IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No.67 of 1981

Between:

LILA MANI d/o Peter Pallan — Appellant

and

REGINAM — Respondent

H.K. Nagin for the Appellant
K.R. Bulewa for the Respondent

Date of Hearing: 3rd March, 1982
Delivery of Judgment: 9th March, 1982

JUDGMENT OF THE COURT

Gould V.P.,

The appellant was convicted by the Supreme Court of Fiji of the offence of larceny in a dwelling house; and sentenced to a suspended term of imprisonment and a fine. The theft was alleged to have occurred on the 19th December, 1979, but proceedings did not commence until some time later and the conviction was on the 19th October, 1981. The trial took place before the learned Chief Justice and two assessors, both of the latter expressing the opinion that the appellant was guilty. The appeal being largely dependent on questions of fact requires the leave of this Court under section 21(b) of the Court of Appeal Act (Cap. 12 - Ed. 1978) and we have accordingly treated the application as the appeal.

It will be necessary to summarize the main facts and evidence relied upon by the prosecution. No evidence was called by the defence.

The articles allegedly stolen were described in the Information as one gold chain and a pendant valued at $400 the property of Daya Wati. Daya Wati was the wife of Bharat Singh and it was from their house that the theft is said to have occurred. The appellant was a friend of the family, living just across the street from their house. On the 19th December, 1979, the date given by Daya Wati, she went to Daya Wati's house at her invitation, to help with house cleaning preparations for the wedding of Daya Wati's daughter, Reena, which wedding had actually been arranged by the appellant. Reena herself said she worked in the kitchen that day, and confirmed that the appellant and one Vidya Lal, whose evidence will be referred to below, came to help clean the house.

Daya Wati gave evidence that during the morning she went out to do some shopping, leaving the others working. On her return she took off her pendant and chain, put them in her brown purse, and left it on the bed in her bedroom. Later she saw the appellant go away to get another brush - she was away for 15-30 minutes. Daya Wati did not miss her purse for some days - she reported the loss to her husband and according to his deposition (he has since died) he reported it to the police on the 23rd December. Daya Wati went to the accused and asked about the purse and pendant and the appellant said she did not see the pendant and chain but only the purse. The appellant told her not to worry because she would buy her a new one. She found what is described as "an empty purse" in a wooden box in another room - the record of the trial does not make it clear whether it was the purse in question, though it was apparently accepted as such by Judge and counsel.

Vidya Lal, a labourer who knew Bharat Singh and his wife, gave evidence that on a certain date he was called to the house to help with some work. He was vague about the date but he worked in conjunction with the appellant. He was dismantling a bed when he saw the appellant pick up a purse from a bed and put it in her blouse. He did not speak to her about it. Before the wedding, to which he was invited, he was asked about the purse and told Daya Wati he had seen the appellant take it. He had not asked the appellant about it at the time because he did not know whose purse it was.

The daughter, Reena, who put the date of her marriage as the 5th January, 1980, said that the appellant had not asked her to pick up a purse, and when counsel for the appellant put it to her in cross-examination that the appellant had showed her a purse, said she had not even mentioned a purse.

We come now to evidence concerning the identification of Exhibit 2, a pendant referred to as a gold pendant. It was shown to Daya Wati and she identified it as her property (though not a chain that was included in the same exhibit) from her teeth marks which were visible upon it. She had bought it for about $400. She had discovered it at Sungold Jewellery shop in Suva, about three months after the incident in question. The owner, Suresh Jogia, told her he got it from Singapore.

Asilika Lili said she had at an earlier date been the appellant's housegirl for about six months. She described going with the appellant and another girl, Liku, about January 1980, to the Sungold Jewellery, and a transaction whereby the appellant handed over articles of jewellery including a gold chain and a gold pendant, in exchange for one man's gold ring and one woman's gold ring. To the court this witness said she went to

Reena's wedding and the visit to Sungold Jewellers was about two weeks later than that. She also testified that the appellant owned a lot of property and jewellery.

