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IN THE FIJI COURT OF APPEAL
Criminal Jurisdiction
Criminal Appeal No. 6 of 1981

Between:

UMA DUTT SHARMA s/o Ram Autar — APPELLANT

- and -

R E G I N A M — RESPONDENT

S.M. Koya for the Appellant
K.R. Bulewa for the Respondent

Date of Hearing: 9th and 10th July, 1981

Delivery of Judgment: 31 JUL 1981

JUDGMENT OF THE COURT

Spring J.A.

The appellant was convicted by the Magistrate's Court Sigatoka on 27th October, 1980, of the offence of receiving stolen property contrary to section 347 of the Penal Code (Cap.11) and sentenced to 21 months' imprisonment.

It is necessary to outline the procedure adopted by Morris Hedstrom Limited in respect of liquor sales. Morris Hedstrom Limited (hereinafter called "M.H.") operates a liquor store at Sigatoka. When an order is received

it was the practice for the Sales Supervisor - Bal Krishna - to make out 6 copies of the invoice covering the order - 2 of which would go to the office, one copy to the stock card clerk, 2 to the despatch department (one of which is given or sent to the customer, the other goes to the bulk store) the remaining copy is left in the invoice book. The bulk store supervisor Lalmun, who had the key to and the sole control over the liquor store would upon receipt of the 2 copies of the order remove from the liquor store the quantity of liquor ordered and would place same near his desk; in the bulk store a security officer (there were two Iliasa and Jovesa) would be called to check the quantity and description of the liquor brought out of the liquor store against the invoice. If the liquor was to be delivered, the delivery driver Sashi Kant would sign the register and take Lalmun's 2 copies of invoice with the goods; upon delivery one copy of the invoice would be signed by the customer and returned by the driver Lalmun who would file it as proof of the receipt of the liquor by the customer; liquor is loaded under the supervision of Lalmun and checked by one of the security officers who signs one of the invoices at the time of loading. In the event of a customer collecting his liquor, the security officer supervises the loading - hands 2 copies of the invoice to the customer who signs one, and returns it, thereby acknowledging receipt - the security officer also signs that copy which is duly returned to Lalmun for filing.

We now turn to a brief summary of the facts:

C.S. Patel & Co. Ltd. a merchant of Sigatoka was invoiced for 5 cartons of Gordons gin purchased from M.H. on 13th June, 1980, consisting of 120 half bottles of gin. The Company denied ever ordering or receiving the gin nor was any invoice found signed by C.S. Patel & Co. Ltd. acknowledging the receipt thereof. An inquiry was instituted by M.H. which revealed that the delivery driver Sashi Kant who was entitled to bring orders from customers for liquor

came to work on the morning of 13th June, 1980, with appellant; Sashi Kant was asked by appellant to remind Bal Krishna about appellant's van and (although it was denied by Sashi Kant) about the order of 5 cartons of gin for C.S. Patel & Co. Ltd. which appellant would pick up. Lalmun at first denied, but later admitted, that upon receipt of the 2 copies of invoice from Bal Krishna he made out an order in favour of C.S. Patel & Co. Ltd. for 5 cartons of gin; he stated he opened the liquor store, removed the liquor and handed same to Iliasa for checking; Iliasa denied all knowledge thereof or of loading any gin into any truck or vehicle. Jovesa, the other security officer, denied all knowledge of the affair.

As a result of the inquiry the Police were called in and Sashi Kant, Bal Krishna and Lalmun were jointly charged that on 13th June, 1980, as servants of M.H. they stole 120 half bottles of gin valued at $534, contrary to section 306 of the Penal Code (Cap. 11).

The appellant was charged that on 13th June, 1980, he received the 120 bottles of gin knowing the same to have been stolen.

Before the charges were gone into and evidence called, Bal Krishna through his counsel, pleaded guilty to the charge brought against him; he was convicted and fined $1,000 in default 9 months' imprisonment. (The sentence was later enhanced by the Supreme Court which set aside the fine and substituted a term of 12 months' imprisonment).

The prosecution called 12 witnesses including Bal Krishna. Each accused, who was represented throughout by Counsel, gave evidence in his own defence; in addition the appellant pleaded an alibi and called 7 witnesses in support thereof. The hearing before the learned Magistrate commenced on 1st September, 1980. Mr. Kuver counsel for accused became unwell during the trial and it was adjourned until 24th September, 1980, when the trial continued; it was adjourned again to 9th October, 1980, on which date

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the prosecutor was unavailable; the hearing was adjourned until 15th October, 1980, on which date the trial continued; the hearing was completed on 17th October, 1980. A written judgment was delivered on 27th October, 1980.

