IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 28 of 1982

Between:

SUNIL MOHAN NAND s/o Shardha Nand — Appellant

and

REGINAM — Respondent

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

Date of Hearing: 28 February, 1983

Delivery of Judgment: 23rd March, 1983

JUDGMENT OF THE COURT

Marsack, J.A.

This is an appeal against the conviction of the appellant before the Supreme Court at Lautoka on 8 April, 1982 for the offence of obtaining money by false pretences.

Very shortly stated, the Prosecution case was that appellant was a clerk in the office of the Sigatoka Court House. On certain occasions he collected fines imposed by the Court. One Narendra Kumar, a farmer of Nasau, Sigatoka was involved in a motor collision and was

charged with careless driving. He pleaded guilty in writing to the charge and handed to the appellant, in his office, the summons and his plea. He called back about two days later and was informed by appellant that he had been fined $95.00. Kumar borrowed this sum from his cousin Subhas Chand, took it in to the Sigatoka Court House and paid the sum to the appellant who went into the inside office from which he returned in three or four minutes and gave Kumar a Fiji Revenue Receipt for $95.00. Some six months later, as a result of information obtained from the Police Station, Kumar went to the appellant and said that he had been fined only $15.00 and that appellant had better return the $80.00 balance. Appellant said - according to Kumar - "If I return the money I will be caught."

Appellant was originally charged on four counts: forgery, uttering a forged document, receiving money on a forged document and obtaining money by false pretences. He was however tried only on the last of these charges, and, as has been stated, he was convicted.

The grounds of appeal submitted by the appellant were nine in number and lengthy. There was some overlapping and duplication, and the first five grounds, to which we need make only brief reference, may be condensed and summarised in this way:

1. That the information was defective in charging the appellant with fraudulently obtaining $80 from Kumar when it was the Prosecution's case that he had actually received $95. In this regard reliance was placed upon the decision in R. v. Lurie (1951) 2 All E.R. 704. That case, however, is clearly distinguishable, and we are satisfied there is no merit at all in this ground. The allegation was that the appellant told Kumar the fine was $95 when in fact he knew it was $15, and in this

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way secured for himself the difference of $80. There was evidence to justify the finding that this allegation had been established, and we can see nothing defective in the way the information was expressed.

2. That the intention to defraud had to be determined by reference to the appellant's conduct immediately before or at the time of receiving the money and that evidence of his later conduct was not relevant. There is no doubt that later conduct could properly be considered in order to draw an inference as to the state of mind at the time of receiving the money, and we are unable to say that there was any wrong test applied.

3. That the information ought to have included particulars of the appellant's status at the time he received the money, that is, as a person employed by the Government of Fiji with authority to collect fines. In our view it matters not in what capacity the false pretence was made so long as there was evidence to show that there was an intent to fraud.

Ground 7 depended upon the success of an application made by Mr. Koya to amend the record. The application failed and Ground 7 was accordingly not pursued. There remain Grounds 6, 8 and 9. For convenience we will renumber them 1, 2 and 3 and set them out shortly in these terms:

1. That the prosecution had failed to prove how the original receipt on the court file showed "$15.00" only whereas the receipt

handed to Kumar read "$95.00"; that the learned trial Judge had rightly directed the assessors that

> "This is quite a serious gap in the Crown case."

and that this created a grave and/or reasonable doubt entitling appellant to be acquitted as of right.

2. That the learned trial Judge had not correctly directed himself or the assessors on the evidence given by Kumar and Subhas Chand, conflicting in some important particulars with previous statements made by them to the Police.

3. That in view of the evidence given by the official accountants, the learned trial Judge should have directed the assessors that it was unsafe to convict.

There is a very definite conflict of evidence between that tendered for the Prosecution and that submitted by the appellant himself. In the course of the latter's evidence in Court, he says all the way through that he had informed Kumar that he had been fined $15.00, that Kumar had paid $15.00 and appellant had made out a receipt for that amount. He denies making any alteration to the receipt. It is clear however, that the majority of the assessors, and the learned trial Judge, did not believe this evidence and accepted that put forward on behalf of the Prosecution. As far as this Court is concerned we must accept the findings of fact in the Court below unless they are plainly unsustainable. As the learned trial Judge says in his judgment:

> "As I have said this is a case where the credibility of the witnesses involved is of the greatest importance. The

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> majority of the assessors clearly believe that Narendra Kumar did hand over $95, and that it was the accused who altered the original of the receipt, accounting to the Government for only $15 and I see no reason to differ from their opinions."

