whether trial magistrate adequately cautioned assessors regarding corroborative evidence by accomplice

whether "no substantial miscarriage of justice" occurred, application of §23(1) Appeal Ordinance

Criminal Laws - accomplices
" " corroboration §11
" " corruption - bribery
" " witnesses lies - warning by trial judge - sufficiency
Evidence - corroboration - lies
words + phrases. "no substantial miscarriage of justice"

Court of Appeal Ord. (Cap 12) §23
Penal Code (Cap. 11) §98

Accused convicted for accepting bribe to grant his licence for motor trucks.

IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

CRIMINAL APPEAL NO. 29 OF 1981

Between:

SUBAIYA PILLAY s/o Kuo Sami Pillay — APPELLANT

- and -

R E G I N A M — RESPONDENT

G.P. Shankar for the Appellant.
M. Raza for the Respondent.

Date of Hearing: 3rd November, 1981
Delivery of Judgment: 25 NOV 1981

SPRING, J.A.

JUDGMENT OF THE COURT

The appellant was convicted by the Supreme Court of Fiji sitting at Lautoka on 18th June, 1981, of the offence of official corruption, pursuant to section 98 of the Penal Code (Cap. 11) and sentenced to 12 months imprisonment. The information brought against appellant was laid and determined under the 1967 Edition of the Laws of Fiji and accordingly we shall refer to this legislation. The appellant was jointly charged with two other defendants Narayan Sami Goundar and Ashok Kumar; the appellant in addition to the count on which he was convicted faced five further counts of official corruption and one count of attempted official corruption; in respect of these other counts the three assessors returned the unanimous opinion of not guilty which the learned trial Judge accepted; the appellant was acquitted in respect of these other counts.

Narayan Sami Goundar and Ashok Kumar were each charged with 2 counts of official corruption and both were acquitted.

The appellant, a driving examiner, employed by the Government of Fiji in the Department of Road Transport was charged with the offence of corruptly receiving, on 3rd July, 1980, the sum of $190 for passing Gyaneshwar Dutt on his driving test for a licence for a motor truck; Gyaneshwar Dutt having passed the test received a certificate of competency from appellant and subsequently the appropriate driving licence.

The prosecution in support of the charge brought against appellant called evidence from Gyaneshwar Dutt and Narayan Naidu both of whom, it was acknowledged, were accomplices. Gyaneshwar Dutt stated that having heard that Narayan Naidu could arrange for the issue of a certificate of competency went to Narayan Naidu's shop in Ba and informed him of his desire to obtain a licence to operate a heavy goods vehicle. Gyaneshwar Dutt said -

> "Narayan told me the fee required for the licence. He said he would let me know how much was required."

Gyaneshwar Dutt made an appointment for his driving test with a clerk in the Road Transport Department and was advised he could take the test in two weeks time. The day before his test Gyaneshwar Dutt was advised by Narayan Naidu to bring him the sum of $190; about 8 a.m. on 3rd July, 1980, Gyaneshwar Dutt was tested and passed by appellant; later the same day (after he had been tested and passed) Gyaneshwar Dutt withdrew $190 from his Savings Bank Account and paid this amount to Narayan Naidu at his shop; Narayan Naidu placed this money in a torch battery box; at 1 p.m. that same day Gyaneshwar Dutt went back to Narayan Naidu's shop where he saw the appellant and handed him the box containing the money. There were contradictions in the evidence given by both Gyaneshwar Dutt and Narayan Naidu, but we shall have more to say hereon later in this judgment.

Narayan Naidu denied having any discussions with appellant regarding the issue of a driving licence to Gyaneshwar Dutt or the payment of money. Narayan Naidu stated that Gyaneshwar Dutt approached him regarding the obtaining of a driving licence and that he advised him to make his own arrangements; that he saw Gyaneshwar Dutt and appellant having a discussion; he claimed he did not tell Gyaneshwar Dutt that it would cost $190 for a licence, although he admitted that Gyaneshwar Dutt after passing his test brought the sum of $190 to him for appellant. Narayan Naidu said he placed the money in a torch battery box; Narayan Naidu was unable to explain how or why Gyaneshwar Dutt mentioned the sum of $190. Narayan Naidu stated that Gyaneshwar Dutt came to his shop at about 1 p.m. on 3rd July, 1980, with the appellant, and Narayan Naidu handed appellant the box containing the money.