The Magistrate acquitted Sashi Kant, the delivery driver, and stated :

> "A1 (Sashi Kant) denies any knowledge of this conspiracy. He says he first passed on the reminder from A4 (appellant) to PW4 (Bal Krishna) to supply the order. It is difficult to see what evidence there is against him that he knew that A4 (appellant) was to receive the gin although it was charged to C.S. Patel Ltd. There are suspicious circumstances surrounding his part in the business but without corroboration of the evidence of PW4 (Bal Krishna) that A1 (Sashi Kant) knew of the facilities , I do not think it would be safe to convict (A1) Sashi Kant. Accordingly I find him Not Guilty and acquit him."

The Magistrate found that C.S. Patel & Co. Ltd. "were charged for 5 cartons of gin which were never ordered, never received and never signed for by them."

The learned Magistrate said :

> "I am satisfied that Lalmun s/o Saha Deo, A3 stole the gin from M.H. as charged. I convict him accordingly."

He further stated :

> "The prosecution has satisfied me that the sequence of events was that PW4, knowing earlier that A4 was to receive the liquor, made out an invoice in the name of C.S. Patel Ltd., and gave the order to A3, who knowing that it was to be collected by A4 and knowing that the invoice was made out to C.S. Patel Ltd. took the liquor out of the liquor store and gave it to A4, evading the attention of the security officer on duty. A3 then destroyed or hid the invoices normally required to be kept and checked by him to ensure that the right customer got the order, and which would show otherwise. At the same time, by allowing the pink copy to go to the stock card clerk, the actual stock in store would balance with the card, when physical stock was taken."

Appellant was convicted of receiving the 120 half bottles of gin stolen by Lalmun knowing them to have been stolen.

Appeals against both conviction and sentence were heard by the Supreme Court of Fiji at Lautoka on 30th January, 1981 and were dismissed.

Appellant now appeals to this Court against his conviction; such appeal is limited to questions of law. (Section 22, Court of Appeal Ordinance). Mr. Koya Counsel for appellant argued 6 grounds of appeal. The first ground of appeal alleges that the trial in the Magistrate's Court was unfair and that there was a miscarriage of justice in that -

> "After the Prosecution had closed its case and after the Defence had called about 6 witnesses but before the close of the Defence case the learned Magistrate addressed Defence counsel Mr. Anirudh Kuver and said 'You are calling so many witnesses that I am beginning to get suspicious'."

An affidavit was filed by Mr. Kuver confirming that the statement was made by the learned Magistrate as set out in the above ground of appeal.

Mr. Koya submitted that the remarks made by the learned Magistrate raised the question whether appellant had received a fair trial and, submitted that the appellant had not; further that the learned Magistrate had not withdrawn his remarks before pronouncing judgment; nor had he stated in his judgment that the remark made by him had no bearing on his findings. Mr. Koya relied on the judgment of the Privy Council in Prasad and Anor. v. Comptroller of Customs (No. 46/1961) (unreported) which was an appeal to the Privy Council from the Supreme Court of Fiji affirming the conviction of appellants in the Magistrate's Court on charges of making false entries in Customs forms. During the hearing in the Magistrate's Court and before the prosecution case was closed the

Magistrate suggested to a witness called by the prosecution that the appellants "had diddled" him; further the Magistrate said to the witness "I have no time for these two people". Thereupon he addressed the appellants and said "you two are crooks. It is a pity that this case does not carry a penalty of imprisonment". When the last prosecution witness gave evidence the Magistrate said to him "Don't you think these two people have cheated?"

Mr. Koya submitted that the remarks made in the instant case under appeal evidenced clear hostility or bias on the part of the Magistrate which had the effect of converting appellant's trial into a non trial and that the conviction should be quashed.

Mr. Bulewa for the Crown submitted that the facts in Prasad's case (supra) were in no way comparable with the facts in the instant case. In Prasad's case the remarks were made during the prosecution case and before the accused had elected to give evidence; that the remarks in Prasad's case showed a clear hostility by the bench towards the appellants which was lacking in this case; here nothing untoward was said to the appellant when he gave evidence and it was not until after the 6th witness called in support of the alibi that the Magistrate made his "somewhat hasty" remarks but it did not in any way proclaim an intention to convict. He submitted that the judgment of the learned Magistrate manifests a careful analysis of all the evidence called in the case; that the trial was fair; and there was no miscarriage of justice.

