IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

Criminal Appeal No.55 of 1983

Between:

HARI DASS s/o Girdhari — Appellant

and

REGINAM — Respondent

Mr. S.R. Shankar for the Appellant
Mr. K.R. Bulewa for the Respondent

J U D G M E N T

On the 1st February, 1983 the appellant was convicted and sentenced by Mr. J.T. Bradshaw, Resident Magistrate, as follows :

Count 1	Forgery	- 3 years' imprisonment
Count 2	Uttering	- 1 year's imprisonment
Count 3	Attempting to obtain money on a forged document	- 1 year's imprisonment
Count 4	Forgery	- 3½ years' impris nment
Count 5	Uttering	- 1 year's imprisonment
Count 6	Obtaining money on a forged document	- 1 year's imprisonment

It was ordered that all sentences of imprisonment were to run concurrently.

The charges arose out of the actions of the appellant on the 1st March, 1982. On that date he

presented to the Walu Bay Agency of the Bank of New South Wales a withdrawal slip and passbook. The passbook was in the name of one Suresh Chandra and the amount requested was $13,900. The appellant required cash and, as this was refused by the teller, the appellant left the Agency. Later on the same day he presented himself at the bank's main branch in Suva where he succeeded in withdrawing the money. It was the prosecution case that the appellant was encouraged and assisted in this matter by Prakash Chandra, an accountant employed by the bank, who gave evidence as an accomplice at the trial. It is not in dispute that the police recovered the $13,900 from the appellant.

Some of the grounds of appeal are concerned with amendments to certain of the charges which were made during the course of the trial and the procedure followed thereafter. Originally Counts 1 and 4 read as follows :

" First Count

HARI DASS s/o GIRIDARI on the 1st day of March, 1982 at Suva in the Central Division, with intent to defraud forged a certain document namely, Bank of New South Wales withdrawal slip purporting to have been signed by Suresh Chandra.

Fourth Count

HARI DASS s/o GIRIDARI on the 1st day of March, 1982 at Suva in the Central Division, with intent to defraud forged a certain document namely, Bank of New South Wales withdrawal slip purporting to have been signed by Suresh Chandra. "

The record contains the following note during the course of the evidence of one Rex Perry (P.W. 9) :

"COURT:

Q: Bank concerned about recover.
A: Certainly are, Bank at loss, account been rectified.

DEFENCE - PARTICULARS

In relation to Count 1 and Count 4.

PROSECUTOR:

Amended to include Bank of New South Wales. "

On the original charge sheet the magistrate inserted the words "Bank of New South Wales" between the word "defraud" and the word "forged" on both counts. The provisions of section 214 of the Criminal Procedure Code were not followed by the magistrate after the alteration of the charges. The accused was not called upon to plead to the amended charges. Mr. Shankar submitted that the failure to apply the provisions of section 214 amounts to an incurable defect in the procedure followed. He relied upon The Attorney General v. Vijay Parmanandam 14 F.L.R. 6 in support of his submission.

The charges were framed in accordance with specimen No.16 in the Second Schedule to the Criminal Procedure Code. Section 122 (a)(iv) authorises the use of these forms and subsection (g) has the effect of making it unnecessary to state an intent to defraud, deceive or injure any particular person, where the enactment creating the offence does not make an intent to defraud, deceive or injure a particular person an essential ingredient of the offence. I am satisfied that it was not necessary to allege an intent to defraud any particular person having regard to the provisions of section 334 of the Penal Code. Hence it can be said that the charges as originally framed were not defective either in substance or in form and the amendments made were not necessary. In Ram Lakhan v. R. 19 F.L.R. 1974 Grant J. held that the proviso to subsection (1) of section 214 (then section 204) of the Criminal Procedure Code came into operation only when a charge was amended due to a defect either in substance or form. In view of this Mr. Shankar's submissions are rejected.