It is to be noted that neither Gyaneshwar Dutt nor Narayan Naidu admitted having any discussions with the appellant relating to the issue of a driving licence or the payment of money in respect thereof; nor was there any direct evidence from either Gyaneshwar Dutt or Narayan Naidu that either or both of them entered into any agreement with appellant relating to the issue of a driving licence and the subsequent payment of money.

Appellant in his evidence denied entering into any agreement with either Gyaneshwar Dutt or Narayan Naidu regarding the issue of a driving licence; he admitted testing Gyaneshwar Dutt, but denied receiving the sum of $190. It was acknowledged that the only evidence against appellant was the evidence of the two accomplices Gyaneshwar Dutt and Narayan Naidu which remained uncorroborated; clearly there was no other independent evidence implicating appellant in the alleged offence.

An appeal has now been brought against conviction and the grounds thereof may be briefly summarised.

(1) That the learned trial judge failed to warn the assessors as to the danger of acting on the uncorroborated evidence of 2 accomplices and accordingly there was a miscarriage of justice.

(2) That the trial judge failed to put to the assessors the defence case adequately and failed to point out to the assessors the contradictions in the evidence given by the accomplices.

(3) That the trial judge misdirected the assessors in his summing up when he said: "However, guilty people do tell lies in order to try and conceal their guilt and you can take into account your opinion that an accused has told lies and weigh that aspect in the balance with other evidence". That there was no evidence of the appellant having told a lie and that the direction was unfair to appellant.

(4) That the verdict is unsafe and/or unsatisfactory having regard to the evidence as a whole, and the summing up."

It will be convenient to deal firstly with Ground 2 of the Notice of Appeal.

Mr. Shankar for appellant submitted that there were major inconsistencies in the evidence given by Gyaneshwar Dutt and Narayan Naidu; further, that where the only evidence against an accused is the evidence of accomplices it is important that the evidence be fully tested in cross examination and carefully scrutinised by the Court. That the case for the defence had not been fully or fairly put by the learned trial Judge before the assessors.

Admittedly there were inconsistencies in the evidence given by Gyaneshwar Dutt and Narayan Naidu particularly in relation to the alleged passing of money to appellant.

Gyaneshwar Dutt said:

> "Later I saw Accused 1 (Pillay) the same day about 1.00 p.m. at Narayan's shop (PW3). He called me into the shop. I picked up the "money box" and handed it to Accused 1 (Pillay) and I left."

Narayan Naidu in cross examination said :

"The Sanyo Battery box was handed to Accused 1 by PW2.

Q. At Preliminary Inquiry you said, "I gave this money in presence of PW2 (Gyaneshwar) to Accused 1?

A. I handed to him. I handed the box to Accused 1 in presence of Gyaneshwar.

I did not count the money. There was a lid on the box. Third parties could not have seen what was inside.

I handed it to Accused 1 when PW2 handed it to me."

Earlier in examination in chief Narayan Naidu said :

"About 1.00p.m. Pillay (Accused 1) and PW2 came in. PW2 gave Pillay the money. They shook hands and left. I do not know how PW2 came to mention $190.00."

There were other differences in the evidence given by Gyaneshwar Dutt and Narayan Naidu in relation to the discussions alleged to have taken place between appellant and Gyaneshwar Dutt, and between Narayan Naidu and appellant. In our view, however, these discrepancies were adequately referred to and discussed by the learned trial judge in his summing up. An extract from the summing up clearly shows that the learned trial judge was aware of the conflict in evidence between Gyaneshwar Dutt and Narayan Naidu and he dealt with these adequately as an extract from the transcript shows . The learned trial judge said :

"In cross-examination P.W.2 said that in the shop P.W.3 Narayan handed him the box telling him to pass it on to accused 1, Pillay, who was also in the shop. P.W.2 Gyaneshwar was cross-examined on what he said at the Preliminary Inquiry before the magistrate. He agreed that he may have said it was Narayan (P.W.3) who handed the box to accused 1, Pillay. He also agreed saying at the Preliminary Inquiry that he handed the money to P.W.3 (Narayan) when they were in the truck and on his way to be tested but in cross-examination he said that he now recalls that P.W.3 (Narayan) told him to wait until they were in his shop."

The learned trial judge in his summing up fairly outlined the evidence given by appellant.

We are satisfied after a close examination of the record that there is no merit in this ground of appeal and it fails accordingly.