In essence Mr. Koya submits that the rules of natural justice have been contravened in that the offending remarks made by the learned Magistrate displayed such a departure from the accepted canons of judicial behaviour as to give reasonable grounds for suspicion that the learned Magistrate was biased - using the term 'bias' - not in the sense of bias through interest, nor by reason of relationship, friendship or enmity, but bias by reason of some pre-determination the Magistrate had arrived at in the

course of the case.

In Franklin v. Minister of Town and Country Planning (1948) AC 87 Lord Thankerton at p.103 referred to bias as to "denote a departure from the standard of even handed justice which the law requires from those who occupy judicial office". He added -

> "The reason for this clearly is having to "adjudicate between two or more parties he "must come to his adjudication with an "independent mind without any inclination "or bias towards one side or the other in "dispute."

However, in our opinion a suspicion of bias must be supported by the evidence and must be reasonably entertained before it can avail to establish bias against an inferior tribunal. Bucknill J. said in Cottle v. Cottle [1939] 2 A.E.R. 535 at p.541 -

> "The test which we have to apply is whether or not a reasonable man in all the circumstances might suppose that there was an improper interference with the course of justice."

In Turner v. Allison (1971) N.Z.L.R. 833 Turner J. at p. 847 said :

> "It is not of course enough that the tribunal, or some member of it, has expressed a preconceived opinion, even one strongly held, on the matter to be tried. 'I know of no reason for saying that the expression of a man's opinion on any subject should render him unfit to adjudicate upon it', said Mellor J. in R. v. Alcock 37 LT 829, 831; and Cockburn C.J. in the same case said 'there is no authority for saying that an expressed opinion is sufficient to oust a Magistrate's jurisdiction'."

In Regina v. Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co. Pty. Ltd. (1953) 88 C.L.R. 100 Dixon C.J. and Williams Webb and Fullager J.J. said at p. 116 :

> " But when bias of this kind is in question, as distinguished from a bias through interest, before it amounts to a disqualification it is necessary that there should be strong grounds for supposing that the judicial or quasi-judicial officer has so acted that he cannot be expected fairly to discharge his duties. Bias must be 'real'. The officer must so have conducted himself that a high probability arises of a bias inconsistent with the fair performance of his duties, with the result that a substantial distrust of the result must exist in the minds of reasonable persons. It has been said that 'preconceived opinions - though it is unfortunate that a judge should have any - do not constitute such a bias, nor even the expression of such opinions, for it does not follow that the evidence will be disregarded', per Charles J., Reg. v. London County Council; Ex parte Empire Theatre(1894)71 LT 638 at 639."

The learned Justices in this case appear to have considered that to warrant a grant of prohibition it is necessary that there should be shown a real likelihood of bias.

In R v. Commonwealth Conciliation and Arbitration Commission Ex parte Angliss Group (1969) 122 C.L.R. 546, it was held that the expression of an attitude of mind by members of the Commonwealth Conciliation and Arbitration Commission on a matter of principle would not justify a reasonable misapprehension that those members might not bring fair and unprejudiced minds to bear upon the matters before them. The Court consisting of 7 Judges said :

> " The common law principles of natural justice are well understood though they have been variously expressed. It is sufficient here in relation to that aspect of those principles which is called in aid by the applicant to recall the well known passages from Allinson v. General Council of Medical Education and Registration /1894/ 1 Q.B. 750, as cited and commented upon by Isaacs J. in Dickason v. Edwards (1910) 10 C.L.R. 243 at 258, and from R. V. Sussex Justices; Ex parte McCarthy /1924/ 1 K.B. 256. A recent exposition is to be found in the judgment of the Master of the Rolls in Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon/1969/1 Q.B. 577.

> Those requirements of natural justice are not infringed by a mere lack of nicety but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who come before the tribunal or in the minds of the public that the tribunal or a member or members of it may not bring to the resolution of the questions arising before the tribunal fair and unprejudiced minds. Such a mind is not necessarily a mind which has not given thought to the subject matter or one which, having thought about it, has not formed any views or inclination of mind upon or with respect to it."

Turning now to the case under appeal. The learned Magistrate had made no adverse comments during the whole of the prosecution case - which consisted of 12 witnesses; he had also heard the accused and 6 witnesses called by the appellant in support of the alibi. It was not until after the 6th witness for the appellant had completed his evidence that the remarks complained of were made; it has to be remembered the trial had been a long one and had commenced some one and a half months previously and continued sporadically thereafter; the remarks could well have been induced by frustration on the part of the learned Magistrate in giving vent to his opinion at the inordinate time that was being spent on the trial - remarks which were no doubt injudicious and lacked "nicety" and were better left unsaid, but, in our view, no substantial injustice was occasioned thereby. As was pointed out by their Lordships in Prasad's case (supra):

> "Their Lordships appreciate that a judge sitting without a jury may without impropriety give vent to interim expressions of opinion which it would be gravely improper to express in a trial by jury."

