IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 32 of 1983

Between:

HABIB KHAN s/o Yakub Khan — Appellant

and

R E G I N A M — Respondent

Mr. S. Koya for the Appellant
Mr. A. Gates for the Respondent

Date of Hearing: 3rd and 7th November, 1983

Delivery of Judgment:

JUDGMENT OF THE COURT

Mishra, J.A.

The appellant was convicted by the Supreme Court Suva on one count of Fraudulent Application of Property contrary to section 274(b)(ii) of the Penal Code and sentenced to two years' imprisonment. He was acquitted on seven other counts charging him with other acts of fraudulent application of property.

In each case the learned trial judge accepted the unanimous advice of the assessors.

Count 6 on which the appellant was found guilty reads:-

" SIXTH COUNT

Statement of Offence

HABIB KHAN s/o Yakub Khan FRAUDULENT APPLICATION OF PROPERTY: Contrary to Section 274(b)(ii) of the Penal Code, Cap.17.

MOHAMMED TAKI s/o Mohammed Hanif, being COUNSELLOR AND PROCURER to the same offence

Particulars of Offence

HABIB KHAN s/o Yakub Khan on the 19th day of June, 1981 at Suva in the Central Division, being employed in the public service of Her Majesty as a Building Supervisor in the Public Works Department, fraudulently applied 5 tons of steel valued at $2,706 for purpose other than for the public service, which was entrusted to him by virtue of his employment.

MOHAMMED TAKI s/o Mohammed Hanif, at the same time and place did counsel and procure HABIB KHAN s/o Yakub Khan to commit the said offence. "

Some facts were not in dispute. The appellant was at the relevant time employed by Government of Fiji as a Construction Supervisor in the Public Works Department. Among his duties was ordering the purchase of building materials from local firms.

On 17 6.1981 he authorised the purchase of 5 tons of steel (Exhibit 31) from Carpenters Steel Ltd. This steel was collected from Carpenters on 19.6.81 by one Mathura Prasad, a carriage Contractor working for the Public Works under a private contract. According to the local purchase order (Ex.31) the steel was intended for the Flagstaff Reservoir then under construction. A record was kept at the Flagstaff site of all construction materials received. There is no entry to show that any steel was received at the site on 19.6.81.

This much is not in dispute.

The Local Purchase Order (Ex.31) was written out by one Taki, a clerk working under the appellant, and signed by the latter. According to Mathura Prasad the driver, when he was handed the purchase order, he was instructed by Taki to deliver the steel to his (Taki's) brother's house at Nasinu. He accepted the delivery from Carpenter's Steel Ltd. on behalf of the Public Works Department with a delivery docket (Exhibit 8) and took it to Taki's brother's house as instructed.

According to Taki's brother Shariff, this steel was, some days later, collected by the appellant on a Sunday. He, says Shariff, brought a truck and the steel was loaded on to it by some men who came with him assisted by Taki and Shariff himself.

The prosecution case was that this steel was taken by the appellant to his own land at Nakasi where he had started the construction of a new concrete home for himself.

The appellant's evidence was that he did take 5 tons of steel from Shariff's house on a Sunday to his land at Nakasi but, said he, the steel he took was Shariff's own steel which he, the appellant, had purchased from him and that it was taken several weeks before the purchase order (Ex.31) was signed by him. The steel, said he, would have been taken by him late in April 1981 or May not in June as claimed, by the prosecution. In support of his assertion he produced a cash sale docket dated 13.1.1980 (Ex.25) evidencing purchase by Shariff of 5 tons of steel from Carpenters Steel Limited. This docket, said he, Shariff gave him by way of receipt.

The prosecution case depended largely on the evidence of Taki, Shariff, Mathura Prasad, one Achari and some witnesses who gave evidence relating to the

presence of the steel near Shariff's house and its transport by the appellant.

Taki's name appears on the indictment as a coaccused in relation to this offence but a nolle prosequi was entered at the commencement of the trial in so far as he was concerned and he was then called as a prosecution witness. Mathura Prasad was declared a hostile witness and the prosecutor was allowed to cross-examine him.

Assessors were told to treat Achari as an accomplice. Shariff is Taki's brother.

All had made statements to the police containing inconsistencies with what they said in their evidence at the trial.

The appellant appeals against his conviction on seventeen grounds covering 8 typed pages and we will not, therefore, set them out in full in this judgment. Some of them are largely repetitive of what is alleged in other grounds. Ground 1(a) alleges that the learned trial judge erred in amending count 6 to show the value of the steel as $2,076.00 instead of $2,706 as had been given in the particulars of the chrge. The respondent concedes that no application had been made for this amendment during the trial and that the first intimat on of it came from the learned judge himself during his summing-up when he said:-

> "The value of the steel was incorrectly stated in the charge sheet as $2,706 when it should in fact be $2,076. The charge is amended accordingly. "

Neither counsel had been aware of the discrepancy or had attached any significance to the value shown on the

indictment. The learned judge, it seems, noticed the slip while examining the exhibits and decided, as counsel for the respondent put it, 'to tidy up' things.

The respondent concedes that the correct procedure for making an amendment to an indictment was not followed in this case. Had the amendment been necessary for the purposes of a fair trial the manner in which it was effected would be highly irregular and could be regarded as having resulted in a miscarriage of justice. The Criminal Procedure Code, however, has the following provision:-

> "122(c)(i) the description of property in a charge or information shall be in ordinary language, and such as to indicate with reasonable clearness the property referred to, and, if the property is so described, it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property. "

The property in this case had no special value and the value shown in the particulars was not essential for the purposes of laying the charge. The appellant contends that the value shown had an important bearing on the identity of steel. We are unable to accept that the rest of the particulars without the words "valued at $2,706" would have in any way been inadequate. It would, however, have been much better for the learned judge to have left the particulars of the offence as they were, drawn the attention of the assessors to the discrepancy revealed by the evidence and then directed them to ignore it, as it made no difference to any issue before them. He dealt with it, instead, by making an unnecessary

amendment. We accept the respondent's submission that, in the circumstances, no miscarriage of justice could possibly have resulted.

The rest of ground 1 also concerns the identity of steel allegedly misapplied by the appellant. The ground complains that, while the police had seized steel from the appellant's premises at Nakasi, none was produced before the court and that there was no evidence to suggest that the steel taken from the appellant was the steel purchased for the Government under the local purchase order (Ex.31) signed by the appellant. As for the production of steel before the court, we fail to see how it could have helped with the issue of identity. It was just so much mild steel without any special marks of identity. To establish the identity of the steel removed by the appellant from Shariff's place the prosecution was relying entirely on the oral evidence of Taki, Shariff, Achari and Mathura Prasad. Acceptance or rejection of that evidence was another matter. We are unable to accept that there was no evidence of identity of steel before the court or that production of the steel seized by the police was essential to the trial.

The ground, therefore, fails.

The effect of ground 2, briefly stated, is that the evidence before the court did not show that the steel in question was entrusted to the appellant by virtue of his employment. To establish entrustment, contends the appellant, the evidence must prove fiduciary relationship between the appellant and the Government of Fiji and that no such relationship was proved to have existed. For purposes of their submissions both counsel rely largely on Grubb (1915 2 K.B. 683). The headnote there reads:-

> " A person may be "entrusted" with property, or may "receive" it "for or on account of any other person," within the meaning of s.1 of the Larceny Act,

1901, notwithstanding that it is not delivered directly to him by the owner and that the owner does not know of his existence and has no intention of entrusting it to him. If a person has obtained or assumed the control of the property of another under circumstances whereby he becomes entrusted, or whereby his receipt becomes a receipt for or on account of another, and he fraudulently converts it, he commits an offence under s.1. "

The appellant was employed as a construction supervisor under the Government. He was authorised to issue local purchase orders for purchase of construction materials. Mathura Prasad was a carriage contractor employed as a carrier of these materials and took directions as to their carriage and delivery from the appellant. In fact the intended destination of the steel in question was on the purchase order (Ex.31) itself signed by the appellant. Taki, and the other clerk, were working directly under the appellant and would be mere conduits for transmitting the appellant's directions to the carrier. His employment as the Supervisor placed him in complete control of the materials he purchased locally until they were delivered at the site of construction for use. Any person who assumes such control over other's property becomes entrusted with it for the purpose of the offence in question.

If his clerk, without his knowledge, gave the carrier directions to deliver any material to a person for whom it was not intended that would go to the issue of fraudulent application and the appellant then could not be held responsible for misdelivery. The clerk alone would be liable for his unauthorised act. That, however, does not affect the question of entrustment arising out of the fact of the appellant's employment as supervisor.

The prosecution case here proceeded on the basis that Taki was merely acting under the appellant's instructions when the steel was delivered to Shariff's

house. The misdelivery, the prosecution evidence suggested, resulted from a fraudulent exercise by the appellant of his authority and control over the steel. Acceptance or rejection of this evidence was a matter for assessors.

Ground 2, therefore, must also fail.

Grounds 3 and 5 deal with Taki's position as a coaccused in whose favour a nolle prosequi had the day of the trial been entered in order to secure his evidence for the prosecution. That evidence, says the appellant, should have been excluded altogether as a matter of judicial discretion, for a nolle prosequi would not prevent him from being charged again should his evidence fail to come up to the prosecutor's expectations. A continuing inducement to incriminate the appellant any how would, therefore, operate on his mind as he testified for the prosecution. Alternatively, says the appellant, the warning to the assessors in the learned judge's summing-up on this aspect of Taki's trustworthiness fell short of what was required. He relies on the case of Weightman (1978 1 N.Z.L.R. 79) for his submission. In that case the witness in question was an accessory after the fact to a murder and was granted immunity from prosecution before being called as a witness for the prosecution. An application for the exclusion of his evidence was disallowed. Mahon J. said:-

> " The dominant consideration will be the power of the inducement thought likely to prevail, and whether, looking at all the facts on the deposition or so far proved at the trial, the operation of the inducement might create a real danger of injustice to the person charged. I should think that the occasions when such evidence is directed to be excluded must necessarily be rare. The jury will be warned of the danger of convicting on the uncorroborated evidence of that witness, and in the end they will weigh his credibility not only with that warning in mind, but with the further reflection that by contrast with the ordinary case of convicted accomplice or accessory, the witness is escaping prosecution by virtue of his testimony. "

In this case no immunity had been granted and it could not strictly be said as learned counsel for the appellant conceded, that Taki was ascaping prosecution altogether. The learned judge in his summing-up gave the following directions:-

> "You must examine the evidence of Mohammed Taki very carefully in all respects because not only is he an accomplice and a person who has departed in his evidence from what he said on a previous occasion to the police in material respects but whose position in this Court is a strange one. He was originally charged with the accused and at the beginning of the trial the case was withdrawn against him. He was not tried and it is possible that the D.P.P. might decide to prosecute him again whether this is likely or not to happen is immaterial. The possibility remains that Mohammed Taki may well fear prosecution in future and may be induced to give evidence which he believes to be pleasing to the prosecution, that is, evidence involving the accused. "

Taki was a key witness in this case, his evidence being vital to the prosecution. The learned judge had to balance this against the likelihood of any danger to a fair trial. Complete exclusion of witnesses who could generally be termed 'unreliable' must, indeed be rare as was acknowledged in Weightman (supra). What is required is a warning to the assessors which would leave no doubt in their minds as to the nature of the testimony and the standard of scrutiny required. The directions to the assessors in this case was clear and strong. We cannot, therefore, accept that the exercise of his discretion in favour of inclusion was wrong or that miscarriage of justice resulted from it.

The grounds fail.

Grounds 4, 6 and 7 deal with Taki's credibility as a witness and the learned judge's directions to the

assessors in that regard. Counsel agree that Taki's conduct in the witness box had drawn from the learned judge some very unkind remarks. He was called a "grass hopper" and "evasive". The learned judge threatened to lock him up if he did not give straight answers to questions put to him and told him that he, the judge, was not partial to witnesses who lied in court. All this occurred in the presence of the assessors and must have been very much to the advantage of the appellant. The appellant's complaint, however, is that the learned judge, having treated Taki in this manner, should have directed the assessors to disregard his testimony altogether.

It is clear from the learned judge's summing-up that he was fully aware that Taki

(a) had been a coaccused and, therefore, necessarily an accomplice,

(b) that he had made statements to the police inconsistent with what he was saying in his evidence and

(c) that he had generally failed to impress the court as a witness.

We are, however, unable to accept that the learned judge should, in as many words, have told the assessors to place no credence whatever on his entire testimony. What was required of him was to draw the attention of the assessors specifically to these features and to give them directions on the need for close scrutiny while assessing credibility and looking for corroboration.

Taki was not the only witness who had made inconsistent statements. The learned judge dealt with all these witnesses one by one to assist the assessors in deciding whether or not to treat them as accomplices as well. Taki and Achari, he said, were accomplices. Shariff

he said could be one, depending on the view they took of certain evidence to which he drew their attention. He then said:-

> " In the course of the cross-examination of some of the prosecution witnesses it has been shown that on previous occasions they have made statements to police officers which were inconsistent with the evidence they gave in this Court. It is an unfortunate feature of this case that although the accused was charged in July, 1981 a great deal of time has elapsed before bringing him to trial. It is natural to expect that in many cases the recollections of witnesses have been adversely affected by the passage of time. Where, however, you consider that the inconsistencies are of such a nature as to lead only to the conclusion that any of the witnesses concerned either lied to the police or in this Court then you must view the evidence of that witness with suspicion and on that account submit it to the closest scrutiny before acceptance. The statements made by these witnesses to the police are not evidence in this Court on the matters they contain but, they are evidence that the witness concerned had on some earlier occasion said something different from what he told this Court. It is nonetheless your duty having regard to the warning I have just given you to determine whether or not the evidence given in this Court by the witness is worthy of belief and if so what weight you should attach to it. "

The directions substantially follow what was approved in Golder (45 Cr.App. R.9).

Taki, the key witness, would certainly have been in the assessors' mind when this direction was given. Taki had not only made contradictory statements, he was, in addition, to be treated as an accomplice and a coaccused in whose favour a nolle prosequi had been entered. The directions on contradictory statements, in our view,

were quite sufficient when read in conjunction with directions given generally on accomplices and particularly on Taki's position as a coaccused.

The directions on Taki as a coaccused have already been dealt with in this judgment. The learned judge's general directions on accomplices were:-

> " The most important thing to remember about accomplices is that there may be all sorts of reasons for an accomplice to tell lies and to implicate other people and for that reason, it is dangerous for any Court to act on the evidence of an accomplice unless that evidence is corroborated in some material way.
>
> Corroboration means independent evidence that is, evidence which does not come from any other accomplice, which confirms in some material particular not only the evidence that the crime has been committed, but, also the evidence that the accused committed it. I will point out to you the evidence which, if you accept it and depending how you assess it, is capable of constituting corroboration, but, it will be for you to decide whether in fact it does corroborate the accomplice evidence. "

In addition to this, having told the assessors that Taki and Achari were to be treated as accomplices, he, while dealing with Achari's evidence on an earlier count, said:-

> "Before you accept the evidence of Achari you have to be satisfied that he is a credible witness and as a further safeguard you should look for corroboration. "

If the learned judge erred in giving these directions, he did so greatly in the appellant's favour. He omitted to tell the assessors that, if they were satisfied beyond reasonable doubt of the appellant's

guilt, they were entitled, bearing the warning as to danger in mind, to convict him on the evidence of accomplices alone. We will advert to this omission later. As for grounds 4, 6 and 7 we see no deficiency in the directions which might have caused any miscarriage of justice.

These grounds also fail.

Ground 8 is worded thus:

> "8. THAT the Learned Trial Judge erred in law in directing the Gentlemen Assessors and himself that Exhibit 25 corroborated the evidence of Prosecution Witness MOHAMMED TAKI when infact without the oral evidence of the said Prosecution Witness Exhibit 25 did not convey any sinister meaning. "

According to Shariff's evidence he had given the cash sale docket (Exhibit 25) to his brother Taki some time before the steel was delivered at his house by Mathura Prasad. Taki's evidence was that the appellant had requested him to get the docket so that he, the appellant, could check the material and prices before issuing a government purchase order and had retained it as a "cover up" should the need arise. It was Taki who, according to the prosecution, had given the docket (Ex.25) to the appellant and it was he who gave the reason for its retention by the latter.

The docket was found in the appellant's possession and, in his evidence, the appellant said it was obtained by his son Nizam at the time the delivery of the steel was taken at Shariff's house and that it was evidence of sale of the steel shown on the docket.

The learned judge drew the attention of the assessors to this docket and gave certain directions on how to treat it.

He referred to it, saying:-

" On the question of corroboration on this count Exhibit 25 which the accused retained in his possession and produced in this Court may amount to corroboration depending upon the view that you take of it. The prosecution witness Taki says that Exhibit 25 was acquired by the accused in order to cover up the origin of the steel obtained on the LPO. The accused says that it was the receipt for steel which he purchased from Mohammed Shariff. "

Later, he gave the following directions:-

" The accused is in his 50's he has worked for the Public Works Department most of his working life and he has achieved the grade of building supervisor, a post which carries with it responsibilities. He has told us about his work and that it is his duty to see that documentation is in order before he certifies payment due to suppliers of goods to his department. Is it likely that the accused, with that background and experience would purchase materials from a comparative stranger without proper enquiry or inspection and make a large payment without a receipt? The accused's earnings are such that you must ask yourselves if it is likely that he would risk a loss of $2,000 in order to achieve a modest saving of about $100 in the cost of the steel? If having heard the accused you reach the conclusion that his evidence in this Court could not reasonably be true then you must ask yourselves why he has chosen to fabricate his story and you will then be entitled to regard the possession of Exhibit 25 as corroboration of the accomplice evidence. "

The last sentence of this passage seems to suggest that the learned judge had the case of Chapman (1973 Q.B. 774 at 784) in mind where it was said:-

"Similarly in a case such as the present if the accused are found to have given evidence which is incapable of belief or otherwise unreliable, the jury are entitled to ask the single question: "Why has this

> evidence which we have rejected been tendered to us?" If there is only one possible answer - that the accomplice, though uncorroborated, was telling the truth - once again they are entitled to give their answer in their verdict provided, of course, that the trial judge has properly warned them of the dangers of acting on the accomplice's uncorroborated evidence. "

The language used by the learned judge in his directions does not correctly reflect what was said in Chapman. There it was clearly stated:-

> "Mere rejection of evidence is not of itself affirmative or confirmatory proof of the truth of other evidence to the contrary. " (p.784)

Rejection of the appellant's evidence is not capable of being corroborative of the accomplice's evidence (See Tumahole Bereng v R 1949 A.C. 253). Its effect could well be to lead the assessors to hold that the accomplice was telling the truth on the issue and, that being so, they would be entitled, bearing in mind the warning as to danger, to convict on his uncorroborated evidence. Had the learned judge's direction been to this effect there could be no complaint if a conviction had resulted.

The learned judge, however, did not tell the assessors anywhere that they could, having considered the warning as to danger, nevertheless convict on the uncorroborated evidence of an accomplice, if satisfied beyond doubt of the appellant's guilt.

This Court said in Sharda Nand v. R. (F.C.A. No.25 of 1979 at p.30):-

> " 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. The pieces of evidence which are capable of constituting corroboration ought to be pointed out by the judge who should also state that no other evidence can be considered by them on this topic and the assessors then directed that it was for them to decide whether or not they believed that evidence and were satisfied it contained the two limbs of corroboration which had earlier been defined for them. "

In the present case the learned judge merely said:-

> "The most important thing to remember about accomplices is that there may be all sorts of reasons for an accomplice to tell lies and to implicate other people and for that reason, it is dangerous for any Court to act on the evidence of an accomplice unless that evidence is corroborated in some material way. "

The assessors might, we think, take this to mean that they were not to convict unless they could find corroboration of accomplices' evidence. Evidence that could amount to corroboration, the judge said, was Exhibit 25 depending upon the view they took of the appellant's evidence relating to his purchase of the steel from Shariff. There, we think, he fell into an error. Possession of Exhibit 25 by itself, was incapable of showing that a crime had been committed by the appellant and the rejection of the appellant's evidence could not lend to it a character it did not possess. It was not the possession but its likely use that gave exhibit 25

a complexion of culpability and the evidence of that use came entirely from Taki, the accomplice, himself.

We accept the submission that the learned judge's treatment of Exhibit 25 amounted to a misdirection and the ground, therefore, succeeds.

The effect of the success of this ground will be considered after the remaining grounds have been dealt with.

Ground 9 complains of the learned judge's failure to comment on the evidence of one Hussein Ali who had helped carry the steel from Shariff's house and who had testified that the appellant's son Nizam had been given a docket of pink colour. This evidence, says the appellant, if given sufficient weight would have supported the appellant's claim that he had purchased the steel. We see nothing in this ground. It is not possible in a long trial of this nature for a judge to comment on every piece of evidence. The evidence in question was before the assessors and the record clearly shows that it had been fully commented upon by the appellant's counsel.

Ground 10 is a repetition of Ground 4 except that, instead of Taki, it relates to the witnesses Mathura Prasad, Mohammed Shariff and Achari. What we have said earlier about the learned judge's directions on the evidence of accomplices applies equally to this ground.

The ground, therefore, fails.

Grounds 11, 12 and 13 relate again to Mathura Prasad, Mohammed Shariff and Achari all of whom had been cross-examined on statements they had made to the police to demonstrate to the court inconsistencies between those statements and their evidence at the trial. These grounds substantially repeat the allegation contained in ground 6(b) in relation to Taki's evidence. We have fully dealt with

this aspect of the summing-up and say nothing more.

Ground 14 alleges, unwarranted intervention by the learned judge who, according to the record, put several questions to the appellant at the end of his testimony. This, says the appellant, had the effect of bolstering up an otherwise weak prosecution case. We can find no substance in the allegation. It is the function, and sometimes even the duty, of a trial judge to put questions to witnesses whose evidence may call for clarification, or even elucidation. What he must not do is to enter the arena and try to take over the conduct of the case from counsel, as happened in Jones v. National Coal Board (1957 2 All E.R. 155). There counsel had felt that their role had been eroded by the trial judge's constant intervention. Nothing of the kind occurred in this case. The questions were put at the conclusion of the appellant's testimony and the record has the following entry before the questions were put:-

> "Examined by Court - questions put at request of Defence Counsel. "

After the learned judge had finished, Counsel would have been free to put further questions on matters arising out of the judge's questioning. Neither counsel seems to have considered it necessary.

We see no basis for alleging any impropriety on the part of the learned judge.

The ground must, therefore, fail.

Ground 15 quotes a lengthy extract from the learned judge's summing-up which deals with the answers given by the appellant to the learned judge's questions complained of in ground 14. We have already expressed the view that the judge's action in asking these few questions did not transgress the limits of propriety. The appellant alleges

that an induly large part of the summing-up was devoted to the answers that the learned judge's own questions had drawn from the appellant. The assessors were already aware of that part of the evidence and, in our view, it was the duty of the learned judge to give any directions that the evidence in its totality called for. It would have been improper for him to ignore significant evidence merely because it resulted from questions put by him, instead of counsel.

As for the extract in question, it has been dealt with at considerable length under ground 8, and requires no further comment.

The ground fails.

Ground 16 alleges that the wording of the following statement in the passage dealt with in last preceding ground amounts to a misdirection -

> "You have to ask yourself, not whether you believe the accused, but whether his version could reasonably be true. "

The appellant submits that the learned judge should have used the word "might" instead of "could reasonably".

We accept the respondent's submission that this phrase should not be treated in isolation, its effect on the assessors necessarily depending on the part it played in the whole of the passage in which it appears. Later in same passage the learned judge said:-

> "If having heard the accused you reach the conclusion that his evidence in this court could not reasonably be true then you must ask yourselves why he has chosen to fabricate his story ....."

We cannot see how the assessors could have been misled by the use of the words "could reasonably" in the passage. What the judge was clearly asking then was to decide if they thought the accused was fabricating a story i.e. telling a deliberate lie.

As has been acknowledged, time and time again, there is no magic formula to be followed in these matters and we do not think the use of the words complained of could, considering the summing-up as a whole, create any misapprehension in the assessors' minds as to the burden or standard of proof.

The ground fails.

Ground 17 is similar to the last ground. It alleges miscarriage of justice because the learned judge did not, in as many words, direct the assessors to take the totality of evidence into account in reaching their opinions. We can say no more than repeat what we have already said about the use of any particular formula.

The ground fails.

Ground 18, relating to severity of sentence, was abandoned at the hearing.

In the result this Court finds no substance in any of the 17 grounds except ground 8 which has been upheld. We now consider the effect of our decision on that ground.

In Chapman (supra) the proviso was applied and appeal dismissed as there were convictions on several counts and the misdirection could not vitiate all of them. There was also considerable other evidence not affected by the misdirection. In Sharda Nand (supra) too, there

was a considerable body of other evidence which, on proper directions might have led to a conviction. There, a new trial was ordered.

In this case there were 8 counts in all, resulting in 7 acquittals and only one conviction. Exhibit 25 related solely to the count on which the appellant was convicted and it was the only piece of evidence in the whole trial which, the learned judge said, was capable of amounting to corroboration. The appellant submits, with some force, that the finding of guilt by the assessors on this count must have been based entirely on the learned judge's direction to look for corroboration before convicting. The other counts depended on uncorroborated evidence of the same accomplices and in each case an opinion of "Not Guilty" was tendered by the assessors.

Learned Counsel for the respondent does not suggest that there was any other piece of evidence relating to Count 6 which could be relied upon as constituting corroboration of the accomplices' evidence.

In Chiu Nang Hong v. Public Prosecutor (1964 1 WLR 1279 at 1285) where the appellant had been convicted on the basis that there was corroboration when, in fact, there was none, the Privy Council had this to say:-

> "The case is one therefore where the appellant has been convicted on the basis that the complainant's allegation was corroborated when it was not. It is accordingly one of those cases where the protection of the rule which guides courts in these matters has, in effect, been withheld from the appellant. There is thus a miscarriage of justice bringing the case within the category of cases where the board will intervene. "

We therefore, feel that this is not an appropriate case for the application of the proviso under section 23(1) of the Court of Appeal Act, or for ordering a new trial.

The conviction of the appellant is quashed and he is acquitted.

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Vice President

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Judge of Appeal

.....
Judge of Appeal