There were also amendments to Count 2 and Count 5. These arose at a later stage in the trial where the following note appears :

"PROSECUTION:

2nd and 5th count to forged.
No objection to amendment.
Amendment read over. "

The original charges did not allege that the documents uttered were forged and the purpose of the amendments was to remedy that defect. The offence of uttering under section 343 of the Penal Code only arises where the document used is forged. Hence the charges were defective. All the magistrate appears to have done was to read over the amendment but he did not call upon the appellant to plead to the amended charges. Therefore, following Parmanandam's case (supra) the conviction on these counts must be quashed, as the failure to follow the procedure set out in section 214 of the Code was a fatal and incurable defect in the proceedings.

The appellant was represented at his trial and on this appeal by Mr. S.R. Shankar who is a barrister and solicitor of this Court with considerable experience. It is not to be supposed that he was not well aware of the provisions of section 214 of the Criminal Procedure Code and the obligation which rested upon the magistrate to apply its provisions. There is no indication that he drew the magistrate's attention to these mandatory requirements. He allowed the magistrate to make a fatal procedural blunder without offering him any assistance.

The duty of a counsel appearing in a case has been set out with reference to barristers in Rondel v. Worsley (1969) 1 A.C. 191 at 227 where Lord Reid stated as follows :

> " Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce. "

In Fiji the legal profession is a fused one. This does not decrease the duties and responsibilities of persons admitted to practise. In Rex v. Neal 2 K.B. 590 at 596 Lord Goddard said :

> "If some irregularity comes to the knowledge of counsel before the verdict is returned, he should bring it to the attention of the court at the earliest possible moment so that the presiding judge may consider whether or not to discharge the jury without giving a verdict. Points of this sort ought not to be held in reserve with a view to taking them before this court when it may be, as here, too late to remedy the mistake. "

No lesser duty falls upon counsel appearing before a magistrate to ensure that the court before whom he appears applies the correct procedure at all times. In failing to give his assistance to the court below in this matter Mr. Shankar failed in his duty as a member of the legal profession. In bringing his own dereliction of duty before the Supreme Court as a ground of appeal in the interests of his client he compounded it into an impropriety.

The next ground of appeal reads as follows :

"(b) (i) That the learned Magistrate erred both in law and in facts when he admittedly forcefully cross examined a prosecution witness (namely PW11) on matters which were favourable to the appellant, when the said witness was not declared by the prosecution to be hostile, thus departing from accepted practise of neutrality expected to be exercised by a judicial office and adopting an improper procedure which was more favourable to the prosecution.

(ii) That as the learned trial Magistrate had not heard the whole of the evidence presented in the case he was not in a position to forcefully cross examine the said PW11 as he had by then not had heard whole of the evidence in the case.

(iii) That the learned trial Magistrate had erred both in law and in facts, impliedly and expressly suggesting by the said forceful cross examination of PW11 that he had reached a conclusion beyond reasonable doubt that the appellant was in fact guilty of the offences charged thus depriving himself of the benefit of the evidence of the appellant to consider the case properly. "

The witness who was the subject of the magistrate's prolonged questioning was the accomplice, Prakash Chandra. I can well understand the magistrate's exasperation on being confronted with the prevarications of this accomplice. Such witnesses usually have their own purposes to serve. The law of evidence recognises their basic unreliability. Chandra is a cousin of the appellant and there can be no doubt that the offences for which the appellant was convicted were the result of a conspiracy between the two men to defraud the Bank of New South Wales. The money having been recovered and the witness having pleaded guilty, he had nothing to gain by telling the magistrate the whole truth. Because of his intimate knowledge of the crime, this witness was presented with an opportunity to present his evidence in whatever light it pleased him either favourable to himself or to the appellant. It was

imprudent of the magistrate to have been drawn into what was in effect an argument with the witness when listening to his evidence. But, I do not think it can be said that the magistrate's attitude materially affected his judgment considering the totality of the evidence. There was overwhelming evidence to the effect that the appellant presented himself at the bank and obtained the money and that the documents which he used for this purpose were not genuine.

