IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Criminal Appeal No. 15 of 1966

Between:

RAM LAGAN s/o Budhu Appellant

- and -

REGINAM Respondent

R.A. Kearsley for Appellant
G. Mishra, Crown Counsel, for Respondent

JUDGMENT OF MARSACK, J.

On the 3rd March 1966 the appellant was convicted by the Magistrate's Court of perjury in respect of evidence which the appellant had given on the 26th May, 1965, in the Magistrate's Court, in the course of an action which the appellant had brought against one Ram Lore claiming the sum of £50. The appellant, who does not speak English, gave evidence in support of his claim in Hindi, and this was interpreted into English by the Court Interpreter Mr. K.P. Sharma. The Magistrate who presided at the hearing was Mr. J.C. Thompson.

The evidence against the appellant at the trial for perjury was that of two witnesses only. Mr. K.P. Sharma swore that he had correctly interpreted into English to the Magistrate all that the appellant had said in the course of his evidence in Hindi. He could not remember in detail the evidence given by the appellant and had not made notes of that evidence or checked notes made by any other person. Mr. Thompson, the Magistrate, gave evidence that he had kept a full record in the English language of the evidence given by the appellant as translated to him by the Court Interpreter and put into narrative form by himself. Mr. Thompson was permitted to refresh his memory from the record which he had kept and then gave detailed evidence in the same words as those of the record he had made.

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The appellant appealed to the Supreme Court of Fiji against his conviction on the ground that Mr. Thompson's evidence was hearsay and should not have been admitted. Acting under the provisions of section 30A of the Fiji Court of Appeal Ordinance the Supreme Court reserved two questions of law for consideration by this Court. These questions are:

> "(1) On a charge of perjury contrary to section 106(1) of the Penal Code, where the accused has given sworn testimony before a Magistrate in a judicial proceeding through the medium of a sworn Court Interpreter, is the evidence of the Magistrate of what the Interpreter has interpreted into English what he says the accused has said in the vernacular, admissible in evidence against the accused or is such evidence inadmissible on the ground that it is hearsay?
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> (2) On a charge of perjury contrary to section 106(1) of the Penal Code where a Magistrate, before whom the accused has given the evidence alleged to be false, in the course of his, the Magistrate's evidence produces the record of the proceedings made by him and adopts it as a record of what the accused has said, is such a record itself admissible in evidence of what the accused said or may it only be referred to, by the Magistrate who is giving evidence, to refresh his memory?"

In determining these questions the Court is faced with what would appear to be a complete lack of compulsive authority. Conflicting decisions have been given in the Courts of Fiji; and judgments given in other Commonwealth Courts on the same subject must necessarily be examined carefully in the light of differences among the relevant statutes and ordinances. It is true that decisions of high persuasive authority can be found on the broad general principle affecting the question of whether the evidence sought to be adduced, that is, the translation into English of what the witness said in another language, is hearsay or, if so, an exception to the rule that hearsay is not evidence.

It is first necessary to consider the provisions of the code of procedure applicable to the Court hearing at which was tendered the evidence in respect of which the charge of perjury was brought.

The relevant sections would appear to be sections 100
52 and 62 of the Magistrates' Courts Ordinance (Cap. 5) and section 4 Order III of the Magistrates' Courts Rules. These read:

> "52. The language of magistrates' courts shall be English."
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> "62.(1) Subject to Part V of the Criminal Procedure Code, in every case heard before a magistrate's court, and at every stage thereof, the presiding magistrate shall, save as hereinafter provided, take down in writing the oral evidence given before the court or so much thereof as he deems material."

Section 4 of Order III of the Magistrates' Courts Rules reads:

> "4. If, in any cause or matter, any accused person, party, witness or other person is unable to speak or understand the English language, the court may direct a fit and proper person to attend and interpret the proceedings so far as may be necessary. Before so interpreting, such person shall swear on oath in the following form:
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> > "I swear that I will well and truly interpret and explanation make of all such matters and things as shall be required of me to the best of my skill and understanding. So help me God." "

The sections quoted make it clear that the Court record must be kept in English. For general purposes it is this record which must be produced and accepted as an authoritative statement of what took place in the course of the trial or action. The official Court record must be entirely set out in the English language, and what appears there in English as the evidence of any party or witness must normally be taken as an authoritative record of what the witness said.

In a prosecution for perjury, however, the Court before which the prosecution takes place will require sworn evidence of what the accused actually stated on oath in the course of the previous judicial proceeding. When the statement upon which the prosecution is founded was made in a language other than English, no difficulty would arise if the interpreter, either from memory or with the aid of notes made or checked by himself at the time, were able to give direct evidence of what the

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accused had said to him in the previous Court proceedings. The position is different in cases such as the present, when the interpreter has no independent recollection of what the accused had said, and the evidence relied on by the prosecution is that of the magistrate who heard the case and who can give evidence only of what the interpreter passed on to him as a translation into English of what the accused deposed to in his own language.

