IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

CRIMINAL APPEAL NO. 18 OF 1970

000001

Between:

RAM KUMAR s/o Tilak Dhari — Appellant

\- and -

REGINAM — Respondent

## J U D G M E N T

The appellant was on the 13th day of December, 1979 convicted by the Magistrate's Court Suva of the offence of Failing to Keep a Record of Wage Payments contrary to Regulations 6 & 19(1) of the Employment Regulations, Cap. 75. He was fined $100 and ordered to pay $40 costs.

He was on the same day acquitted of the offence of Failing to Produce Record of Payments on Demand made by a Labour Inspector contrary to Subsection 1(d) of section 9 and subsection (1) of section 12 of the Employment Act Cap. 75. The offence with which he was convicted was an alternative count to the one on which he was acquitted.

The appellant originally appealed on 3 grounds and before the hearing of the appeal a further ground was added. The grounds of appeal are as follows :-

"(a) That the learned trial Magistrate erred in law and in fact when he held that your petitioner was the "employer" of one NAGUR when in fact the taxi permit, third party and Taxi Registration No. S861 did not belong to your petitioner and there was no evidence of any driving record kept by the said NAGUR.

[illegible] was wrong in law when he held that the case was proved beyond reasonable doubt when in fact any reasonable tribunal directing itself properly would not have been so satisfied.

(c) That having regard to the facts and the circumstances of the case the sentence and the costs awarded is harsh and excessive.

(d) The learned trial Magistrate erred in law when he failed to accept your petitioner's evidence - in - chief without testing his credibility in cross-examination and thus not having his evidence challenged, controverted or tested.

There is no cross appeal by the Director of Public Prosecutions, which is probably not surprising, since the appellant was convicted on the alternative charge. However, in view of the irregularity of the trial which counsel for the respondent concedes a cross appeal may have been desirable for reasons which I will refer to later.

The irregularity to which I have referred occurred during the trial when the appellant gave evidence on oath in his defence. At the end of his examination in chief the magistrate intervened to notify the Police Prosecutor that there was no need to cross examine the accused.

So far as the Prosecuting Officer was concerned he was prevented from cross-examining the accused and obtaining any admissions or evidence which would assist the prosecution in establishing the charge against the accused.

So far as the defence was concerned the magistrate clearly indicated to the accused and in particular his counsel by directing the prosecution not to cross-examine that he totally rejected the evidence of the accused. This total rejection occurred when the magistrate could not have known what other witnesses the accused intended calling and before hearing the accused's counsel's argument at the close of the defence. It was also a rejection of the appellant's evidence before he was in a position properly to consider all the evidence and test his evidence against the evidence led by the prosecution.

My first reaction as regards this irregularity was to consider a retrial before another magistrate.

Crown counsel conceded the irregular nature of the trial and requested a retrial. However, I had not at that time fully considered the magistrate's judgment and did not appreciate that a retrial would have to be limited to a retrial on the alternative offence on which the appellant was convicted since the Director of Public Prosecutions has not cross appealed against the acquittal in the first count.

When I came to fully consider the evidence and the judgment there were other matters in which in my view the magistrate erred.

The substantive charge against the appellant was failing to produce records of wage payments on demand made by a Labour Inspector. The evidence of the prosecution established that a notice under section 9 of the Employment Act was delivered to the appellant and he failed to produce a record of wage payments of his employee Nagur and all other employees as demanded in such notice.

The magistrate in his judgment said :-

> "Since it is clear that there were in fact no such relevant records in existence at the material time Accused cannot in the nature of things be convicted on Count 1. Accordingly I acquit on that charge."

The evidence which the magistrate accepted indicates that the Labour Inspector Mr. Davendra Pandaram stated that the accused said he had records to show the witness. Birendra Singh another Labour Inspector said the accused promised to produce records. Nowhere in the prosecution evidence is there any evidence that the accused did not keep records. I can only assume that because the records demanded were not produced the magistrate assumed that they did not exist and since they did not exist he could not comply with the demand and was therefore not guilty.