On 27th October, 1980, the learned Magistrate delivered a carefully reasoned judgment in which he evaluated and analysed the evidence of the prosecution and the defence; there is no semblance of hostility or reasonable suspicion of bias apparent in the judgment nor does it have the air of having been prepared with "indecent haste".

The learned Magistrate in our view maintained judicial impartiality in his treatment of the evidence given for both the prosecution and the defence.

We agree with the learned Judge in the Court below when he said :

"When the magistrate said he was getting suspicious he was not stating as opinion as to the credibility of any particular witness. He was not proclaiming an intention to convict.

The Privy Council stated in J.J. Prasad's Case (supra):

'It must always be a question of degree how far judicial bias or hostility converts a trial into that which is not a trial.'

In my view, the magistrate's remark did not demonstrate hostility or bias. I consider that the trial was fair and the learned magistrate was careful in his judgment and in his examination of the evidence. He did not as Mr. Koya suggested, fail to consider the defence evidence. He did consider it in totality. Thus at page 5 of his judgment he said :

'I agree that the evidence of the alibi must be considered with great care, and that the court cannot surmise or guess where the witnesses may have gone wrong, but mere weight of numbers does not necessarily mean that the truth has been given.'

He then continued :

'The Court has a duty to consider all the relevant evidence and decide which witnesses are telling the truth and that is the only way a Court can decide a case where there is a direct conflict of evidence as to the presence of an accused as in this case.'

Those passages demonstrate the mental approach of the magistrate and it could scarcely express a fairer approach."

The Divisional Court Goddard C.J., Cassells and Slade JJ.) in R. v. Camborne Justices Ex parte Pearce (1954) 3 W.L.R. 415 at p.422 stated :

" The frequency with which allegations of bias have come before the courts in recent times seems to indicate that Lord Hewart's reminder in the Sussex Justices case (1924) 1 K.B. 256 at 259 that it 'is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done is being urged as a warrant for quashing convictions or invalidating orders upon quite unsubstantial grounds and, indeed, in some cases upon the flimsiest pretexts of bias. Whilst indorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, this court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done."

The decision whether there is a real likelihood of bias is one of degree to be taken in each individual case and the question is whether it has been established that it might reasonably be suspected by fair minded persons that the learned Magistrate might not resolve the matters before him with a fair and unprejudiced mind in the individual circumstances in which the magistrate hears the case.

It is apposite in our view to note the remarks of Jacobs J. in his dissenting judgment in The Queen v. Watson exparte Armstrong (1976) 136 C.L.R. 248 at p.294 where the learned judge says :

"But it will be a sad day when the comments of a judge, during pre-trial procedures or during the course of a trial, are taken to reflect on that integrity which has fitted him for the office which he holds. He is justified in proceeding upon the basis and in the confidence that his integrity is beyond question. That confidence may lead him into words or conduct in court which fall short of that model of conduct we would all aspire to but which none of us attain. Then it is fair and right that his words or conduct should be disapproved. But let it be remembered that it is confidence in his own integrity which supports him not only in his judgment but in all his words and conduct, both that which may be approved and that which may be disapproved. Let none by conjecture or base imputation undermine that confidence, however much they may criticise his judgment or the way he conducts his court. To do

so is to shake the foundations of justice."

We have considered the submissions urged upon us by Mr. Koya but we are satisfied that in all the circumstances of this case there was no reasonable suspicion tht the learned Magistrate would not bring to bear a fair and unprejudiced mind; the appellant in our view had a fair trial and no miscarriage of justice was occasioned.

Accordingly this ground of appeal fails.

In Ground 2 Mr. Koya complains that when Bal Krishna pleaded guilty to the charge brought against him the prosecution in outlining the facts stated that the appellant had received the stolen gin in his van near the premises of M.H. on the morning of 13th June, 1980, and that the revelation of such facts created a situation whereby it was impossible for the learned Magistrate to adjudicate upon the appellant's defence of alibi with an open mind and thereby a miscarriage of justice occurred.

Mr. Bulewa submitted that in the Supreme Court the facts as alleged by Mr.Koya and contained in his ground of appeal were not placed before the learned appeal judge and that this ground lacks validity.