The prosecution also called Suresh Jogia, the manager of Sungold Jewellery, dealers in various precious stones and also buyers of second hand jewellery. He remembered having seen the appellant before, most probably in his shop. He confirmed that Daya Wati had come in and enquired about a pendant and chain in his shop. Later the police had come and Daya Wati identified the pendant - but not the chain. The police took both. Suresh Jogia said that they made a record of those who sold them second hand jewellery. He said also that the pendant would cost $120. In cross-examination this witness said he had bought the pendant from a jeweller in Ba, who was selling his stock. The jeweller, Mr. Maganlal Jiwa, had since died. The pendant in question was about 2 or 3 years old. This witness told the court that the police had taken (and later returned) all his invoices but found no record of the transaction relating to the appellant. Also that it was possible that Daya Wati was right because somebody could have sold the pendant to Mr. Jiwa; as to the marks on it they could have been caused by teeth or by anything that pressed on it.

For completeness we should add that a statement made to the police by the appellant was put in evidence, in which she agreed that it was true that she had seen a brown purse on the bed on the day in question (described as the 19th December 1979) but denied that she had picked it up. She told Reena to pick it up. Vidya Lal was lying when he said she put it in her bra.

The first two grounds of appeal read as follows :

"1. THE learned trial Judge directed the assessors to treat the evidence of SURESH JOGIA as being neutral when in fact the evidence of SURESH JOGIA created a doubt in the prosecution case AND therefore a substantial miscarriage of justice occurred.

2. THE learned trial Judge did not adequately or at all direct the assessors in respect of numerous material and fundamental contradictions by the Prosecution Witnesses which created a doubt in the prosecution case AND therefore a substantial miscarriage of justice occurred."

As to the first of these, the learned Judge in his summing up gave a concise summary of Suresh's evidence, including his valuation of the pendant as about $125. A little later comes the passage of which Mr. Nagin complains -

"Here I may observe that the evidence of Suresh Jogia as to the ownership of the gold pendant (Exhibit 2) if you accept it, is only marginal in effect as to the guilt or otherwise of the accused. It has only a neutral value if you believe him. On the other hand if you accept the evidence of Asilika Lili then that is a damning evidence tending to support the evidence of Daya Wati that Exhibit 2 was in fact the missing pendant and further implicating the accused. However, how you view their evidence is a matter for you."

It is argued that on the contrary, if Suresh's evidence is accepted it tells strongly in favour of the appellant. This is based on Suresh's statement firstly that the pendant (Ex.2) was worth only $125 and was only 2 to 3 years old, as compared with Daya Wati's ovidence that the pendant cost $400 and was very old. As to the cost, it is not at all clear that Daya Wati was not including the chain in the price. She actually said "I bought the pendant and chain myself. Pendant cost me about $400". The Charge is worded "stole one gold

ehain and a pendant valued $400". That is probably intended to cover both. As to the age there is no evidence of how easy or difficult it is to judge the age of such articles without scientific aids - the article was in court for the assessors to see. We think the significance of the Chief Justice's description of Suresh's evidence, if believed, as having only a neutral value may arise from his admission, mentioned above, that Daya Wati could be right as someone could have sold it to Mr. Jiwa.

Counsel compared the approach in relation to Suresh with the one that followed it concerning Asilika Lili, with its reference to "damning evidence". The phrase only applies, of course, if the assessors accept the evidence.

Counsel additionally criticised the summing up as unfair in that it failed to remind the assessors that Asilika had admitted that she considered herself badly treated by the complainant when she was her housegirl. In a comparatively short trial we do not think the assessors would have overlooked this last point. While we are inclined to agree that the use of the word "damning" was particularly strong in the context, we do not consider that it amounted to a misdirection or would have misled the assessors.

