IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

CRIMINAL APPEAL NO. 29 OF 1981

Between:

MOHAMMED AZAM s/o Mummy Kutti — APPELLANT

v.

R E G I N A M — RESPONDENT

Mrs. A. Hoffman for the Appellant.
Mr. D.V. Fatiaki for the Respondent.

J U D G M E N T

The appellant was on the 13th March, 1981, convicted by the Magistrate's Court Suva of the offence of robbery with violence contrary to section 326(1)(b) of the Penal Code and sentenced to 12 months imprisonment.

The appellant appeals against conviction and sentence on the following grounds :

(a) That the learned Trial Magistrate erred both in fact and in law in finding your Petitioner guilty as charged.

(b) That the decision of the learned Trial Magistrate was reached against the weight of evidence.

(c) That in coming to his decision the learned Trial Magistrate gave undue weight to certain of the prosecution evidence and insufficient weight to certain of the evidence of your Petitioner.

I have had difficulty in considering this appeal because the learned Magistrate made very few findings of fact and did not properly consider whether the prosecution had established the offence.

After a lengthy summary of the evidence the Magistrate expressed his views on the evidence in 11 paragraphs. The bulk of those paragraphs refer to credibility of the prosecution witnesses and the appellant. He accepted the evidence of the complainant and one of her witnesses and was satisfied the appellant lied to the Court.

Paragraph 11 of the Magistrate's views were as follows :

> "I am satisfied that Accused was one of those who committed this nasty, vicious and cowardly attack on P.W.1 and that he himself struck her in the manner she described. At some stage (though it is not entirely clear when or how) he extracted $20 from P.W.1's purse in circumstances amounting to theft."

Following on his expression of his views the Magistrate said :

> "Accordingly I am satisfied beyond reasonable doubt that accused has been proved to be guilty of this offence."

The Magistrate did not in my view properly evaluate the evidence. Mrs. Hoffman for the appellant in the Court below pointed out to the Magistrate inconsistencies and contradictions in the prosecution evidence which the Magistrate has ignored. He did deal with question of identification and in my view he was correct in accepting the complainant's identification of the appellant.

The Magistrate when considering P.W.2's evidence, a friend of the complainant who came on the scene, merely stated :

"I accept the evidence of P.W.2: she was a particularly good witness".

From the record, accepting the prosecution evidence, it is clear that at about 7 p.m. the complainant, who admitted living on the earnings of prostitution when in financial difficulties, was sitting in the triangle near the Nubukalou bridge in Suva. She was alone. The appellant and two other youths approached her and sought to take her to a guest house and offered her $10 for her services. She refused to go.

She said one of the youths, not the appellant, slapped her on her face and swore at her. She told the youth not to swear whereupon the appellant made an indecent remark which need not be repeated. She hit the appellant with her shoe and then threw it at him. As she was picking up the shoe the appellant kicked her in the face and she fell down.

She said the appellant seized her throat while on the ground.

The Record then discloses she said the following :

"He said he would drink beer with the money. Hew threw the purse at me".

She had earlier testified she had a purse in her hand containing $23.50.

She said she stood up and called to a girl called Madhu (PW.2) to come and save her. The appellant then ran towards the Bank of New Zealand and the other two youths towards the Post Office. She said she found her purse and $20 was not in it.

She then stated in evidence :

"I spoke to Madhu. Accused was there. I told her what happened - that accused had hit me and taken the money".

The foregoing is a summary of the relevant portion of the complainant's evidence in chief up to the point where the youths ran away.

Had the Magistrate properly considered the complainant's evidence it would have been evident that she did not state how the purse which was in her hand came into possession of the appellant so that he was able to throw it at her. She says nothing about him opening the purse and extracting any money in her evidence in chief. When she found her purse a $20 note was not in it.

On this particular point she later said under cross examination -

> "Accused took the money out and threw purse at me at Terry Walk".

As to what she said to her friend Madhu, she told her friend the appellant had taken her money.

When Madhu's evidence is examined she relates that in the hearing of the three youths the complainant told her "the boys had taken the money". She later relates the complainant pointed out the appellant while he was running away as being the youth who took her money.

P.W. .3 D/Corporal Jone Poesi in cross-examination said the complainant said that three Indian boys robbed her.