Ground 4(a) of the petition of appeal to the Supreme Court dated 3rd November, 1980, makes no m^ntion of the appellant being at M.H. and receiving the gin on 13th June, 1980. Mr. Koya relied on <u>Parbhu v. The Police</u> 4 F.L.R. 31 which was a case where immediately prior to Parbhu's trial the Magistrate had heard a defended charge of theft against someone else; after hearing the evidence the accused was convicted of stealing property which had been sold to Parbhu. Parbhu was then charged with receiving. The appellate court held that the same Magistrate could not approach Parbhu's case with an open mind having already decided on the evidence given in the prior case that Parbhu had received the stolen property.

The facts in this case are entirely different; there was no trial of Bal Krishna - the Magistrate simply accepted the plea of guilty to larceny as a servant. No evidence was given before the Magistrate; there was a sketchy outline by the prosecutor of the part played by Bal Krishna in what was referred to as his "allege_ collusion" in the stealing of the gin.

The Magistrate's notes confirm that the prosecution in outlining the facts dealt only with Bal Krishna's involvement in the theft of the gin and did not allude to the receiving of the gin by the appellant.

The notes made by the learned Judge in the Court below of Mr. Koya's argument in support of the appeal to the Supreme Court do not differ materially in this regard from the notes made by the learned Magistrate. Mr. Koya when asked by this Court whether the prosecution in outlining the facts had traversed facts different from those stated in the notes of the learned Judge in the Court below properly replied that he could not, with certainty, reply in the affirmative.

The learned Magistrate in our view brought to bear a clear and open mind in his deliberations; further the learned Magistrate after having been told by the prosecutor of an 'alleged collusion' involving Bal Krishna and his co-accused in the theft of the gin the Magistrate nevertheless acquitted one of the co-accused Sashi Kant, the driver, on the grounds that it was unsafe to convict him.

In re B. (T.A.) An Infant (1971) Ch. 270 at p.277 Megarry J. said :

> " A judge or magistrate who has heard one case concerning a litigant cannot, without more, thereupon be said to be likely to be biased one way or the other in any subsequent case concerning that litigant. With a constant litigant, indeed, some courts would otherwise soon run out of judges."

Therefore having read the record and the judgment of the learned Magistrate we are satisfied that there was no miscarriage of justice and this ground of appeal fails.

Turning now to Ground 3; Mr. Koya argued that the appellate Judge erred in law in not holding that the statement in the learned Magistrate's judgment that the denial by the appellant that he was ever at M.H. on the morning of 13th June, 1980, and his denial that he received any of the stolen gin could only be that of a guilty man in view of the proof adduced by the prosecution to the learned Magistrate's satisfaction that the appellant was there and received the stolen gin; and a miscarriage of justice was occasioned thereby.

Mr. Koya's complaint is that the learned Magistrate accepted the evidence of the prosecution witnesses and did not evaluate the evidence of the witnesses for the defence; and that having believed the prosecution witnesses he automatically rejected the evidence called by the defence.

Mr. Bulewa submitted the matter was one of fact and that the learned Magistrate dealt with the appellant's defence of alibi in detail and after due consideration rejected the defence of alibi. In our view the Magistrate fully considered the defence of alibi and weighed it against the evidence adduced from independent witnesses called by the prosecution. One such witness Jesoni Baleiwai an employee of M.H. said :

> "But while I was filling benzine for Pit^r I saw five boxes of gin in the bulkstore. I saw what happened to the gin. It was loaded onto Accused 4's van. Accused 3 put it on. The van left. Accused 4 was driving the van when it left. He had been in the bulkstore. Talking to Accused 3. I was not suspicious. Accused 4 is a customer of Morris Hedstrom's. I have seen his van there before on many occasions."

Pita Walesi a farmer called by the prosecution said :

> "I have an account with Morris Hedstrom's Sigatoka. I remember in June I came to fill up with benzine. It was the 13th June, 1980. Arrived about 10.00. I have my own container. I went to get my papers signed. I paid for benzine. I took the papers to Accused 3. Close to where my four-gallon drum of benzine was, were five cartons of gin. P.W.7 filled my benzine from a 44-gallon drum. Outside I saw a small van parked there. Belonging to Uma, Accused 4,. Already there when I arrived. I didn't see the van leave. I paid no attention to it. I know Uma, Accused 4, I didn't see him that day."

Iliasa, a Security Officer employed by M.H. said :

> "I remember I did see the van of Accused 4 on 13th June, 1980. Between kerosene bowser and the bulkstore. When I was called to the bank. About 10.00. I didn't see Accused 4. Saw it between 09.00 and 10.00. I usually go to bank before 10.00 - a few minutes. Van already there. Not there when I came. I saw the gin at the same time as the van."