We consider now Ground 3 of the Notice of Appeal. The learned trial judge said :

> "Bear in mind that the accuseds do not have to prove their innocence and the fact that an accused has in your view told lies is not proof of guilt. An accused may tell lies to hide the guilt of some other person or for other reasons not connected with guilt on his part. However, guilty people do tell lies in order to try and conceal their guilt and you can take into account your opinion that an accused has told lies and weigh that aspect in the balance with the other evidence."

Counsel for appellant submitted that there was no evidence before the assessors that the appellant had been proved to have told a lie; further, that where lies constitute an important element in the chain of proof put forward by the prosecution a clear direction from the trial judge is necessary.

Mr. Raza for the Crown submitted that the learned trial judge's remarks did not constitute a direction that the appellant had told lies, but they were meant to convey to the assessors that if they thought the appellant had told lies then the learned judge was saying how such lies should be treated.

The learned trial judge did not deal with any specific lie that the appellant was alleged to have told and, in our view, it was misleading for the trial judge to make a casual reference to lies generally without in any way specifying what lies the appellant was alleged to have told.

Where lies are to be relied upon as supplementary evidence, the trial judge must give a clear direction that the

assessors must be satisfied that the statements challenged do amount to lies or evasions, and if they are so satisfied, that the lies or evasions point to knowledge on the part of the accused of his guilt, and were not merely the result of panic, instability or some other explanation. In the present case no such direction was given by the trial judge, neither in his directions on the law nor in dealing with the matters of evidence. In our view the assessors could have believed that they were being invited to take into account unspecified lies; they may have thought that the learned trial judge believed that the appellant in his evidence had told lies, particularly, as the learned trial judge went on to say "and you can take into account your opinion that an accused has told lies and weigh that aspect in the balance". The only other evidence in the case against the appellant was that of the accomplices and a lie, even if proved, cannot be used to corroborate the evidence of an accomplice.

In Archbold Criminal Pleading Evidence and Practice 40th Edition, at paragraph 1419 it is stated :

> "An accused person does not corroborate an accomplice merely by giving evidence which is not accepted and which must then be regarded as false. Corroboration may well be found in the evidence of an accused person; but that is a different matter, for there the confirmation comes, if at all, from what is said and not from the falsity of what is said. It is, of course correct to say that these circumstances - the failure to give evidence or the giving of false evidence - may bear against an accused and assist in his conviction if there is other material sufficient to sustain a verdict against him. But if the other material is insufficient either in its quality or extent they cannot be used as a make-weight: Tumahole Bereng v. R. (1949) A.C. 253, P.C."

Accordingly in our opinion the reference to lies and the manner in which it was expressed by the learned trial judge was to say the least misleading and could well have bemused the assessors.

However, bearing these observations in mind we turn now to deal with Ground 1 of the Notice of Appeal.

Mr. Shankar submitted that the learned trial judge had correctly directed the assessors that Gyaneshwar Dutt and Narayan Naidu were accomplices; that neither could corroborate the other; that there was no other independent evidence; however, counsel for appellant argued that the learned trial judge failed to give the necessary warning to the assessors as to the dangers and inherent risks of acting upon the uncorroborated evidence of accomplices; he pointed out that the learned trial judge directed the assessors to examine the evidence of the two accomplices "with care", but failed to administer the solemn warning that it was dangerous to convict the appellant on the uncorroborated evidence of the accomplices; that, this evidence, he submitted, was unreliable having regard to the inconsistencies therein and was the only evidence.

Mr. Raza for the Crown submitted that the learned trial judge had dealt at length with the treatment which the assessors were required to give to the evidence of accomplices; that a sufficient warning had been administered when the trial judge told them "it is the practice to regard the evidence of accomplices with suspicion and to require corroboration of their evidence before acting upon it"; that the inconsistencies referred to by counsel for appellant were of a minor nature; that taking the summing up as a whole the warning given was sufficient in the particular circumstances of the trial.

Further, he submitted that if this Court was of opinion that the warning was not sufficiently forceful then the proviso contained in section 23(1) of the Court of Appeal Ordinance (Cap. 12) should be applied.

We consider now the summing up; in so doing however, it must be remembered that this was trial of 3 accused facing in total 9 counts of official corruption and one count of attempted official corruption, and that the evidence on each count varied one from the other.

