IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 40 of 1983

Between:

BIJAI PRASAD s/o Ram Padarath — Appellant

and

R E G I N A M — Respondent

Mr. S.M. Koya for the Appellant
Mr. D. Fatiaki for the Respondent

Date of Hearing: 8th & 9th March, 1984

Delivery of Judgment:

JUDGMENT OF THE COURT

Mishra, J.A.

The appellant was convicted by the Supreme Court Lautoka of larceny by a servant and sentenced to 3 years' imprisonment. He appeals against his conviction and sentence.

On the afternoon of 24th November, 1982, a parcel containing $20,000 in Fiji currency was received by Air Terminal Services Limited, Namaka, the appellant's employers, to be placed on Air New Zealand flight leaving the same evening for Honolulu. The appellant, a movement controller, had just reported for duty and was in the process of taking over from another movement controller.

He entered the parcel in the register kept for that purpose and the parcel was placed in the office safe. The Air New Zealand flight, however, had been cancelled and they would have to await instructions as to the next flight that would carry the parcel. On 27th November, 1982, when such instructions came the accused was again on duty. He opened the safe in the presence of another colleague but the parcel was no longer there. Between the 24th November and 27th November someone had removed it.

During their investigations the police searched the house of one Shiu Narayan, a close friend of the appellant's, who owned several taxis and often picked fares from the Air Terminal. Buried just outside his house they found a container with $10,000 in Fiji currency.

Shiu Narayan, when questioned by the police some time earlier, had denied all knowledge of the alleged theft. He now changed his story and gave a detailed statement admitting that at about midnight on 25th November, 1982, he had picked up the appellant at the air terminal and driven to his own (Shiu Narayan's) house with a parcel of money. He had, at the appellant's request, kept $10,000 and had driven the appellant to his (the appellant's) house with the remainder.

The appellant was arrested and charged.

Shiu Narayan was granted conditional immunity from prosecution by the Director of Public Prosecutions and turned Crown evidence.

The first ground of appeal was that the learned trial Judge erred in not excluding the whole of the evidence of Shiu Narayan.

Shiu Narayan, on his own admission, was a party to the offence with which the appellant was charged and ultimately convicted, but he was neither tried nor charged with any offence. He was given immunity from prosecution, the terms of which appear in a letter from the Director of Public Prosecutions to his solicitors. The relevant parts of the letter are :

> " The Director of Public Prosecutions is prepared to grant immunity from prosecution to your client, Shiu Narayan, s/o Ram Charan of Nawaicoba, Nadi on the following basis : immunity will be given in respect of the larceny offence committed with Vijay Prasad s/o Ram Padarath, provided Shiu Narayan gives evidence for the Crown in the case against the same Vijay Prasad in accordance with Shiu Narayan's statement to the police.
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> It should be pointed out to Shiu Narayan that this immunity is only given to him to further the interests of justice, and should he differ significantly from his statement to the police he may face charges of perjury or of giving false information to a public servant. "

At the point in Crown Counsel's opening address to the assessors where mention was first made of Shiu Narayan's evidence, counsel for the defence made objection and submitted that the learned Judge should exclude such evidence on the ground that the accomplice warning "would not be sufficient to avoid the inherent danger to the accused in his evidence". The learned Judge after hearing submissions refused the application. In this Court the appellant formulated the ground of appeal on the footing that the trial Judge erred in not excluding the evidence on the ground that "the condition attached to the immunity was manifestly unfair, inherently wrong and dangerous and that consequently there was a miscarriage of justice". Although the formulation is expressed in terms different from those in which the basic submission to the trial Judge was put, it is clear that the original objection was

founded upon the conditions attaching to the immunity and that the complaints were first, that Shiu Narayan's evidence at the trial was required to be in accordance with a statement he had made to the police without any apparent regard to the possibility that such statement might be in whole or in part untruthful and secondly it would be given under the threats of certain charges should his evidence differ significantly from such statement. The matter was compounded by the fact that Shiu Narayan had, at the time the immunity was offered, made three statements to the police.

