

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 24 of 1983

Between:

ALICE FAGA

Appellant

- and -

SHIU MANGAL SOMAGAR

Respondent

Mr. D. Whippy & W.P. Whippy for the
Appellant
Mr. R.I. Kapadia for the Respondent

Date of Hearing: 15th November, 1983

Delivery of Judgment:

JUDGMENT OF THE COURT

Henry, J.A.

This appeal, from a judgment of the Supreme Court in its appellate jurisdiction, is confined to questions of law. In the actio before the Magistrate's Court in Suva respondent claimed the sum of \$838.75 and interest. It was alleged that this was money due and owing under a Bill of Sale given by appellant to respondent and registered under the Bills of Sale Act (Cap. 225) in Book No. 73 folio 2210 of the Bill of Sale Book kept by the Registrar of Deeds in pursuance of Section 10 of the said Act. A statement of defence was filed. It denied that appellant was indebted to respondent in any sum, and, further, appellant denied that she had executed "Bill of Sale 73 folio 2210".



At the trial respondent's Counsel produced a duly signed copy of the Bill of Sale. This copy was noted as having been registered with the Registrar of Deeds in the "Bill of Sale Book 73 folio 2210". There also appears an entry that a renewal No. 78/1067 was registered on April 27, 1978. Respondent called two witnesses who swore that they were present at the office of Kapadia & Co. Solicitors in Cumming Street, Suva, and saw appellant sign the document. Appellant strenuously denied that she signed the Bill of Sale; that she had ever before seen any of the witnesses called in that behalf, and, that she had never been in the office in question.

At the hearing before the Magistrate the defence was twofold, namely :

- "(1) That appellant had never signed the Bill of Sale, and,
- (2) That, in any event, the evidence called to prove execution was not the "best evidence" since Mr. Kapadia, who purportedly witnessed the signing of the Bill of Sale, was available but not called. "

The Magistrate, after reviewing the evidence made the following finding, namely :

" Her evidence actually boils down to the fact that she herself has told all the truth and the Plaintiff's witnesses have all lied. The evidence, however, is the other way round, namely, Defendant has not told the truth.

- (d) As far as the Bill of Sale is concerned I find that the Defendant did execute it in the presence of P.W.2. It was a duly executed document and duly registered and subsequency

renewed. Although it was stressed that Mr. R.I. Kapadia in whose presence it was executed should have testified, I do not consider that it was necessary to establish due execution. Another witness (PW2), whom I believe, has given adequate evidence in that regard.

Apart from all this as far as signature on the various documents is concerned I find as a fact that the signature 'Alice Faga' on exhibit 2 and exhibit 4 and 'M. Benjamane' in said affidavit sworn on 5.12.80 are of one and the same person and that person is no other than the Defendant in this action and is the same person who had appeared in this action defending this case as Mr. Kapadia has said one does not have to be an expert to decipher her signature. "

On appeal appellant gave notice of three grounds of appeal. Except the ground which we are about to set out, all grounds related to the question of fact whether or not appellant had signed the Bill of Sale. It emerged, during argument, that there was a point of law resulting from the claimed effect of ground 1. The point, put quite shortly, was that there was no admissible evidence sufficient to prove execution of the said Bill of Sale. In the Supreme Court this ground was :

" The learned Magistrate erred in law in deciding the issue against the Appellant on secondary evidence adduced by the Respondent when the learned Magistrate was aware that primary evidence on the issue was available to the Respondent at the trial but not adduced by the Respondent. "

The present submission by Counsel for appellant is wider. No objection was taken to the appeal being argued on this basis.

The learned Judge upheld the finding of fact that appellant did sign the Bill of Sale. This is a final finding of fact so far as concerns this Court. In the grounds of appeal in this Court questions of weight and credibility were again raised. On the question set out above the learned Judge said :

" Mr. Whippy complains that execution of the document was witnessed by Mr. Kapadia who was not called as a witness. Mr. Shiri Ram Sharma one of the two persons who saw the defendant execute the document produced a duplicate executed Bill of Sale which was admitted. Mr. Whippy did not object to his testifying that he had seen the defendant execute the document.

The other witness Mr. Ram Kirpal, a law clerk employed by Mr. Kapadia, also testified without objection from Mr. Whippy that he prepared the Bill of Sale which was executed by the defendant in his presence.

Mr. Whippy relies on a statement in Phipson on Evidence 12th edition at page 724 paragraph 1751 which is as follows :

"Documents required by law to be attested are (subject to the exceptions mentioned below) provable by calling the attesting witness."

He mentioned that Mr. Kapadia was available and should have been called as a witness. He argues that secondary evidence should not have been admitted to establish that the defendant executed the Bill of Sale. "

(The underlining is ours)

The learned Judge held that the evidence given was admissible in proof of execution of the Bill of Sale." He did comment, in the passage underlined above, on the fact that Counsel had not objected to this evidence but he did not base his judgment on a failure to object. Whether or not Mr. Whippy objected, this present ground of appeal is valid.

In this Court Counsel for appellant again argued questions of fact but, in the result, the only question of law which emerged, and could be considered, was whether or not the evidence given was, in the circumstances earlier set out, admissible to prove the Bill of Sale.

