground 5) that the magistrate erred in both law and fact in failing to consider whether the alleged representation of facts referred to were in respect of past/present/future matters.

He based his argument on the definition of "false pretence" given in section 341 of the Penal Code, which seems to exclude representations of future matters of fact. Such a definition may be pertinent to offences in which false pretences is an element, but with respect I cannot see that it is relevant where the offence is conspiracy to defraud, and where particulars of the fraud are that the conspirators held themselves out to be in a position to get certain favours for the victim whereas in fact they were not, and never were in such a position. The fact that the favours were to be in the future doesn't alter the fact that the holding out was in the present. This ground of appeal therefore fails.

The next ground of appeal (ground 4) was that the magistrate failed to warn himself against the danger of convicting the appellant on the uncorroborated evidence of the accomplices.

Well, the magistrate said that he would treat the evidence of one of the main prosecution witnesses, Raj Gopal, P.W.4 as he would an accomplice's evidence. Raj Gopal is a cousin of Subramani Gounder the father of Shiu Lingam. He went with Shiu Lingam to the Licensing office where they met the two appellants outside. He knew the first appellant before, but the second appellant. Much of the negotiating was done through Raj Gopal, it was he who handed over $5 to the appellants to try to get an early appointment.

There was no evidence that he was a party to the fraud with the appellants, although there was no doubt that he knew that what they were proposing was unlawful (i.e. when the appellant later claimed that they could get the heavy duty licence without Shiu Lingam having to undergo a test). For this reason the magistrate decided to treat his evidence as he would the evidence of an accomplice although as the magistrate said "he was obviously not an accomplice to the conspiracy which is the subject of the charge and had not been charged with any offence."

I think it follows the evidence that though he was not strictly speaking an accomplice at all, he was in no way concerned with defrauding Subramani Gounder, and was in fact himself defrauded of $5 by the appellants. But the magistrate, perhaps from an excess of caution treated him as he would an accomplice and decided "I must approach his evidence with caution

and look for independent corroboration of what he said." He did not perhaps directly warn himself of the dangers of convicting on the uncorroborated evidence of an accomplice (which is always open to a magistrate if he is convicted of an accomplice's truthfulness) but since he decided to look for independent corroboration, he must have been fully aware of the dangers involved and was taking the safe course - although it is clear from what he said towards the end of his judgment that he was satisfied that Raj Gopal was giving truthful evidence.

The magistrate did not specifically deal with the sort of corroboration that was required, but the general rule is that corroboration of an accomplice's evidence should be independent evidence tending to confirm the commission of the crime and tending to confirm the accused person's association with the crime.

He found some corroboration in the evidence of PW1, a licensing officer from Lautoka, and in the evidence of PW3 a bank officer from the Bank of Baroda, Ba, but the evidence of these two witnesses in no way tended to confirm the appellant's association with the offences. There was also some corroboration of Raj Gopal's evidence that he met both appellants in Lautoka on 25.1.79 (the day he and Shiu Lingam first came to the Lautoka Licensing Office) from the two appellants themselves. They both admitted meeting him that day, and both happened to be together at the time. Other than this there was no evidence connecting the two appellants with the offences (other than the inference that might be drawn from the rather strange evidence of A.2's offer to return the money to Raj Gopal)

except for the evidence of Shiu Lingam and Subramani Gounder. Their evidence of course fully supported the evidence of Raj Gopal. There were some discrepancies perhaps, there was also their reluctance to agree that the intention was to get a heavy duty licence without taking the required test. The magistrate found that the two appellants had falsely claimed that they were in a position to obtain an early appointment and a licence without taking a proper test, so he must also have been satisfied that Shiu Lingam and Subramani Gounder knew perfectly well what they were paying the money for, and he disbelieved their protestations to the contrary. However, as he correctly pointed out, it was open to him to believe part of their evidence whilst rejecting another part, and he clearly believed their evidence so far as it concerned the two appellants.

He found that their evidence fully supported the evidence of Raj Gopal, and this it clearly did, both as to the commission of the offence, and the part the two appellants played in it. But what he did not do, at least the record does not show it, was consider whether Shiu Lingam and Subramani Gounder should also be treated as accomplices. Because if they were accomplices then their ability to corroborate (in the legal sense) the evidence of another accomplice must be considered very carefully. There is no fixed rule that one accomplice cannot corroborate another accomplice, but the circumstances in which he can do so should be considered carefully. However in this case, in the light of the opinions expressed by the House of Lords in R v Kilbourne (1973) AC 729 there seems to be no reason why the evidence of these three witnesses should not even if they are considered to be accomplices be considered to be capable of corroborating each other.

It is certainly somewhat surprising that, having decided to treat the evidence of Raj Gopal as he would an accomplice's evidence, the magistrate did not do the same with the evidence of Shiu Lingam and Subramani Gounder. He must have been satisfied that both knew that they were asking the appellants to do something unlawful, and that was the reason he gave why he decided to seek corroboration for the evidence of Raj Gopal. Surely their positions were similar. Both Raj Gopal and Subramani were victims of the fraud, and all three witnesses were expecting Shiu Lingam to get a heavy duty licence without having to pass a proper test, and without experiencing any delay.

But are any of them accomplices, because if they are not there is no reason why they could not fully corroborate each other.

In Davies v DPP (1954) AC378 persons capable of being accomplices were stated to be as follows -

a) participants in the offence charged, whether as principals, procurers, aiders or abettors;

b) handlers of stolen property giving evidence at the trial of those alleged to have stolen such property; and

c) where persons have been charged with particular offences in respect of which evidence of other similar offences has been admitted as showing system and intent and negativing accident then parties to such other offences.

It was also stated that no further extension of the term "accomplice" should be admitted.

Well, none of the witnesses could be considered to be a participant on the offences charged, they could hardly be parties to their own defrauding. And none of them could be brought within the second and third categories of accomplices. The witnesses might properly be said to come within a category, not strictly accomplices, but where the court should exercise especial caution in considering their evidence, but where strict compliance with the practice, or rules relating to accomplices is not a requirement.

Clearly the magistrate has exercised such caution in this case. He has not convicted solely on the evidence of Raj Gopal, though he has clearly found him to be truthful witness, he has very carefully considered the evidence of Shiu Lingam and Subramani Gounder and has believed their evidence in so far as it concerns the appellant. He has carefully considered whether these three main witnesses would have any reason to tell lies about the appellants, should concoct such a story, and should report it to the police, when they could perhaps find themselves in trouble. He has considered the totality of the evidence, including disbelief of the appellant's own evidence, and I can see no reason to question his conclusions. The appeal against conviction is therefore dismissed.

With regard to the sentences passed, they undoubtedly err on the heavy side. The maximum sentence for the offence is 2 years. The appellant has a record of previous convictions, although the last was 10 years ago.

But thesentence is within the magistrate's discretion, and is not manifestly excessive considering the type of offence. It has been argued that the appellant's ill-health should be taken into consideration, but I agree with the magistrate's view. If accused persons are to escape just punishment because of ill-health, then the responsibility should be that of the committee for the prerogative of mercy. The prison authorities also have their own ways of treating sick prisoners. They have medical facilities available, they have discretion to release prisoners to do extra-mural labour. Whereas a court might be persuaded, where a choice of punishments is being considered, to choose a form of punishment which is more favourable to the accused's health, in this case I do not consider bad health to be a ground for reducing the appellant's sentence. The appeal against sentence is also dismissed.

(Sgd.) G.O.L. Dyke

JUDGE

LAUTOKA,
30th May, 1980.