This brings me to the next ground of appeal which (as amended in court) reads as follows :

> "That the learned trial Magistrate erred both in law and in facts in holding the appellant guilty of the said offences when there was no evidence of the fact that there was a forgery which allegation by the appellant that he had acted on the instructions of PW 11 was not rebutted by the prosecution. "

The appellant did not give evidence at the trial. Instead he made an unsworn statement which included the following:

> "The passbook which Prakash gave to me at that time he told me he has kept money in a different name in his account. No body knows about that at his house. I could keep the money and he Prakash would come and take it away. Then he told me he was giving me the authority to withdraw the money.
>
> Then he also told me there was nothing wrong, he made me believe there was nothing wrong in doing that.
>
> Prakash is related to me as my brother. At the bank he was a senior officer and I believed him.
>
> I did as he told me. In our family he was a person whom we had a trust and every body had belief in him.
>
> Whatever he told me I trusted him and I believed him. "

The magistrate rejected this defence. He had every reason to do so because not only does it strain credulity, but, it

fails to explain the appellant's attempts, at an early stage of the investigation, to set up an alibi for his movements on the morning of the 1st March coupled with his denial to the police that he was the person who withdrew the money. I see no ground for taking a different view of the facts in the case.

The final ground of appeal against conviction reads as follows :

> " That the learned trial Magistrate erred in law in accepting and asking (sic) upon the evidence that PW11 had in fact aided the appellant in the commission of the offences when in fact PW11 had only assisted (sic) that he had on another occasion elsewhere had pleaded guilty to aiding and abetting the appellant in the commission of the offence. That the said assertion was not deposed by PW11 as being true against the appellant. "

Mr. Shankar submitted that the evidence given by the accomplice to the effect that he had been convicted of offences relating to the theft of the $13,900 was no evidence that he was in fact guilty. I find this idea rather difficult to grasp. Prakash told the court how, while working at the bank, he came across an unused savings account book. He said that the appellant asked him for financial assistance. Later he examined Suresh Chandra's account and decided to enter particulars of this account on the unused passbook. He continued his preparations and gave the passbook and other documents to the appellant and told him what he should do to draw the money out. To my mind nothing could be clearer than that admission by the witness of his criminal intentions and activities.

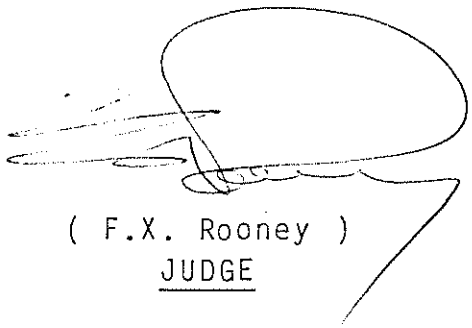
The appeals against convictions and on Counts 1, 3, 4 and 6 are dismissed.

There is also an appeal against sentence. It was pointed out that Prakash, who pleaded guilty, was sentenced

to 9 months' imprisonment and this creates a great disparity between his sentence and that imposed upon the appellant. With this view I must agree, but, the fault appears to lie in the lenient treatment of Chandra rather than the severity with which the appellant was treated.

It is clear from the reasons which the magistrate gave in passing sentence that he regarded the appellant as the instigator of the crime who had persuaded his cousin to jeopardize his career by committing dishonesty merely to satisfy the appellant's greed for money. I do not know on what basis the magistrate reached this conclusion other than the tainted and suspect evidence of Prakash. I do not think there is much to choose between the two men and it is not possible to say with any certainty which of them initiated the crime. The disparity in the sentences must not be allowed to stand and I have decided that justice can be done by reducing the sentences on Counts 1 and 4 to 18 months. This will have the effect of reducing the substantive sentence passed on the appellant from 3½ to 1½ years.

I confirm that the convictions and sentences in respect of Counts 2 and 5 are set aside.



(F.X. Rooney)
JUDGE

Suva,
21st October, 1983