In this Court, Mr. Fatiaki submitted that the trial Judge was invested with no discretion to exclude the evidence. We interpolate that this submission was not offered in the Court below, the matter there being argued and decided on the basis that there was such a discretion.

In support of his submission Mr. Fatiaki relied on R. v. Sang 1979 A.C. 402 in which the House of Lords was called upon to make answer to the question, certified by the Court of Appeal as point of law of general importance:

> " Does a trial Judge have a discretion to refuse to allow evidence - being evidence other than evidence of admission - to be given in any circumstances in which such evidence is relevant and if more than minimal probative value. "

The Sang case had to do with the evidence of an alleged agent provocateur but the judgment of the Court of Appeal had reviewed cases dealing not only with such but also those others in which the existence of a wide discretion in a trial Judge to exclude any evidence tendered by the prosecution which had been unfairly obtained, had been acknowledged in obiter dicta by Judges of great name and high authority. And, as Lord Diplock

observed, such dicta could be traced "to a common ancestor" in Lord Goddard's statement in Kuruma v. The Queen (1955) A.C. 197, which, after a careful analysis, he held "was never intended to acknowledge the existence of any wider discretion than to exclude (1) admissible evidence which would probably have a prejudicial influence upon the minds of the jury which would be out of proportion to its true evidential value and (2) evidence tantamount to self incriminatory admission, which was obtained from the defendant, after the offence had been committed, by means which would justify a Judge in excluding an actual confession which had the like self incriminating effect".

And after recognising the role of a trial Judge in relation to confessions and evidence obtained from an accused after the commission of the offence that is tantamount to a confession and his function to impose sanctions for improper conduct on the part of the prosecution in relation thereto, His Lordship said :

> ".....Your Lordships should I think make it clear that the function of the Judge at a criminal trial as respects the admission of evidence is to ensure that the accused has a fair trial according to law. It is no part of a Judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. "

And Lord Scarman, in the same case, has this to say :

> " The role of the Judge is confined to the forensic process. He controls neither the police nor the prosecuting authority. He neither initiates or stifles a prosecution. ..... The Judge's control of the criminal process begins and ends with the trial, though his influence may extend beyond its beginning and conclusion. It

follows that the prosecution has rights which the Judge may not override. The right to prosecute and the right to lead admissible evidence in support of the case are not subject to judicial control.

Of course, when the prosecutor reaches Court, he becomes subject to the directives as to the control of the trial by the Judge whose duty it is then to see that the accused has a fair trial according to law. "

In our view there is considerable force in the submission made by Mr. Fatiaki. The right of a Judge to exclude the evidence of an accomplice to whom immunity has been given is not included in any of the exceptions to the general rule enunciated by their Lordships in answer to the certified question. However, we note that Pipe (1967) 51 Cr. App. R. 17 (in which the whole of the evidence of an accomplice who had been granted immunity was excluded in purported exercise of judicial discretion) and Turner 61 Cr. App. R. 67 (in which the Court of Appeal proceeded on the basis that such a discretion existed) were not mentioned in Sang.

But we note also from the report of their Lordships of the Judicial Committee of the Privy Council in McDonald v. The Queen (Privy Council Appeal No. 52 of 1982 - delivered by Lord Diplock and unreported) one of the grounds of appeal related to the failure of the trial Judge to exclude the evidence of two accomplices who had been granted immunity. It had been conceded by the Crown both in the Court of Appeal of New Zealand and before their Lordships that the trial Judge had a discretion to admit or exclude the evidence. Their Lordships, in the event, found it unnecessary to go into the submission in depth or to dwell long upon it. These factors and the concession made, may have occasioned oversight of the affinity between the discretion under consideration and the proscriptions which fell from their Lordships in Sang. This apparent

recognition, albeit passing, of the existence of such a discretion makes us reluctant to give an imprimatur to Mr. Fatiaki's submission. And indeed we do not find it necessary in this case to do so. The observations of their Lordships in Sang, of course, are of high authority and great weight but we note that they are, as Lord Diplock himself allowed, obiter. We find ourselves able to resolve the point by assuming, without deciding, that the discretion existed and by applying the tests laid down in Ossenton v. Johnston (1942) A.C. 147 concluding that it has not been demonstrated to us that the exercise of the discretion was wrong.

