

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

Appellate Jurisdiction

Criminal Appeal No. 31 of 1980

Between:

NAGGA MUTTU
s/o Mun Sami

Appellant

- and -

REGINA

Respondent

Mr. C. Gordon, Counsel for the Appellant
Mr. G. Grimmett, Counsel for the Respondent

JUDGMENT

The appellant was charged with the offence of larceny by a servant contrary to section 306(a)(i) of the Penal Code in that he stole from his employer Reddy and Fletcher Construction Limited, an electric welding plant valued at \$400. He pleaded not guilty, but after hearing evidence for the prosecution, the appellant declining to give evidence or call any witnesses, the magistrate found him guilty and sentenced him to 9 months imprisonment.

He now appeals against his conviction and sentence, the main thrust of his appeal being that the prosecution evidence fell far short of that required to sustain a criminal conviction.

On the evidence before the court there was no doubt that the welding plant was stolen from the

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premises of Reddy & Fletcher Construction at some time between 9 - 10 p.m. on 2.6.79 and was found on 17.12.79 on the premises of United Coach Builders owned by one Jitendra Kumar. It had been painted obviously in an attempt to disguise it. It was agreed that the welding plant required 3-4 people to carry it.

There was evidence by two witnesses who said they saw the welding plant at the Reddy and Fletcher Construction premises on the evening of 2.6.79 just before the appellant drove onto the site with three friends, and parked the car near to the plant. One witness had used the plant earlier in the evening. One witness said the car was parked 10 - 15 feet from the plant, another witness, the night watchman said about 10 paces from it. The first witness, Krishna Sami who saw this was working on the site, being on night duty and presumably not paying much attention to what the appellant was doing. The other witness Subramani was the night-watchman. When the appellant came he wanted oil for the compression machine so Subarmani went off with one Sanmugan to get the oil and was away for about 20 minutes. Sanmugan had taken the oil straight back to the car, and when Subarmani got back the appellant and his friends and the car had gone. So had the welding plant because Subarmani then noticed that it was missing. He said he noticed this at about 9.05 p.m., the appellant and the car having left apparently about 9 p.m. Subarmani said he went to call Krishna Sami from the wharf and asked him about the plant. This would account for Krishna Sami saying the plant was missing between 9.30 - 10 p.m., because it is clear that he really meant that that was when he got the information that it had gone.

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Apparently nobody saw the appellant or his friends take the plant, but then nobody seems to have seen them whilst Subarmani went to get the oil. It is obvious that 3 or 4 persons would be needed to lift the plant and a vehicle of some sort would be required to take it away. There was no evidence of any other vehicle or small group of persons visiting the site at about that time. It seems that Krishna Sami saw the appellant and his friends walk away after drinking grog with them but didn't see them carrying anything. It is not clear whether that was when they drove away, and it by no means follows that they had no opportunity to put the plant in the vehicle when no one was looking. Unfortunately there was no evidence as to the type of car they were using, whether it would have been possible to get the plant in the car.

The evidence so far is not overwhelming but there is at least a very strong presumption that the appellant and his friends took the plant, because it disappeared, or its disappearance was noted, just after they left, they had the opportunity and the manpower to remove it when no one was looking - and there is no suggestion that anyone else had the opportunity or the manpower - and transport to remove it. One might wonder what happened between 2.6.79 and 17.12.79 when the plant was discovered by the police. Was there an investigation into its disappearance, because if so surely, the appellant was questioned?

But there was no other evidence before the court until sometime in December 1979. According to Jitendra Kumar, the owner of the garage

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where the plant was found, he met the appellant at a party and the appellant said that he had a plant that he wanted checked. The witness, who admits he was drunk at the time, says that he told the appellant to see him at the garage, and the appellant said he would bring the plant for checking. The next day he found the welding plant left at his garage. He did not see who brought it, and his garagehand who was present at the time it was brought said a car came about 9 - 9.30 p.m. and left the plant. He didn't see it taken out of the car, he did not see who was in the car. He saw the plant after it was put in the garage and someone shouted from the car, shouted to him to tell his boss that the plant was there.

Again this is by no means conclusive evidence against the appellant. It is merely very suspicious that just after the appellant tells Jitendra Kumar that he is bringing a plant for him to check, the plant is left at the garage by someone who doesn't bother to identify himself to the garagehand.

This was the prosecution case, not the strongest case perhaps but one which does lead to the inference that it was the appellant, together no doubt with others who stole the welding plant on the night of 2/6/79. The appellant had a constitutional right to remain silent in the face of this evidence, and no inference of guilt should be drawn from that. But on the other hand a reasonable explanation might have helped to cast a reasonable doubt on the prosecution evidence, and he can hardly complain now that the magistrate drew the only inference possible from the evidence before him, namely that it pointed inescapably to the appellant's guilt.

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I see no reason to differ from the magistrate in any way and the appeal against conviction is dismissed. The sentence is by no means excessive and the appeal against sentence is also dismissed.

(Sgd.) G.O.L. Dyke
JUDGE.

LAUTOKA,
30th May, 1980.