At the commencement of the summing up the learned trial judge gave a lengthy disquisition to the assessors

dealing with the manner in which assessors should treat evidence given by accomplices; the different types of accomplices; the meaning of corroboration; the need for the evidence of accomplices to be corroborated, and that if there is no corroborative evidence the evidence of an accomplice can nevertheless still be accepted and acted upon providing the assessors are convinced of its truth. The learned trial judge in dealing generally with the evidence which had been called in the trial of the three accused dealt with the risks of acting on the evidence of an accomplice which is not corroborated and said :

> "If there is no corroboration of accomplice evidence you can still accept it and convict on it provided you are sure that he is telling the truth; but examine it with care."

The underlining is ours.

The learned trial judge also directed the assessors in these terms :

> "It is the practice to regard the evidence of accomplices with suspicion and to require corroboration of their evidence before acting upon it."

Again the learned trial judge when dealing with accomplices who became "Crown Witnesses" and who gave evidence for the prosecution said :

> "There is another type of accomplice who has not avoided police suspicion but without whose evidence the prosecution will have no case against other persons whom they regard as the more serious offenders. Therefore the prosecution offer them immunity from prosecution in return for their evidence; they become what are often known as Crown witnesses. In their cases there is not the same motive for telling lies; they are not trying to shift the blame on to someone else to protect themselves because they are not being charged. Nevertheless they can be activated by improper motives; perhaps some idea of getting even with their accomplices who are charged; they may feel spiteful because of some grievance; or they have perhaps persuaded the police that they are not as bad as the others. Their evidence must be carefully examined."

The underlining is ours.

Dealing now with the count upon which the appellant was convicted the learned trial judge after discussing the evidence led by the prosecution and the defence concluded his remarks by saying -

> "Remember that P.W.2 (Gyaneshwar) and P.W.3 (Narayan Naidu) are accomplices. They cannot corroborate each other and there is no independent evidence. Therefore you will have to decide whether you can accept their uncorroborated evidence."

The learned trial judge did not, however, go on and warn the assessors that notwithstanding the fact that they accepted the evidence of the accomplices as truthful it was dangerous to convict on such evidence where it was uncorroborated.

The question that arises for determination by this Court is whether the caution given by the learned trial judge was in the circumstances of this case sufficient. In considering the criticisms levelled at the summing up we are conscious that it would be unwise to suppose that there is any such thing as a model summing up appropriate to all cases of this kind. As was emphasized in D.P.P. v. Hester [1973] A.C. 296 and D.P.P. v. Kilbourne [1973] A.C. 729 a direction to a jury on a matter of corroboration may be framed in accordance with the particular requirements and circumstances that the particular case demands.

It is we believe the rule, however, that a clear and precise warning should be given to assessors of the dangers and inherent risks of convicting an accused person upon the uncorroborated evidence of an accomplice.

In Davies v. Director of Public Prosecutions [1954] 1 All E.R. 507 at p.513 Lord Simonds L.C. said :

> "The true rule has been, in my view, accurately formulated by the appellant's counsel in his first three propositions..... First proposition: In a criminal trial where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury that, although they may convict upon his evidence, it is dangerous to do so unless it is corroborated....."

However, we are also mindful that this rule does not mean that there is some magic formula to be applied by the trial judge but, there is clearly a duty in our view to use language which will in plain terms convey the warning that it is dangerous to convict on the uncorroborated evidence of an accomplice. In Reg. v. O'Reilly /1967/ 2 Q.B. 722 at 727 Salmon L.J. said :

> "But the rule that the jury must be warned does not mean that there has to be some legalistic ritual to be automatically recited by the judge, that some particular form of words or incantation has to be used and, if not used, the summing-up is faulty and the conviction must be quashed. The law, as this court understands it, is that there should be a solemn warning given to the jury, in terms which a jury can understand, to safeguard the accused."

The underlining is ours.

This Court has anxiously examined the summing up and the directions given by the learned trial judge which are the subject of complaint. In respect of the evidence given by Gyaneshwar Dutt and Narayan Naidu the assessors were directed "to examine the evidence with care" which in our view, with respect, does not greatly increase the duty already cast upon the assessors and as expounded by the learned trial judge in his directions on the burden of proof when he said :

> "Give the same anxious care to the evidence as you would to some very serious domestic or business problem of your own."