It was submitted to the learned Judge that the requisite accomplice warning would not be sufficient to avoid inherent danger to the appellant. We accept that such submission had its genesis in the form of the immunity and the conditions attaching to it and that it was part and parcel of the submission that the witness, to retain the immunity, was under constraint to adhere to his statement whether it be true or false, or in part true or in part false, and that the threat of prosecution for perjury was ever present. But any witness who neglects to tell the truth on oath is in peril of prosecution for perjury if the prescriptions of the statute in that behalf are met. And all the features of the immunity and conditions were as manna sent from heaven for the defence counsel when he set about, as he did, to criticise, to discredit and indeed to ridicule both the evidence itself and the man who gave it. But the evidence was, whatever were its other characteristics, admissible evidence. And subject to its being scrutinised in the light of the requisite directions prescribed by law, it was capable of being accepted and relied upon by the assessors if, after heeding such directions, they chose to do so. If it had been lawfully excluded it would have had resulted, as Judge Buzzard, the trial Judge in Sang observed, in facts which afforded no defence to the charge requiring the

Judge to secure the defendant's acquittal before any of the evidence was heard. (See Sang (supra) at page 273A).

In our view, the learned Judge could not properly have dealt with the matter in any other way. Accordingly, we reject the submission.

Ground 2 urges that, in addition to other warnings admittedly given by the learned Judge, the circumstances of the case required an additional warning as to the danger of accepting the evidence of a person who, because of the grant of immunity, was escaping prosecution altogether. In support is cited R v. Weightman (1978 1 N.Z.L.R. 79). The logic of this ground seems difficult to comprehend. In Weightman the witness was granted unconditional immunity provided he testified at the trial, and could be treated as a person escaping prosecution altogether. Here, the contrary appears to be the case. The main thrust of the appellant's argument under other grounds is that the conditions attached to the immunity would keep the threat of prosecution very much alive inducing the witness to adhere to his statement irrespective of its truthfulness or falsehood. Even so, the learned judge drew the attention of the assessors to Shiu Narayan's escaping prosecution so far in respect of the offence with which the appellant was charged. He said :

> " There may be many reasons (for the grant of immunity), but we are not concerned with them. We are only concerned with considering the fact of immunity knowing that the accused is facing a serious criminal charge, whilst the accomplice will not face any charge; and considering the terms or conditions of the immunity, and how they might bear on the truth or otherwise of the accomplice's testimony. "

We do not, therefore, see any merit in the ground.

Grounds 3, 4 and 5 relate to the issue of corroboration. They allege firstly, that the warning as to the danger of acting on uncorroborated evidence of an accomplice was inadequate, secondly, that the explanation of the nature of corroborative evidence was imprecise and unclear and lastly, that the evidence pointed out as capable of being corroborative lacked that capacity.

For the sake of clarity we will deal with the first two allegations together. The learned judge's directions on these matters were :

> " But having said that I have to go into the question of Shiu Narayan's evidence rather more fully. As you have already heard Shiu Narayan's evidence is accomplice evidence. An accomplice is simply someone implicated in the offence, either as a joint offender or a person guilty of some offence connected with the offence charged. To take the case of Shiu Narayan, he was found in possession of part of the money which the Crown says is the subject of this trial. On his own admission he knew it was stolen money when he received it into his possession. He did not immediately report to the police, indeed he has said that he would not have reported to the police, he would not have given the accused's name, if the police had not dug up the money in the garden where he had buried it. On his own admission therefore he is either guilty of being an accessory after the fact to larceny, or of receiving stolen property. So his evidence must be looked at very closely indeed to ensure that it is credible evidence, that it is trustworthy evidence. There is no written law that says that you may not convict on the sole uncorroborated evidence of an accomplice, provided that it is credible evidence and you believe it. It does not necessarily mean that because a man is a thief or has committed an offence, that he is incapable of telling the truth. But there is a rule of practice, which now has the power of a rule of law, a rule that you might agree is based on good sound common sense, that requires that you be warned, and that you should be aware,

of the danger of convicting someone solely on the evidence of an accomplice, (even though you may believe that evidence), without there being some independent corroborative evidence in some material particular, and preferably actually implicating the accused.