As to Ground 2 we do not think that counsel was able to point out any discrepancies which went to the root of the matter or were really material. There were inevitably variations in the estimates of the time at which people did certain things, such as temporarily leaving the house. Counsel said that it was the defence case that Daya Wati never left the house. All that need be said is that the great weight of evidence is to the contrary. Counsel pointed out that Vidya Lal contradicted Daya Wati's evidence that the only two persons "from outside the family" who came

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that day were the appellant and Vidya Lal. Vidya Lal said that a relative with her children came in the afternoon and was there when he left. These apparently could be regarded as members of the family. Another matter relied upon was a statement (Ex.3) made by Daya Wati to the police on the 8th April, 1980. Exactly how or to what extent this became admissible is not clear, but in it Daya Wati said that when she told the shopkeeper Exhibit 2 was her pendant, he questioned her if it was stolen. When she said "yes", he said it was brought by one Indian girl fat and dark, together with a Fijian girl. This did not appear in her evidence in court but all we need say about it is to indicate that if it was to be used to discredit the witness it was counsel's duty to put the discrepancy to her specifically. This was not done.

The learned Judge directed the assessors on the subject of inconsistencies and told them that if they felt there had been very serious and material inconsistencies and discrepancies he advised them to approach that evidence with the greatest caution.

There is nothing in Ground 1 or 2 which would induce us to allow the appeal.

Grounds 3, 4 and 5 are as follows :

"3. THE learned trial Judge did not properly direct the assessors as to the circumstantial nature of the prosecution case.

4. NO reasonable tribunal properly directed could have found the appellant guilty on the evidence adduced.

5. THE learned trial Judge failed to direct the assessors as to the Defence case AND therefore a substantial miscarriage occurred."

Ground 3 relates to the circumstantial nature of some of the evidence. We do not think that the case

called for any stereotyped direction - as was decided in McGreevy v. Director of Public Prosecutions [1973] 1 All E.R. 503 , there is no rule of law which requires this. The learned Judge said :

> "The more significant evidence in this case I should think was given by Daya Wati and Vidya Lal and the evidence of interview to which I have already referred and the evidence of denial by Reena Devi of any conversation about the purse taking place between her and the accused. I would suggest to you that if you accept the evidence of these four witnesses namely Daya Wati, Vidya Lal, Constable Ramesh Chandra and Reena Devi then you may think the case against the accused has been made out. On the other hand if you have a reasonable doubt that these witnesses were not telling the truth or were mistaken about the events they have described then clearly the case for the prosecution has not been made out in which case you express the opinion that the accused is not guilty as charged."

From our perusal of the record we agree with that assessment. The emphasis was to a large extent upon the reliability of direct evidence.

Ground 4: This ground is not arguable. Counsel submitted that it was a case in which there might remain in the mind of this Court "some lurking doubt..... which makes it wonder whether an injustice has been done" - 11 Halsbury's Laws of England (4th Edn) para 650. In this respect all that could be pointed to is the bizarre nature of the circumstances, in that appellant and complainant were friends and neighbours. There is not enough in this point to override the firm evidence which the assessors clearly found sufficient.

As to Ground 5, the appellant did not give or call any evidence and counsel was hard put to it to explain what the defence case was, that the Chief Justice should have left to the assessors. He said

one aspect of the case was that on the 19th December, 1979, Daya Wati did not leave the house. Though this was put to Daya Wati by counsel in cross-examination (and denied) there is no evidence to support it and a good deal to the contrary. There was nothing to leave as part of the defence case.

The other aspect of the defence case relied upon by counsel was the claim that the pendant produced was not the one stolen - not the property of Daya Wati. As part of the case for the defence this would depend upon inferences to be drawn from the evidence of Suresh Jogia, relied on as contradicting the direct identification by Daya Wati. We think that in the circumstances of the case, where all witnesses were called by the prosecution it was enough to remind the assessors of Suresh's evidence and valuation, as the Chief Justice did. He might also have reminded them of counsel's argument based on some aspects of that evidence but even if the summing up could have been improved in that way we do not accept that the omission caused a miscarriage of justice.

These grounds also fail and the appeal is dismissed.

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Vice President

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Judge of Appeal

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Judge of Appeal