The learned trial judge had at the beginning of his summing up admittedly given a lengthy treatise as to accomplic and the reasons for adopting a "careful approach" to their evidence but, in our view, where, as in this case under appeal the only evidence against the appellant consisted of the uncorroborated evidence of accomplices a clear and solemn warning should be given as to the dangers of convicting on such evidence; in our view this danger is heightened as Gyaneshwar Dutt and Narayan Naidu may well have been moved to shift any blame or risk of involvement from themselves. In these circumstances we believe that the comments expressed by this Court in Shardha Nand & Anor. v. Reginam, Cr. Appeal

25/1979 are apposite and we repeat them :

> "We cannot too strongly stress that it is important to state the rule as to corroboration in simple language which can be understood by the assessors. It should be made clear that it is dangerous to convict on uncorroborated evidence. The warning ought not to be watered down by such expressions as 'safer', 'wiser', 'highly desirable', 'desirable' or similar expressions. If the assessors are fully satisfied of the truth of the evidence after taking the warning into account then they are told that they may convict."

However, having said that, we hasten to add that we are not suggesting that it is not open to a judge to indicate in his summing up that the degree of danger or risk in relying upon an accomplice's evidence may not vary according to the circumstances of any particular case. (See Varinava Rokoseba Tikoduadua v. Reginam F.C.A. Cr. Appeal 18/1980).

In the instant appeal, however, considering the whole of the circumstances we find it necessary to say that the directions given by the learned trial judge as to the manner in which the evidence of the accomplices should be treated did not sufficiently alert the assessors to the dangers of convicting upon the uncorroborated evidence of accomplices; coupled with this deficiency is the distinct possibility that the assessors may have been misled by the reference to lies which we have already discussed.

Accordingly, we are of the opinion that Ground 1 of the Notice of Appeal and the submissions advanced by counsel for appellant in support thereof succeed . The question now is whether the proviso to section 23(1) of the Court of Appeal Ordinance (Cap.12) should be applied to this case as being one where there has been no miscarriage of justice. Section 23(1) (supra) reads :

> "Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred."

Mr. Raza for the Crown invited this Court to say that if we found that the warning given by the learned judge was NOT sufficiently clear and precise as to the dangers of convicting on the uncorroborated evidence of the accomplices we should, having regard to the evidence, conclude that this was a proper case to apply the proviso as there had been no substantial miscarriage of justice. The expression "no substantial miscarriage of justice" was dealt with in R. v. Weir [1955] N.Z.L.R. 711 am at page 713 North J. said :

> "The meaning to be attributed to the words 'no substantial miscarriage of justice has actually occurred' is not in doubt. If the Court comes to the conclusion that, on the whole of the facts, a reasonable jury, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso has occurred notwithstanding that the verdict actually given by the jury may have been due, in some extent, to the irregularities which are proved to have occurred."

The question we pose, therefore is - can it be said that in this case that, although, the assessors were not warned of the dangers of convicting the appellant on the uncorroborated evidence of accomplices, nevertheless the evidence is of such a convincing cogent and irresistible character that it is apparent that even after a proper direction the assessors would inevitably have come to the same conclusion? If so then the omission is not fatal; otherwise it is. The application of the proviso is justified only if the Court considers that no substantial miscarriage of justice has occurred. We are driven back to a consideration of the evidence and it is manifest that the case against appellant consisted in the main of the uncorroborated evidence of the 2 accomplices who on some material matters were in conflict; after a careful review of all relevant considerations we are unable to say that in view of the importance and the character of the weakness in the summing up coupled with the other criticisms thereof that it would be right to apply the proviso and say that no substantial miscarriage of justice has occurred.

We conclude therefore, with reluctance, that this conviction cannot stand.

Accordingly we allow this appeal, quash the conviction and the term of imprisonment is set aside.

We consider now whether the interests of justice require that a new trial should be ordered. In determining this question we are mindful that we must act judicially considering and balancing a number of factors some of which may weigh in favour of a new trial and some which may weigh against it. See Au Pin-Kuen v. Attorney-General of Hong Kong [1979] 1 All E.R. 769. The strength of the prosecution evidence led against the appellant is clearly one of the factors to be considered; the appellant has already been charged with, and stood trial on, five other counts of official corruption and one count of attempted official corruption on facts similar to this instant appeal, and has been acquitted thereon, and this is another matter which must be taken into account.

Therefore, weighing in the balance all relevant factors, we conclude that the interests of justice will be served by our refusing an order that the appellant be retried.

We order accordingly.

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Vice President

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Judge of Appeal

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Judge of Appeal