When I said this warning is based on sound common sense what I meant was this. What you are first and last concerned about is whether what the accomplice is saying is the truth, particularly in implicating the accused person. So you are concerned not only with what is said but why it is said. It is possible that the accomplice has some special reason not to tell the truth, or to falsily implicate the accused, or to ingratiate himself with the police, perhaps to get favourable treatment, by giving testimony that is not the truth? And so you should look at the accomplice's evidence especially carefully to detect flaws in it and you should look for some independent evidence which will corroborate that evidence in some material particular, preferably implicating the accused.

It is not necessary nor is it usually possible to corroborate that evidence in every detail, or to fully implicate the accused by other evidence otherwise of course the evidence of the accomplice would not be unnecessary. What is corroborative evidence? Perhaps I can best explain that by quotir a very eminent Law Lord in an English case who said this :

> 'There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter. The better it fits in the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in. '

> So then once you have considered Shiu Narayan's evidence, and the way he gave his evidence, and responded to cross-examination, and decided whether in itself it is credible evidence, looking at it in the light of all the evidence, including that of the accused and his witnesses, you must see how it fits in with other credible evidence, how it becomes fully or substantially credible in the light of all that other evidence, and look for other credible evidence that makes his implication of the accused credible. "

The learned Judge admittedly did not use the traditional formula generally used in directions to assessors on corroboration. It is not suggested that a Judge must. What, however, he has to do is to make it clear to them the nature of corroborative evidence and its need to prove both the commission of the offence and the identity of the offender. Here the evidence of the commission of the offence had come almost entirely from sources other than Shiu Narayan, the appellant himself being the first person to discover the disappearance of the parcel and initiate investigation. There was little in this regard in Shiu Narayan's evidence calling for corroboration. The sole issue at the trial was the identity of the offender.

The learned Judge directed the assessors to decide first if they could treat Shiu Narayan as a credible witness and, even if they believed him, they were to be aware of the danger of convicting the appellant on his evidence alone. He then said :

> "And so you should look at the accomplice's evidence especially carefully to detect flaws in it and you should look for some independent evidence which will corroborate that evidence in some material particular, preferably implicating the accused. "

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Strong objection was taken, justifiably perhaps, to the use of the word 'preferably' which, if left unqualified, might leave the impression that corroborative evidence need not necessarily implicate the accused.

Further directions, however, appear in the summing-up. A few lines earlier the learned Judge had, in a similar context, used the phrase "preferably actually implicating the accused". From that we understand, and think the assessors would have understood, that they were first to see if they could find any evidence implicating the accused directly rather than merely inferentially.

Towards the end of the long passage quoted above from his summing-up occurs :

> "You must see how it fits in with other credible evidence, how it becomes fully or substantially credible in the light of all the other evidence, and look for other credible evidence that makes his implication of the accused credible. "

Later still, while drawing the attention of the assessors to evidence that could be treated as corroborative he again said :

> "Is there any other independent evidence, if believed, which you should look for and which could fit in with Shiu Narayan's evidence, corroborate it, and implicate the accused. "

And again :

> "Well if you come to the conclusion, after considering all the evidence, that omission by the accused was deliberate with some such intention as I have mentioned then could that not afford corroboration of Shiu Narayan's evidence, directly implicating the accused. "

We are satisfied that, taken as a whole, the directions make it clear that the issue before the assessors was whether or not the accused was the thief and that some independent evidence was required to corroborate Shiu Narayan's evidence in that material particular. They also clearly warn the assessors of the danger of convicting without such independent evidence.