The learned Magistrate was mindful of some of the discrepancies in the evidence of these prosecution witnesses and discussed them in his judgment; he reminded himself of the approach the Court should adopt in considering the evidence when he said :

> "I agree that the evidence of the alibi must be considered with great care and that the court cannot surmise or guess where the witnesses may have gone wrong, but mere weight of numbers does not necessarily mean that the truth has been given. The Court has a duty to consider all the relevant evidence and decide which witnesses were telling the truth, and that is the only way a court can decide a case where there is a direct conflict of evidence as to the presence of an accused, as in this case."

He painstakingly analysed the evidence relating to the alibi raised by appellant and said :

> "The Court has no doubt that PW5, PW7 and PW8 are telling the truth when they say that they saw A4's van at MH that morning about 10.00, and no doubt that they saw the gin ready there also, and no doubt that PW7 who, as a labourer supervised by A3 and pumping benzine, would be on the spot, saw the gin loaded by A3 into A4's van and saw A4 drive away with the gin. It is not for the Court to surmise how A4 manages to produce give witnesses to show that he could not be there at that time. In not one instance has a witness for A4 shown how he positively identified the time. DW5 and DW6 fixed it 'because the club was not open'. DW2's evidence is contradicted by his register, and I do believe him anyway. DW3, relying on his book, has nothing to support his evidence as to the times of arrival and departure of the van and he said 'I cannot remember without the book. I am busy and there is no record of the van being taken out by DW7.' As to DW4 and DW1, neither can fix the time, and the Court wonders how a sheriff's officer from Nadi Court got to the interior behind Sabeto by bus and back to Waimalika, even with a lift from another relative, on Queen's Road, by 10.00. I do not believe him, nor DW1, who had no way of fixing the time."

In our view, therefore, there is no validity in this ground of appeal; the learned Magistrate found after a careful and detailed evaluation of all the evidence that the appellant was at M.H. on the morning of 13th June, 1980, and that he received the gin; further that the learned Magistrate after having all the evidence concluded that the appellant's concerted attempt to give a false explanation by way of alibi was evidence of guilt and that his denials could properly be regarded as those of a guilty man. We agree with the learned Judge in the Court below when he said :

> "The words state quite clearly that because the magistrate has found that appellant received the stolen gin he can only regard his denials as that of a guilty man."

Accordingly we reject this ground of appeal.

Turning to Ground 4 of the grounds of appeal Mr. Koya alleges -

(1) that the learned Magistrate failed to direct his mind to the requirement that corroboration had to come from an independent source and should implicate the appellant in a material particular.

(2) that the learned Magistrate failed to warn himself that the evidence of accomplice Bal Krishna (A2) required corroboration.

(3) that the learned Magistrate erred in treating matters arising out of the evidence of Sashi Kant and Lalmun as corroborating the evidence of Bal Krishna.

(4) the learned judge on appeal erred in holding that the evidence of Bal Krishna could be corroborated by Sashi Kant and Lalmun when they were all particeps criminis.

Mr. Bulewa submitted that the learned Magistrate an experienced judicial officer was fully aware of the necessity for an accomplice's evidence to be corroborated from a source independent of the accomplice himself. Mr. Bulewa supported the judgment of the learned Judge in the Court below and submitted that if Sashi Kant and Lalmun were accomplices they were called by the defence and did not on the authority of R. v. Barnes and Richards (1940) 27 Cr. App.R. 154 require corroboration.

The necessity for an accomplice's evidence to be corroborated was referred to by the learned Magistrate at the beginning of his judgment when he said :

> "His evidence (Bal Krishna) was that of an accomplice and I have warned myself that it is dangerous to convict on the evidence of an accomplice unless it is corroborated in a material particular."

Bal Krishna, the accomplice, called by the prosecution did not implicate the appellant in the offence of receiving the stolen gin in his evidence-in-chief. When he was cross

examined by counsel for appellant the evidence implicating appellant was adduced and there was an abundance of evidence from witnesses independent of the appellant who corroborated Bal Krishna's evidence.

The learned Magistrate in dealing with the reception of the evidence given by Bal Krishna reminded himself of the necessity for corroboration when he said :

> "The court must be satisfied by the prosecution beyond all reasonable doubt that A4 received the gin knowing it to have been stolen, and the Court will not accept the evidence of PW4, an accomplice whom it distrusts, without material corroboration."

The learned Magistrate in considering the part played by the co-accused Sashi Kant in the theft of the gin dealt with the necessity of having corroboration of Bal Krishna's evidence when he said :

> "There are suspicious circumstances surrounding his part in the business but without corroboration of the evidence of PW4 that A1 knew of the facilities, I do not think it would be safe to convict A1".