Regulation 6 of the Employment Regulations requires every employer to keep certain records. The notice under

section 9(1) of the Employment Ordinance requires any employer to product (inter alia) any records required by the employer to be kept by him under the provisions of the ordinance. Failure to comply with a proper notice duly served is the offence and it is immaterial whether such records exist or not. It would be no defence for an accused to allege that he has kept no records which by law he is required to keep and he was not guilty of failing to produce such records on demand because he could not produce something which does not exist.

In my view the prosecution established the guilt of the accused on the substantive offence but since there has been no cross appeal against the acquittal there is nothing I can now do about the matter.

I do not know why the prosecution charged the accused with the alternative charge of failing to keep a record of wage payments of one Nagur for the period May 1978 to May 1979 in view of the evidence given by the two labour inspectors. It may be the prosecution wanted to cover the situation where the notice given to the accused might be held to be defective and the prosecution could then seek to rely on a demand for production of records and failure to produce them to establish a prima facie case.

A perusal of the evidence, however discloses that the accused was not requested to produce a record of wage payments in respect of Nagur for the period May 1978 to May 1979 the dates alleged in the particulars of the alternative offence.

The notice given to the accused required him to produce (inter alia) wages records for the employee Nagur for period January, 1978 to July 1979. Nagur on his own evidence only worked for the accused from May 1978 to May 1979. That notice did not refer to a "record of wage payments" but to wages records. A wage record could be merely a record of wages paid to Nagur. One of the Labour Inspectors stated the

accused showed him a cheque butt but was told by the Inspector a cheque butt would not do. If all the accused had to do was produce a record of wages paid to Nagur and such record appeared on cheque butts that would be sufficient compliance with the demand.

A "record of wage payments" kept in compliance with Regulation 6, however, must contain all the particulars referred to in the regulation as are applicable. I can find no evidence on the record that the appellant was ever asked to produce such a record of wage payments. On the alternative charge I do not consider the prosecution established a prima facie case.

There is more serious criticism however of the magistrate's judgment. There is no finding of any relevant fact. He expressed his view that three aspects of the defendant's case were of no relevance. These aspects were :-

1. The insurance on the vehicle driven by Nagur was in the applicant's wife's name.

2. Nagur did not drive on a regular basis for the accused and

3. The vehicle was registered under the name of the accused's wife.

These matters were relevant to the defence's contention that the accused was not Nagur's employer and was a casual employee. As regards the alternative charge the prosecution had to establish that the applicant was an employer of Nagur and that for the period stated in the charge he failed to keep a record of wage payments contrary to regulation 6 and 19(1) of the Employment Regulations. If the magistrate properly considered this alternative charge it is not apparent from his judgment.

While magistrates are far too busy to write lengthy judgments unless the case requires they should do so they must comply with section 154 of the Criminal Procedure Code which is as follows :-

"154. (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the court in English, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it:

Provided that where the accused person has admitted the truth of the charge and has been convicted, it shall be a sufficient compliance with the provisions of this subsection if the judgment contains only the finding and sentence or other final order and is signed and dated by the presiding officer at the time of prounouncing it.

(2) In the case of a conviction the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

(3) In the case of an acquittal the judgment shall state the offence of which the accused person is acquitted and shall direct that he be set at liberty."

The magistrate accepted the evidence of Nagur and rejected that of the accused whom the prosecutor did not cross-examine when told by the magistrate there was no need to do so. There were discrepancies in the evidence of Nagur whose evidence in toto was accepted. There were facts stated by the accused which were clearly established but rejected entirely by the magistrate.

This was an unsatisfactory trial and I see no virtue in sending the case back for rehearing by another magistrate on the alternative count.

The appeal is allowed and the appellant is acquitted. The fine and costs if paid are to be refunded to him.

(R.G. KERMODE)

[illegible]

SUVA,

[illegible], 1980.