The appellant also submits that the use of the word "implicate" fell short of what was required, that some phrase like "perpetrator of the offence" was necessary to indicate active participation. We do not, however, see any ground for possible confusion. The word "implicate" is freely used in D.P.P. v. Kilbourne (1973 1 All E.R. 440) to indicate sufficiency of corroborative evidence. For instance at p.459 occurs :

> " But in the context of this case, nothing runs on that, since the evidence of the other boys as to the offences committed against themselves, if corroborative at all, plainly implicated the accused. "

If the independent evidence in this case was sufficiently to implicate the appellant in the larceny of the parcel it would certainly tend to confirm Shiu Narayan's evidence and would, therefore, be corroborative of it.

The submission, therefore, fails.

There is then the submission that the circumstances pointed out by the learned Judge as corroborative were not such. One of the first things the learned judge asked the assessors to decide was whether the money found buried in Shiu Narayan's garden was part of the same money which had been removed from the safe in movement controllers' office at the air terminal. If they had any reasonable

doubt on the issue they had to go no further. The assessors, obviously, had no doubt as to the identity of the money the evidence of which had come largely from completely independent witnesses. When dealing with evidence capable of affording corroboration he asked them to consider certain matters not seriously in dispute and others that were. Matters not seriously in dispute were :

(a) that the parcel of the money had been received at the time when the appellant was commencing his shift of duty and he had taken custody of it;

(b) that half of this money was found buried in Shiu Narayan's garden at his home.

(c) The appellant and Shiu Narayan had been seen together in a car driving from the air terminal towards Nadi just before midnight, the time alleged by Shiu Narayan to have been the time of removal.

(d) That night Makitalena Saukuru, also known as Lilly, the only person occupying the office next to the appellant's and whose shift would finish at the same time as that of the appellant at midnight was sent home earlier by the appellant, her superior officer, though this was not an unusual occurrence when there was no aircraft on the ground and, therefore, no work for Lilly to do.

(e) The appellant had deliberately omitted to enter this parcel on the handing over sheet for the movement controller who would take over from him.

Significance of this omission was seriously in dispute and had properly been left to the assessors.

These circumstances, depending on the view the assessors took of them, when looked at together, were, in our view, capable of affording corroboration of Shiu Narayan's evidence. The learned Judge, however, mentioned two other matters in this regard which would appear to have little significant as corroborative evidence and add nothing to the weight of the matters so far considered.

These were :

(a) When asked by the police if he could name anyone who might commit such a theft had mentioned one Gulab Singh, a colleague who also worked in that office. He, said the appellant, was supporting a mistress in addition to his own family and was always short of money. Gulab Singh did have a mistress but nothing incriminatory was found against him.

(b) Two days later when the appellant, again on duty, learnt that the parcel was being sought for placing on aircraft, he went straight to the safe without checking either with the register or with the handing-over sheet to ascertain which parcel was required. Failure to check does not seem to be a proven fact.

Learned Counsel for the appellant submits that the inclusion of these two matters would vitiate entirely the learned Judge's direction as there is no way of being sure what formed the basis of the assessors' decision. We are unable to accept the submission. The circumstances correctly pointed out to the assessors as corroborative were quite substantial and their value cannot be entirely destroyed by one or two innocuous items of evidence all of which the assessors would have taken into account together.

An appellate court would certainly regard it as a fatal flaw if evidence was erroneously described to the assessors as being corroborative and there was, in fact, no such evidence. Here, however, there were several circumstances which could be properly so described and the inclusion of the two matters referred to above cannot, in our view, be fatal to the conviction.

The submission fails.

Ground 5(A) alleges that the learned Judge's omission to give specific and separate directions on the need for a satisfactory explanation where a witness had made a prior statement contradictory to his testimony was a serious non-direction resulting in miscarriage of justice. When first interviewed by the police Shiu Narayan had denied all knowledge relating to the disappearance of the money and had made no mention of the appellant. After the money was found in his garden he made a detailed statement implicating the appellant and describing the part played by himself. There is no suggestion of inconsistency with this last statement. Learned Counsel, however, submits that specific directions were needed concerning the earlier statement containing denial of knowledge of the alleged theft.