We are satisfied from the treatment of the evidence by the learned Magistrate that he was well aware of the need to be satisfied firstly that the evidence of the accomplice Bal Krishna was credible and secondly that his evidence was corroborated from an independent source and in a material particular.

We agree with the learned appellate Judge when he said :

> "The learned magistrate did not record that the evidence had to be from an independent and credible source. As I have stated earlier a magistrate's judgment is not the same as a summing-up to assessors nor is it analogous to a professional examination paper. His evaluation of evidence will indicate whether he has overlooked the rule of practice or assessed it the wrong way."

Accordingly we can find no merit in subparagraphs (1) and (2) above.

Mr. Koya complained that the learned Magistrate relied on the evidence of Sashi Kant and Lalmun who were to be treated as accomplices notwithstanding that they were not called by the prosecution but gave evidence in their own defence. We agree with Mr. Koya's submission that one accomplice cannot corroborate another accomplice where each is involved with accused in the commission of the same crime and that it is necessary in such circumstances that the learned Magistrate warn himself of the danger of acting upon such evidence.

The Court has looked at the transcript of the evidence and we are satisfied that the learned Magistrate was mindful of the need for corroboration of the accomplices when he said :

> "I am satisfied from the evidence of PW5 that A3 never handed him the invoices or the gin. I have no doubt, without the evidence of the accomplice PW4, that A3 handed the gin to A4, as described by PW7, whose evidence is supported by PW5 and PW8".

Again there was a satisfactory indication in the evidence that the learned Magistrate was aware of the danger of acting on the evidence of an accomplice without corroboration and was applying the correct principles when he said :

> "PW5 evidence corroborates PW4 and does that of PW7 and PW8. Without the evidence of the accomplice PW4 there is sufficient evidence, if believed, to satisfy the Court that A4 and his van were at M.H. that day and that A4 collected the gin from A3."

In our view the learned Magistrate observed the requirements of the law relating to corroboration in his treatment of the evidence of the accomplices albeit that their evidence came from the dock and not the prosecution; but in any event if the evidence of the accomplices Sashi Kant and Lalmun were put aside there was ample evidence of a compulsive character from the prosecution witnesses if believed, as indeed it was, which confirmed the presence of the appellant at M.H. on the morning of 13th June, 1980, and his receiving the stolen gin.

The learned appellate Judge concluded, in his judgment, that persons who are participes criminis with the accused do not need to have their evidence corroborated if they are called by the defence and not the prosecution and he relied on the decision in R. v. Barnes and Richards (1940) 27 Cr. App.R. 154.

However, since D.P.P. v. Kilbourne (1973) 1 All E.R. 440 it appears that a witness in a criminal case whether he be a fellow accused or called by the prosecution may reasonably be regarded as having some purpose of his own to serve which may lead to false evidence being given against an accused person and a warning is required to be given against convicting a person accused of a crime on that witness's evidence unless it is corroborated.

However, in our view we are satisfied that despite the opinion held by the learned Judge of the law as enunciated in R. v. Barnes and Richards (supra) the need for the corroboration of the evidence of accomplices was ever present in the mind of the learned Magistrate as appears from his judgment and that there was clear and convincing evidence which the learned Magistrate accepted which clearly established the prosecution case.

Accordingly Ground 4 fails.

In Ground 5 Mr. Koya complains that the learned Judge erred in not holding that the learned Magistrate did not direct himself that it was for the prosecution to negative or disprove the appellant's alibi; that he applied different tests in his treatment of the evidence called by the defence and the prosecution on the question of the alibi. Further, that the benefit of the doubt should have been given to the appellant as evidence given by some of the defence witnesses was not expressly rejected.

From a study of the learned Magistrate's judgment it is evident that he dealt with the defence of alibi on the basis that the burden of proof was on the prosecution, and was aware that it was necessary for him to consider carefully the

evidence of the defence. The appellant raised the issue of an alibi and the burden of disproving the alibi rested on the prosecution; this is one of the applications of the golden rule in Woolmington v. D.P.P. /1935/ A.C. 462 at 481.

From a study of the transcript of the judgment we are satisfied that the learned Magistrate did not place the burden of proof on this aspect of the case on the appellant.

The learned Magistrate in dealing with the evidence relating to the alibi said :

> "I agree that the evidence of alibi must be considered with great care......the Court has a duty to consider all the relevant evidence and decide which witnesses were telling the truth and that is the only way Court can decide a case where there is a direct conflict of evidence as to the presence of an accused as in this case."