With regard to the first ground of appeal the question is as to the effect on the Prosecution case of what the learned trial Judge refers to as a "serious gap". A little earlier in his judgment, he says

> "There is the quite formidable problem of how and when the accused could have made the alteration on the receipt."

It is clear that no definite proof was tendered by the Crown as to how and when this alteration was made. On the findings of fact in the Court below, which as we have said we must accept, such an alteration was made. After appellant had received the money from Kumar he went into the Court office and was out of sight of Kumar for some three or four minutes. An examination of the official receipt for $15.00 and the submitted receipt for $95.00 shows that such an alteration would have been a matter of simplicity itself; merely putting a loop on the side of the figure "1" would make it into a figure "9". The time involved in making such an alteration would have been a second or two at the most.

And it must be observed that Kumar said in his evidence, when describing the movements of the accused, "I wasn't watching him all the time." Appellant certainly had the opportunity to make such a slight alteration. There is, as the learned trial Judge pointed out, no direct evidence as to the making of the alteration. But on the findings of fact it must be accepted that appellant obtained an official receipt for $15.00 and that he handed one for $95.00 to Kumar. He certainly on the evidence, had the opportunity to make such a slight alteration; and although he was not seen in the act of doing so there was

evidence upon which the Court below was justified in finding that he had in fact done so. The whole matter was put fully and fairly before the assessors by the learned trial Judge and there could be no suggestion that he in any way tried to indicate the conclusion to which he thought they should come.

Indeed he was at pains to caution them as to the need for great care in assessing this aspect of the case.

In the result, although we agree with the learned trial Judge that there was a serious gap in the Crown evidence, we are not of the opinion that the Court below should necessarily have regarded it as fatal to the Prosecution's case. Ground 1 of the appeal fails.

Ground 2. There is some conflict between the evidence given at the trial, and statements made to the Police by Narendra Kumar and Subhas Chand. In his evidence Kumar said that he was confused in cross-examination and could not concentrate. In the course of his evidence he said

> "I may have said "In my presence he (appellant) wrote a receipt from the book..." That is not true that he wrote the receipt in my presence."

He further deposed that in his statement to Police Officer Net Ram he could not say why he had said different things; Net Ram was asking him too many questions and too many details. With regard to Subhas Chand such contradictions as there are between previous statements and his evidence in the Court are of a very minor character and in no way affect the fundamental facts as found by the Court. The same comment applies in some measure with the evidence given by Narendra Kumar. The learned trial Judge directed

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the assessors fully on this issue. In the course of his direction he said

> "Clearly the evidence of Narendra and Subhas whom you may consider to be interested parties must be submitted to the most careful scrutiny, particularly in the light of the defence evidence, in the light of certain clearly unsatisfactory aspects of the evidence, particularly part, at least, of Narendra's evidence.
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> Not every inconsistency or contradiction makes a witness unreliable on the main issues, though you do of course have to be satisfied in your own minds that they do not reflect upon his truth on those main issues.
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> But to avoid any confusion in your minds let me make it absolutely clear to you, I am not saying that you may ignore inconsistencies, that you should not give the most careful consideration to all defence counsel has said, or to the evidence for the defence. On the contrary you must give the most careful consideration to the Prosecution witnesses' evidence in the light of all the evidence, all the inconsistencies or contradictions brought out and the defence evidence and arguments, and decide for yourselves whether you are left with any reasonable doubt as to any of those points, those elements which go to make up the offence charged against the accused."

This question has been considered by this Court on a number of occasions, and the principle laid down in Gyan Singh v. R 9 F.L.R. 105 has been generally approved; as in Kesty Ta'afia v. R 13 F.L.R. 151 and Hari Pal v. R 14 F.L.R. 218. This principle is stated in these terms:

> "It is the duty of the trial judge to warn the assessors, and to keep in mind himself, that it is dangerous to accept sworn evidence which is in conflict with statements previously made by the same witness; or, at least, that such evidence should be submitted to the closest scrutiny before acceptance.

> It is, however, still the duty of the assessors, and of the judge himself, after full attention has been paid to this warning, to determine whether or not the evidence given before them in court at the trial is worthy of credence and, if so, what weight should be attached to it."

Applying this principle, it is clear that the learned trial Judge complied fully with his obligations to direct the assessors on this point. Accordingly the second ground of appeal also fails.

As to the third ground of appeal, we have carefully perused the evidence referred to and can see nothing in that evidence requiring a direction by the learned Judge to the assessors that it would be unsafe to convict. This ground also fails.

In the result the appeal is in toto dismissed.

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VICE-PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL