

IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Criminal Appeal No. 26 of 1984

Between:

DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

and

RUSTAM ALI

RESPONDENT

V.J. Sabharwal for the Appellant
A.K. Narayan for the Respondent

Date of Hearing: 31st October, 1984

Delivery of Judgment: 31st October, 1984

JUDGMENT OF THE COURT

SPEIGHT V.P. (Orally)

This is a second appeal brought under section 22(1) of the Court of Appeal Act (Cap.12) 1978. It is against a decision of Cullinan J. in which he allowed an appeal by the above-named respondent from a conviction in the Magistrate's Court. The point in issue concerns the refusal by the trial Magistrate to admit as exhibits previous written statements made by each of two prosecution witnesses. Counsel for the defendant in that court, in the course of cross-examination of the two witnesses, wished to demonstrate that there were apparently contradictions in the evidence that they were giving in Court as against previous written statements taken from them by the police. The purpose of such cross-examination of course is to test the witnesses' credibility.

The appropriate procedure for this course is set out in sections 4 and 5 of the Criminal Procedure Act 1865 (U.K.) which is in force in Fiji by virtue of section 25 of the Magistrates' Courts Act Cap.14. Put briefly, questions may be asked as to material in a previous written statement, and the particulars of such earlier occasion must be made clear, to direct the witnesses' attention to the same. He can be asked whether or not he has made such previous statement and if he does not so concede, proof may be given of that event, and the judge may at any time require the production of the writing for inspection. It is common experience that a witness will admit having made the statement and either attempt to explain the inconsistency or admit it. If he denies, or is uncertain of its existence, the document may be shown to him for verification. If necessary a witness may be called to produce the same.

In the present case, the record is a little unclear as to just what questions were put to the two witnesses as to previous statements. We endorse the view expressed by Cullinan J. that it is not easy where the record is brief, and in narrative form, to ascertain whether the previous material was being drawn to the witnesses' attention, nor whether they in fact denied having said it. Like the Appeal Judge, we sympathise with busy Magistrates for whom, in this jurisdiction, the task of recording lengthy evidence is so burdensome; and usually no harm is done by the notes being made in summary and narrative form. However, as with the learned Appeal Judge, we do commend the practice of distinctly recording questions and answers on crucial cross-examination matters. We realise of course that the difficulty is in determining with foresight, what is going to be a crucial matter.

However, the learned Appeal Judge did infer that the witnesses appeared from the transcript to be disagreeing with the suggestion that they had made earlier contradictory statements. The passages appear at the top of page 5 and at

the top of page 6 of the learned Judge's decision. There is justification for the conclusion which he reached from material to be found at page 13 and at page 15. The first witness said "I cannot remember whether I told the police that Yusuf Ali abused me". That seems to be an abbreviated form of recording a question : "Did you tell the police?"; and an answer - "I cannot remember". Similarly the next witness, having agreed that he had made an earlier statement to the police, is recorded as saying "I did not say I picked up a stick". Obviously counsel asked "Did you not say you picked up a stick" ? and the witness said "No".

When Mr. Narayan attempted to have the respective statements introduced as exhibits, the learned Magistrate declined to accept them. We agree with Cullinan J. that quite clearly, in accordance with the provisions already quoted, it was the Magistrate's duty to receive the statements so that he could examine the alleged contradictions to see if they were trivial or substantial, and thereby be assisted in judging the credibility of the witnesses. We uphold the decision of the learned Appeal Judge and for the reasons that he gave.

There is indeed a further ground, which, in view of the conclusion he had come to, he did not need to traverse. The prosecution called as a witness the police constable who had interviewed the two witnesses. It is clear from the cross-examination by Mr. Narayan, that he proposed to allege that the statements had been altered by inserting an additional sentence in each at a later date, presumably after signature. If this suggestion was sustainable, it would of course provide a powerful weapon for the Defence. So for this reason too the receiving of the statements into the Magistrate's hands was essential.

The only matter now to be considered is the consequence of the appeal to the Supreme Court and to this