The learned Magistrate immediately went on and dealt with the onus of proof when he said :

> "The Court must be satisfied by the prosecution beyond all reasonable doubt that A4 received the gin knowing it to have been stolen."

The learned Magistrate saw the witnesses and made his findings as to their respective credibility. The learned Magistrate accepted the evidence of Iliasa, Jesoni and Pita Walesi when he said :

> "The Court has no doubt that PW5, PW7 and PW8 are telling the truth when they say that they saw A4's van at MH that morning about 10.00, and no doubt that they saw the gin ready there also, and no doubt that PW7 who, as a labourer supervised by A3 and pumping benzine, would be on the spot, saw the gin loaded by A3 into A4's van and saw A4 drive away with the gin."

Accordingly in our view once this evidence was accepted, as indeed it was, and the defence alibi rejected it was apparent there was no room for any reasonable doubt on the Magistrate's part. He said :

> "I considered him (PW8) an excellent witness, as was PW7. Neither had any axe to grind nor position to gain by fabricating evidence. Neither had any motive to save MH or himself. All were closely cross-examined about the time. All were certain that the time was about 10.00, not 12.00, when they saw the van or A4 at MH."

It is apparent that the learned Magistrate dealt carefully with the evidence of each witness called by the defence in support of the alibi and when the evidence was weighed in the balance the learned Magistrate clearly rejected the alibi and no other conclusion could be reached than that the alibi defence failed.

Accordingly we can find no merit in this ground.

Mr. Koya raised a technical point in Ground 6 alleging that the appellant should be acquitted as he was involved in the theft of the gin and could not be charged with receiving stolen goods from himself. Mr. Koya's argument was based on a finding in the learned Magistrate's judgment where he said :

> "The prosecution case is that all the accused conspired together to falsify the invoices, defeat the security checks, steal and deliver it to A4, and that that is the only conclusion which can be reached if the prosecution witnesses are telling the truth."

Mr. Koya relied on <u>R. v. Seymour (1954) 38 Cr. App.Reports 68</u>. The headnote reads :

> "In cases where the evidence is as consistent with larceny as with receiving, the indictment should contain counts for both offences. The jury should be directed that it is for them to decide whether the prisoner was the thief or whether he received the property from the thief and should be reminded that a man cannot receive property from himself."

We turn now to consider the evidence.

The false invoice was made out by Bal Krishna and given to Lalmun who was in charge of the liquor store, and held the key thereto; Lalmun removed the 5 cartons of gin

from the liquor store; he destroyed or hid the invoices; he did not process them as he was normally required; he did not call the security officer to check the liquor; he evaded the attention of the security officer and the Magistrate found "I am satisfied from the evidence of PW5 that A3 never handed him the invoices"; further Lalmun ensured that the pink copy of the invoice went to the stock card clerk so that the actual stock in store would balance with the card when stock was taken.

The appellant on the other hand took no part in the removal of the gin from the liquor store; the concealment of the invoices or the gin; or the falsifying of the stock card records. In our view the actions of Lalmun manifested the intention of permanently depriving M.H. of the gin when he "destroyed or hid the invoices" as found by the learned Magistrate, evaded the attention of the security officer and kept the gin after removal from the liquor store in his possession and under his control. We are satisfied that the act of stealing the gin was completed as soon as Lalmun removed the gin from the liquor store animo furandi; R. v. Gruncell and Hopkinson 9 C & P 365.
Seymour's case therefore in our view has no application to the facts of this case.

The learned Magistrate said :

> "I am satisfied that Lalmun s/o Saha Deo A3 stole the gin from M.H.."

We agree that there was sufficient evidence for the Magistrate to so conclude that Lalmun stole the gin and kept it in his possession and under his control.

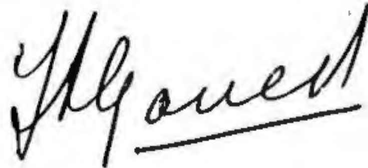
We agree with the conclusion of the learned Judge when he said :

> "The appellant was not needed to help in the theft, but merely to receive the gin when accused 2 and 3 misappropriated it. The charge andconviction for receiving are not inconsistent with the magistrate's finding that the appellant had conspired with the thieves."

Accordingly in our view Ground 6 fails.

Ground 7 was abandoned.

In the result no ground of appeal succeeds and the appeal against conviction is dismissed. The notice of appeal purported to include an appeal against sentence but under section 22(1) of the Court of Appeal Act no such appeal lies to this Court.



Vice President

Judge of Appeal

Judge of Appeal