Shiu Narayan was not merely a witness who had made an inconsistent prior statement. He was, in addition, a participator in the crime who had turned crown evidence after a grant of conditional immunity. In such a case reasons for a careful scrutiny of evidence are far weightier. Without Shiu Narayan's evidence the prosecution had no case, which made the reliability of his testimony a crucial issue. Nothing loomed larger at the trial than the reason why, having first denied all knowledge of the theft, he was now giving such detailed evidence against the appellant and, in our view, nothing could have gone deeper into the minds of the assessors than his explanation i.e. that once the money was found in his garden he realised

that his only salvation lay in telling what he knew. In the long passage quoted above from the learned Judge's summing-up appears :

> "On his (Shiu Narayan's) own admission he knew it was stolen money when he received it into his possession. He did not immediately report it to the police, indeed he said that he would not have reported to the police, he would not have given the accused's name, if the police had not dug up the money in the garden where he had buried it .....
> .....So his evidence must be looked at very closely indeed to ensure that it is credible evidence, that it is trustworthy evidence. "

Again, after he had dealt with the question of conditional immunity, the learned judge said :

> " As for Shiu Narayan's evidence, you should consider it also as a whole in the light of all the other evidence, see how it fits in with other pieces of evidence how or whether it appears as a credible whole, with all the detail involved, whether he appeared to be holding anything back, the way he gave evidence, and answered questions. You night even consider the admissions made by him in that he knew the money was stolen money, but that he had no intention of taking the matter to the police, or giving the accused's name, or of helping the police, till after the money was found and he then realised that his only hope then was to tell the truth. It was not very commendable that he admitted these damaging facts, but were they the truth? In fact if he had said anything else, would you have believed him? "

We consider this to be a clear statement of the explanation Shiu Narayan gave for changing his stance and the assessors would have had no doubt about their functions as to the acceptability or otherwise of that explanation while considering his evidence.

In Ravi Nand and Another v. Reginam (10 F.L.R. 37 at 45) where a witness, not an accomplice, had made a prior inconsistent statement, this court after citing a passage from Gyan Singh v. R. (9 F.L.R. 105), said :

> " It is true that the summing up by the learned trial Judge does not contain a detailed direction such as that which was approved by this Court in Gyan Singh v. Reginam. But it is not to be inferred from the passage cited that there is a preliminary issue which must be decided as a preliminary and separate question before proceeding to evaluate the testimony. It is sufficient if due consideration is given to the acceptability of any proffered explanation, and the fact that this has been done may appear inferentially from the summing up or judgment, and does not necessarily call for an express and separate decision of the point. "

We do not consider the omission by the learned trial judge in this case to give separate and specific directions in this regard could conceivably have resulted in failure of justice and the ground, therefore, fails.

The additional ground 5(b) relates to onus and standard of proof. We see no merit in it. The learned judge's directions on the issue at the beginning of his summing-up were full and correct. He then drew their attention to it several times again during the summing-up. Counsel for the Crown had referred to the appellant's failure to call Manoa a porter who, according to the appellant, had seen him leave the terminal building. The learned judge took special care to remind the assessors again towards the end what he had said earlier. He said :

> "Remember what I said at the beginning that there is no onus upon the accused to prove his case or anything at all. The accused does not have to give evidence at all, or call any witnesses. He can merely sit back and say "you prove me guilty", and no inference of

> guilt can be drawn from this refusal to give or call evidence. In certain circumstances it may not be a wise course to take, but nevertheless the accused is entitled to take that course if he chooses to do so, leaving the whole burden of proving him guilty on the prosecution. "

Ground 6 alleges that the learned judge's treatment of the appellant's good character in his summing-up was inadequate. In our view, he placed the evidence of appellant's character fully and fairly before the assessors when he said :

> "There was a lot more, of course, including the accused's long service with Air Terminal Services and its predecessor Qantas, his family and his children's education, his standing as a candidate at the last general election. An admirable background I'm sure you will agree. "

The learned judge had already given detailed directions on Shiu Narayan's position as a witness and there was, in our view, no need to deal with it again by way of comparison.

The submission fails.

As for Ground 7, relating to sentence, no reasons have been put forward by counsel why this court should interfere with the sentence imposed by the learned judge.

In the result the appeal is dismissed both as to conviction and as to sentence.

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