At this stage of my judgment I would point out that the foregoing recital of some of the evidence discloses serious and relevant inconsistencies. There were others. The Magistrate's statement that he was satisfied P.W.1 had not lied to the Court and that he accepted the evidence of P.W.2 without stating his findings on the facts places an appellate Court in a position where it does not know and cannot know what were the facts he found which he considered established the offence.

According to Madhu's first story, and what the

complainant said later to the police, the complainant did not specifically accuse the appellant but accused the "three boys".

To take up the story about what happened that night. The complainant and Madhu saw the three youths a little later in the Metropole Hotel drinking. They went and called the police.

Corporal Jone Poesi accompanied the complainant and Madhu to the Metropole Hotel and took them inside where P.W.1 identified the three boys. The complainant and the three boys then argued in Hindustani which the Corporal could not understand. What this evidence does disclose is that even in the presence of the appellant and the police the complainant appears not to have accused the appellant personally but to have argued with all three youths. The Corporal arrested all three of them.

The Corporal admitted in cross-examination that the appellant had no money on him but one of the other youths did have $18.65 on him. The prosecution should have elicited from the Corporal in evidence in chief that the youths were searched after they were arrested and no money was found on the appellant. Instead they had him testify that he found seven $20 notes in the till at the hotel. If any of the three youths had produced a $20 note to a barman at the hotel only a short while before proper investigation by the police might have elicited that fact. If any such inquiry was made the Corporal did not mention it.

The Magistrate as he stated could not from the evidence determine how and when the appellant extracted $20 from the complainant's purse but he was satisfied that accused was one of the youths who assaulted the complainant.

I am unable to gather either from the judgment or the evidence how the Magistrate came to be satisfied beyond reasonable doubt that the prosecution had proved the offence.

The Magistrate did not even consider whether the facts disclosed that the offence was robbery with violence or larceny from the person or simple theft.

There was no acceptable evidence before the Magistrate to establish that the appellant opened the purse and extracted $20. There were three youths around the complainant. She also stated, in contradiction of other evidence she had earlier given, that she was helped by two Koreans while she was on the ground. There were another four Koreans not far away.

The complainant was assaulted by two of the youths including the appellant and his assault was by far the most serious. The third youth is not mentioned.

There was the evidence of two independent witnesses who testified that the complainant did not at first accuse the appellant but accused all three boys as having robbed her.

A proper and critical examination of the evidence should have satisfied the Magistrate that the prosecution had not established the offence was committed by the appellant.

The word "rob" is not defined in the Penal Code but at common law robbery is the felonious taking of money or goods from the person of another by violence or putting him in fear. The appellant assaulted the complainant as did one of the other youths but the evidence discloses that such assault arose out of the complainant's refusal to go with the youths to a guest house and, in the case of the appellant's assault, after she threw her shoe at him. The assault on the complainant was clearly not with the intent of stealing money from her.

Smith & Hogan's Criminal Law first edition at p.394 states :

> "The taking must be accomplished by violence towards the victim by putting him in fear."

A little further down on the same page the learned author states:

"It follows, then, that violence must be intentionally used by D on the person of P to achieve the purpose of taking the goods."

The Magistrate did not know when and how the money was extracted from the purse. Furthermore the evidence does not disclose that the offence of robbery with violence or even simple robbery was committed that night.

The Magistrate did not address his mind to the question of mens rea had he done so he would not have convicted the appellant of robbery with violence and would have considered whether the facts proved reduced the charge to a minor offence.

While I fully appreciate that Magistrates are under considerable pressure and in this instant case the Magistrate's difficulties were compounded by difficulties caused by the appellant's counsel, it is essential that Magistrates make sufficient findings of fact so that an appellate court is in a position to ascertain on what facts he convicted a person. Where, as in this case, there is a serious conflict of evidence given by prosecution witnesses, it is no help to this Court to merely state that a prosecution witness's evidence is accepted.

Accepting that the complainant did lose $20 from her purse that night a critical examination of the recorded evidence does not establish beyond reasonable doubt that it was the appellant who stole the money. Nor did the evidence in any event establish that the theft of the money was attended with violence with intent to steal the money.

I allow the appeal and quash the conviction.

(R.G. KERMODE)

ACTING CHIEF JUSTICE

SUVA, 24 JUNE, 1981.