The determination of this question depends upon the effect of Section 7 of the Evidence Act (Cap. 41). It reads :

"7. Subject as hereinafter provided, in any proceedings, whether civil or criminal, an instrument to the validity of which attestation is requisite may, instead of being proved by an attesting witness, be proved in the manner in which it might be proved if no attesting witness were alive:

Provided that nothing in this section shall apply to the proof of wills or other testamentary documents. "

The crucial words, so far as concerns this appeal, are :

".....be proved in the manner in which it might be proved if no attesting witness were alive. "

This dispenses with the necessity of calling Mr. Kapadia. The question argued thus is whether or not the evidence called would have been admissible to prove the Bill of Sale, if Mr. Kapadia were no longer alive.

The Bill of Sale ex-facie complies with Section 9 of the Bills of Sale Act. The case in the lower courts and in this court did not question the qualification of Mr. Kapadia to attest the Bill of Sale. The sole question was whether the failure to call him to give evidence was fatal.

Section 9(1) requires the attesting witness, before the execution of the Bill of Sale to explain its effect to the position and satisfy himself that the person signed it appeared to understand its meaning. Then follow subsections (2) and (3) which provide :

"(2) The person attesting the execution by any grantor of a bill of sale under the provisions of subsection (1) shall, either in the attestation clause or in a separate certificate endorsed upon or attached to such bill, certify the date upon which the bill of sale has been executed by such grantor and the place of execution.

(3) Any certificate given under the provisions of subsection (2) shall have effect in the same manner as if it were a statutory declaration made under the provisions of the Statutory Declarations Act. "

The certificate appearing on the copy of the Bill of Sale complies with the above provisions. Section 7 of the Evidence Act (Cap. 41) is in the same terms as Section 3 of the Evidence Act (U.K) 1938. Commenting in Section 3 the following passage appears in Phipson on Evidence 13th Edition para. 35-14 p. 866 :

" Production of the Document. The law has been much altered by the Evidence Act 1938, S.3. In the case of any document, other than a will or other testamentary disposition, the former law is practically reversed by

the provision that an instrument required by law to be attested may be proved in civil or criminal proceedings as if no attesting witness were alive. In the case of a will or other testamentary instrument, the Act expressly leaves the old law unaltered. In the case of a testamentary instrument, therefore, it remains the law that where the attesting witness is dead, insane, out of the jurisdiction, kept away in collusion with the other side, or cannot be found after diligent search, and the document is not 20 years old, secondary evidence of execution must be given by proof of the handwriting of the witness; or, if this is not obtainable, by presumptive or any other available evidence. So, perhaps, if the witness is seriously ill. "

35-12 :

" Several Witnesses: Primary and Secondary Evidence. Where there are several attesting witnesses only one need be called, except in the case of wills of realty; and, where the execution has already been proved in a former trial between the same parties by an attesting witness, since deceased, his deposition dispenses with calling the survivor. The above methods are often loosely called "primary", and the absence of all the witnesses must be accounted for before "secondary evidence" of execution, i.e. by proof of their handwriting, will be admitted; proof of the handwriting of any one, however, will then be sufficient. "

In the light of these passages, the effect of Section 7 of the Evidence Act in that "secondary evidence" as abovementioned is available to prove any document, other than wills and other testamentary instruments. The evidence tendered in the present case is therefore admissible.

The law is stated in Cross on Evidence Australian Edition p. 649-650 :


"Other documents required by law to be attested.

In the case of the comparatively few documents, other than wills, to the validity of which attestation is essential, it may be proved by the testimony of one of the subscribing witnesses, but it is unnecessary to call any of them if the person wishing to prove due execution does not desire to do so. He may content himself with proving the handwriting of an attesting witness, and, if he is unable to do this, he may have recourse to other evidence. "

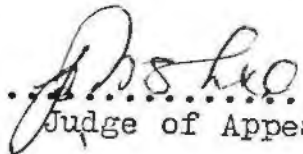
P.W.1 who produced the Bill of Sale said appellant signed the document in his presence. He identified the signature of appellant. He further said that the Bill of Sale was explained to her before she signed it. P.W.2, who had been a Law Clerk to Kapadia & Co., Solicitors for 12 years, said he was present when appellant signed the Bill of Sale. He identified her signature and that of Mr. Kapadia. There is thus evidence, accepted as fact in both courts below, that the Bill of Sale is a document signed by appellant and by Mr. Kapadia, who, as a Solicitor, completed a form of attestation in accordance with Section 9 of the Bills of Sale Act. There is accordingly admissible evidence which proves that an original copy of the Bill of Sale, noted as being registered with the Registrar of Deeds in Bills of Sale Book 73 folio 2210, was signed by appellant and was attested by Mr. Kapadia in the form prescribed by Section 9 of the Bills of Sale Act. We regret that, in the circumstances of this case, that Mr. Kapadia did not give evidence and also that he appeared as Counsel in a case in which the authenticity of a document attested by him was in issue.

In the result the accepted evidence proved that the Bill of Sale was signed by appellant. Further, by proof of the signature of Mr. Kapadia, it was proved that the signature of appellant was attested by Mr. Kapadia in the form prescribed by Section 9(1). There was thus proof of signature of the grantor of the Bill of Sale and of the attesting witness to a document which on its face complied with Section 9 of the Bills of Sale Act. In our opinion there was proof of a document which supported the claim in question.

The appeal will be dismissed with costs to be fixed by the Registrar and paid to respondent.



 Judge of Appeal



 Judge of Appeal



 Judge of Appeal