In any event the evidence given at the criminal trial must be given to the Court, either directly or through an interpreter, in English. Section 186 of the Criminal Procedure Code provides that in the case of both the Supreme Court and the 'subordinate' Courts the language of the Court shall be English. The only difference is thus the stage at which the evidence in question is translated from the vernacular into English.

As to the first question, the argument before us was almost entirely confined to an examination of the hearsay rule. Counsel for the appellant contended that the making of a statement to an interpreter is an event; and just as evidence at second hand of an event is not admissible, so similar evidence of an utterance is also hearsay and on that ground inadmissible. Some of the decisions cited in the argument would appear to lend some support to that view. In my opinion, however, both the logic and the justice of the matter compel another answer. That answer is to be found in the very careful and detailed judgment of the High Court of Australia in Gaio v. R. (1960) 104 C.L.R. 419. In that case it was held that evidence of a confession made to a patrol officer by medium of an interpreter, could be given by the patrol officer at a criminal trial against the primitive Papuan who had made the confession in a language known to the interpreter but not to the officer concerned. The basis of that judgment was set out by Fullagar, J. at p.429:

> "What is in truth and in substance taking place is a single conversation between A and B - and nonetheless because a means of communication has to be used which would be unnecessary if they had a common language."

The hearsay rule was considered but it was held that this rule did not apply. As was stated by Dixon, C.J. at p.421:

> "I think that the translation word by word or sentence by sentence by the interpreter is not an ex post facto narrative statement of an event that has passed within the rule against the admissibility of hearsay but is an integral part of one transaction consisting of communication through the interpreter."

With respect I am of opinion that the decision of the majority judges in Gaio's case should be followed here. The principle there laid down, when applied to the circumstances of the present case, would be to this effect: that the statement made by the interpreter to the Court is to be treated as really the statement of the witness. Evidence given by the magistrate as to what was said by the interpreter to him in English would accordingly not be hearsay, but direct evidence of the sworn testimony of the appellant given in the judicial proceeding before the magistrate.

In some cases, in particular a number of American decisions, the evidence was admitted on the ground that the interpreter was acting as the agent of the witness. In Gaio's case Kitto, J. points out that this principle can apply only when the witness has actually authorised the interpreter to say on his behalf that which he has in fact said. In Gaio's case there could be no foundation for imputing such an agency to the accused, who was being interviewed through an interpreter by a patrol officer. As Kitto, J. says at p.430:

> "Obviously the appellant had no intention of doing more than submitting to an interrogation ..... It would be going beyond everything the facts can justify to say that his conduct implied a request to the interpreter to speak as his agent to Smith. It was not at his request, express or implied, that the interpreter performed any part of his task."

In the present case there is a much stronger ground for suggesting that the interpreter might be considered the agent of the appellant. The appellant was plaintiff in an action brought against one Ram Asre, and in support of his claim he elected to give evidence on his own behalf. As by the rules of procedure in Fiji

the language of the Court may be English, it was necessary for the appellant's evidence to be translated into that language. Though he was not compelled to do so, he accepted the services of the court interpreter for that purpose. The onus was on the plaintiff in that action to give his evidence in such a way that it would be understood by the Court. He elected to do so by taking advantage of the services of the court interpreter. There would, therefore, in my view, be reasonable grounds for contending that the interpreter was the agent of the appellant for the purpose of putting his statement before the Court; that there was at least an implied request by the appellant, as plaintiff in the proceedings before the magistrate, that the interpreter should perform the task of translating his statement into English for the benefit of the Court. This aspect of the matter, however, is not referred to in the form of the question submitted to us by the Supreme Court and I mention it only for the purpose of showing that some distinction exists between the facts in Gaio's case and those with which we are concerned. None the less I am of opinion that the broad principle laid down in Gaio's case is directly applicable to the present case.

It is true that in R. v. Attard (1959) 43 C.A.R. 90 Gorman, J. held that evidence by a police officer of an interview which he had conducted with the prisoner through an interpreter was inadmissible. There, however, the interpreter was not called to testify that he had fully and accurately interpreted to the police officer what the prisoner had said in his own language. In the present case the interpreter has sworn that an accused gave his evidence he interpreted to the Court in English whatever accused was saying in Hindi. R. v. Attard is accordingly distinguishable.

For these reasons I am of opinion that the answer to the first question put before this Court should be that the evidence given by the magistrate of the interpretation into English of what the accused had stated on oath in the vernacular is admissible against the accused on a trial for perjury.

The argument before us on the second question consisted very largely of a discussion of the New Zealand

Court of Appeal decision in R. v. Maidanovici (1962) N.Z.L.R. 334. In that case the majority of the Court (North and Cleary, JJ.) held that a document used to refresh the memory of a witness who actually prepared the document, but who had no independent recollection of the transaction recorded in it, was admissible in evidence if the record was adopted by the witness whose evidence was made co-extensive with its contents. It is not quite clear whether the magistrate, when giving evidence at the trial of the appellant for perjury, had any independent recollection of the testimony given by the appellant in the civil proceedings. Referring, however, to that portion of the record which contained the evidence of the appellant the magistrate, in the course of his own evidence, says:

> "That part of the record was a full and complete record of the evidence of Ram Lagan s/o Sudhu as interpreted to me by Mr. Sharma and put into narrative form by myself."

It is clear from this statement that the magistrate, to use the phrase in Maidanovici's case, did "adopt the record" as his own evidence. A distinction is drawn in R. v. Maidanovici between the case of a witness who has an incomplete memory of the transaction and uses the document to refresh that memory, and the case of a witness who has no independent recollection of the matter but adopts as his evidence the record which he made at the time. In the latter case the majority judgment holds that the document itself is admissible as the evidence of the matters there set out, on the ground (p.340):

> "Where a witness has no independent memory of the transaction, the document itself, once it is properly proved, provides the best evidence of the matter which it contains."

In his dissenting judgment Gresson, P. gives his view of the law in these words (pp.336/7):

> "Many American decisions have held that where a witness verifies and adopts the written record of a past transaction it thereby becomes part of the witness's testimony and admissible accordingly, but I am not aware of any decision in England or any Commonwealth country which has modified the strict rule of evidence rendering such a document inadmissible as settled in England by a strong trend of authority and

> "stated to be the law by all the English text-book writers. Accordingly I think as a matter of strict law the sale note itself was not admissible as evidence to establish that there was in fact such a sale as was therein recorded. So to hold in this case is a technicality quite devoid of any merit or justice, for the admission of the sale note added nothing at all to the oral testimony given."

Further at p.337:

> "My view of the law being therefore that though a witness may use a written statement made more or less contemporaneously with the happening it records in order to refresh an imperfect recollection or even to revive what has been wholly forgotten and though it be produced, cross-examined upon and shown to the jury, it is not of itself of any probative value and accordingly should not be put in and accepted by the Court as an exhibit, but only referred to by the witness for the purpose of incorporating the contents in the oral testimony."

There is a wealth of authority to be found in the English decisions which appear to support the proposition put forward by the minority Judge, Gresson, P. The authorities to which reference is made are carefully considered by the learned President in his judgment at pp.336/7 and it does not appear necessary to examine them in detail here. Although the term "refresh the memory" of a witness would suggest that the witness on perusing the document recalls some parts of the events he recorded yet, as is pointed out by Hayes, J. in Lord Talbot v. Cusack (1864) 17 Ir. C.L. 213 at p.220:

> "in nine cases out of ten the witness's memory is not at all refreshed; he looks at it again and again and he recollects nothing of the transaction; but seeing that it is in his own handwriting he gives credit to the truth and accuracy of his habits, and though his memory is a perfect blank he nevertheless undertakes to swear to the accuracy of his notes."

It is, however, to be noted that the decision in Maidanovici's case, in which the document in question - an invoice - was admitted in evidence, is subject to the qualification stated by North, J. at p.340:

> "Subject then, to the admitted document not being treated as independent confirmatory evidence of what the witness has said, in our opinion no possible harm can follow from its admission."

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In its essence, therefore, the gap between the view expressed by North and Cleary, JJ. and that of Gregson, P. is not a wide one. The document must in any event be produced in order that the other party may cross-examine on it. It may be read by the Court and shown to the jury. But even if the document is actually admitted it is not to be treated as independent confirmatory evidence. The evidence is in fact solely the evidence of the witness himself.

A further distinction may, however, be drawn between that case and the one before this Court. Here by virtue of the provisions already quoted from the Magistrates' Courts Ordinance and the Rules, the notes made by the magistrate of the interpreted version of the witness's evidence form part of the record. On this ground it might be felt that the document itself had a probative value which would not attach to a commercial document such as the invoice referred to in the New Zealand case cited.

In R. v. Atkinson X E.A.L.R. 119 (C.A.) the Court of Appeal of East Africa held upon the construction of the section in the Criminal Procedure Code worded identically with that in the Criminal Procedure Code of Fiji, that the terms of an alleged false statement were properly proved by the production of the judge's note of the evidence of the accused which formed part of the record of the civil action. It is understood however that the Indian Evidence Act 1872 was then in force in Kenya, and section 80 of that Act makes express provision as to the evidential value of such a document. There is no such enactment in force in Fiji.

The point was also considered by the Divisional Court of Nigeria in Wayode v. R. IV Nigeria L.R. 126. At p.128 the principle applied in that decision is thus stated by Combe, C.J.:

> "That the statements made by the accused as a witness were not proved by the record of the proceedings put in evidence there can, I think, be no question. The record may or may not contain a full and accurate record of the evidence given by the accused, and the record is no better evidence than notes of evidence taken by a Judge or notes or minutes of evidence taken by the clerk to a Court, which

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"notes or minutes are not sufficient proof of the evidence given by a person who is charged with perjury in giving such evidence."

On a full consideration of the relevant statutory provisions and of such authorities as I have been able to find, I conclude that the proper principle to apply in cases like the present is that the document in question may be used by the witness for the purpose of refreshing his memory, whether or not he has any independent recollection of the matters covered by the document; that it should be produced to Court and made available to counsel for cross-examination; but that it should not be admitted in evidence in the sense that it should form part of the evidence for or against either of the parties to the action in which it is produced. To adopt the words of North, J. in Naidenovici's case - "the document should not be treated as independent confirmatory evidence of what the witness has said".

For these reasons the answer to the second question should, in my opinion, be that the record of the proceedings may be used by the magistrate to refresh his memory and may be produced to the Court and to counsel but is not in itself evidence of the matters contained therein.

Marsack JA
JUDGE OF APPEAL.

SUVA,

16th September, 1966.

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Appellate Jurisdiction

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- and -

REGINAM Respondent

R.A. Keersley for Appellant
G. Mishra, Crown Counsel, for Respondent

JUDGMENT OF MILLS-OWENS, P.

I agree with the conclusions reached by the other members of the Court.

Section 61 of the Magistrates' Courts Ordinance (Cap. 5) provides that no person shall be entitled as of right to inspect the record of evidence given in any case before a magistrate's court, so that it may be that such a record is not a public document. This provision is not expressly limited to civil proceedings and would therefore appear to extend to criminal proceedings notwithstanding that section 185 of the Criminal Procedure Code (Cap. 9) provides that the evidence taken shall form part of the record. Here, however, we are concerned to inquire whether the record of evidence in certain civil proceedings is admissible as proof of the terms in which the evidence was given. The production of such a record, in my view, is evidence only of the fact of the proceedings - not proof of the terms in which the evidence was given in those proceedings. The fact that section 185 of the Criminal Procedure Code provides that the evidence taken in criminal proceedings is to form part of the record may have significance

in proceedings such as certiorari, but in perjury proceedings, as I understand it, it is essential that there should be direct evidence of the alleged false statement from someone who heard the statement made, or, in the case of a signed statement, that there should be direct evidence of the accused's signature; unless, that is to say, there exists some statutory provision enabling the record to be taken as proof of what was actually said by the witnesses, as, for example, in the case of depositions (vide R. v. Child 5 Cox 197, 203). This conclusion is borne out, I think, by the terms of section 116 of the Penal Code (Cap. 8). It is not suggested that the Evidence Ordinance (Cap. 27) has any application in this matter.

In Fiji, where sworn court interpreters hold office in the Judicial Department and perform daily duties as such in order that the official language of the Court may be adhered to, they are, in effect, part of the machinery of the Court, and for the reasons given in Gaio v. R. I agree that evidence received by the Court through the medium of such interpretation is not to be regarded as 'hearsay'.

On the second question, I agree with the conclusions of Marsack, J.A. As it appears to me, the Magistrate may identify the record and refresh his memory thereby notwithstanding that he has no independent recollection of the evidence. This may be put either on the basis that the record is one made in the course of the Magistrate's duty (R. v. Bryant and Dickson 31 Cr.App.R. 146) or on the basis of the Magistrate swearing to the accuracy of his notes (vide Maugham v. Hubbard (1828) 8 B. & C. 14; and R. v. St. Martins, Leicester (1834) 2 Add. & El. 210). The duty referred to arises in civil proceedings by virtue of section 62 of the Magistrates' Courts Ordinance, and in criminal proceedings by virtue of section 185 of the Criminal Procedure Code (Cap. 9). The fact that the record need not be a verbatim record of the evidence does not appear to me to affect the matter. On a charge of perjury it is not necessary to prove the precise words used by the accused in his evidence; proof of the substance and effect is sufficient (Leefe (1809) 2 Camp. 134).

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The order of the Court will therefore be that the questions raised in the case stated be answered in the terms stated in the judgment of Marsack, J.A. and that the case be remitted to the Supreme Court for such decision to be made as is in conformity therewith.

Mills-Owens

PRESIDENT

SUVA,

16th September, 1966.

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JUDGMENT OF WYLIE, J.

I agree that the proper answer to the questions set out in the case stated are those given in the judgment of my brother Marsack. Having carefully considered the important issues involved, I agree entirely with the reasons given for those answers and have nothing to add.

Wylie Ag V

JUDGE OF APPEAL.

SUVA,

16th September, 1966.