IN THE FIJI COURT OF APPEAL
Criminal Jurisdiction
Criminal Appeal No. 46 of 1983

Between : 1. GANGA RAM
2. SHIU CHARAN

Appellants

- and -

R E G I N A M

Respondent

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

Date of Hearing : 5th July, 1984

Delivery of Judgment : 13th July, 1984

JUDGMENT OF THE COURT

Speight, V.P.

This is an appeal by Ganga Ram against conviction and sentence. He and one Shiu Charan were tried in the Supreme Court commencing on the 19th of July, 1983 concluding on the 1st of September. The present appellant faced seven charges, one of perjury and six of uttering forged documents. Shiu Charan faced six charges of forgery of the documents in question. Shiu Charan also lodged an appeal against conviction and sentence but several months ago he wrote to the court in the following terms :

" I wish to inform that I am withdrawing my appeal against sentence which was forwarded to your office.

After seeing the visiting justice Chief Magistrate Mr. Gordon Ward I was informed that the first accused Ganga Ram s/o Sukhai has made his appeal.

Through consultation by the visiting justice I am willing to await the outcome of

Ganga Ram's appeal. So I can also be included in its judgment.

If I am true in my interpretation I would be also cleared in the first Mr. Ganga Ram s/o Sukhai win his case as we were jointly charged.

I hope that this application will be favourably considered. "

It will be seen that although he withdrew his appeal against sentence, his appeal against conviction is still extant. However, no steps were taken on his behalf to bring his appeal on for hearing, but he was brought to court and heard the argument of counsel in the present appeal.

The various charges arose out of circumstances which related to both accused persons. A money-lender Peshra Singh had lent various sums of money totalling some thousands of dollars to Ganga Ram whom we will refer to as "the appellant". Repayments had fallen badly into arrears and Peshra Singh took steps to enforce his remedies under the mortgage which secured the appellant's debt, and had gone as far as to call for tenders to purchase the secured property. The appellant then issued proceedings in the Supreme Court in its civil jurisdiction under number 96/82 (Suva) to have accounts taken, and also moved for an interim injunction pending trial to restrain Peshra Singh from selling. In support he swore affidavits which were filed in the Court. The criminal proceedings arose from the appellant's affidavit sworn on the 10th of February, 1982. In this he alleged that he had paid all current debts owed under the mortgage and in particular he claimed six specific payments of sums varying between $500 - $3,000. In support he annexed as exhibits six documents purporting to be receipts, with dates between February 1977 and July 1981 witnessing receipt by Peshra Singh of the alleged payments. Peshra Singh filed a counter affidavit denying any such payments and claiming the receipts were not signed by him. We presume that he or his solicitors reported the matter to the authorities - hence the criminal proceedings.

The Crown case was that these payments had never been made and that the receipts were forgeries written by Shiu Charan at the appellant's request - hence the forgery charges against him - and used by the appellant in support of his application for interim injunction - hence the perjury and uttering charges.

The evidence proffered by the prosecution fell into three classes. First, there was evidence from Peshra Singh who denied that he had received these alleged payments. Secondly, there was the evidence of a number of police officers concerning confessional statements made by the two accused persons at the police station in the course of these investigations. Thirdly, there was the evidence of two witnesses, Bhan Pratap and Tulsi Ram. Each of these men said that he had been approached by the appellant and had been asked to say that he had personally witnessed one or other of the payments.

Bhan Pratap's evidence was that at appellant's request he had written a letter stating that he had witnessed the payment of $2,000.00 to Singh on the 26th of May, 1980 and that letter, containing details of time and place of the alleged payment and of the issuing of a receipt had been given to the appellant. The letter was produced to Pratap in cross-examination and it clearly stated what has just been set out, but in evidence he said that that statement was untrue and had been made by him at appellant's request because he was sorry for the appellant's financial plight.

Tulsi Ram's evidence was similar. He too said that he had been asked by the appellant to say that he had witnessed the payment of $3,000.00 on another occasion and on request he went to the offices of appellant's solicitors in May 1982 and spoke to a clerk there and told him what appellant had asked him to say concerning this payment. As with the previous witness at the trial he said that he had made that statement but it was untrue; that he had agreed to say so because appellant's son was a friend of his and he was concerned that the family might lose their land.

It seems clear that the actions of these two witnesses took place some time in 1982 after Kermode J. had indicated his willingness to grant an interim injunction restraining sale but the terms of that preliminary order were only interim and it is obvious that in the ordinary course of civil proceedings the main action could be expected to come on for hearing at a later date. The clear inference is that the requests by the appellant (if they did in fact take place) were for the purpose of procuring supporting evidence from these two men to confirm his claims in the main action to the effect that payments had been made.

At the criminal trial the voluntariness of the alleged confessions to the police by tbe two accused persons was challenged. Quite early in the hearing there was a trial within a trial. After the Court had heard Peshra Singh, the police evidence and also the witnesses Bhan Pratap and Tulsi Ram, the two accused persons, gave evidence. They said that they had each been interviewed at great length and that initially they had maintained their innocence. Although Peshra Singh had denied writing the receipts,appellant in his evidence claimed that they were genuine and made by Singh. He, and in his turn Shiu Charan, each claimed that they had been subjected to assaults at the hands of the police officers part way through their interviews and had then made false confessions out of fear of further violence.

The learned trial Judge said that he totally disbelieved their claims and he admitted the statements.

The trial then resumed. At the close of the Crown case each accused elected not to give evidence but made an unsworn statement from the dock to the same effect as his earlier evidence. After the learned Judge's summing up, the three assessors returned their opinions and were unanimous in holding each accused to be guilty of all charges. The Judge convicted them and in due course sentenced this appellant to three years imprisonment.

In the present appeal there are a number of grounds advanced.

Ground 1 relates to an objection taken at the commencement of the trial to one of the assessors. Grounds 2, 3, 4 and 5 concern the admission of the confessional statements. Ground 6 was on the question of proof in respect of individual charges. Ground 7 alleged misdirection by the trial Judge for not treating Bhan Pratap and Tulsi Ram as accomplices and failing to give the recognized warnings appropriate to such circumstances. Ground 8 was an appeal against sentence.

GROUND 1 -

On the opening day of the trial, and before the assessors had been sworn in, counsel for each accused objected to one of the assessors as being a person who would not or might not be impartial, on the grounds that the gentleman concerned was an ex-police officer and hence his inclination would be to favour the prosecution. Mr. Thorley, on behalf of the Crown, sought and was granted an adjournment to the following day so that he could consider this objection.

On the following day the objections were renewed and Mr. Thorley indicated that in the Crown's view it might be preferable to replace the assessor. The learned Judge asked the assessor some questions. He acknowledged that he had once been a police officer and had also sometimes acted as a prosecutor. He claimed, however, he did not have any feelings adverse to the accused persons or any views which would affect his performance of his duty as an assessor. The learned Judge ruled that as the assessor was not exempted from service and as he had no personal connections with either accused and had not evidenced any sign of prejudice in the matter, the objection was overruled and the trial proceeded.

Mr. Koya's submission is that without making any personal reflection upon the assessor, the known facts would give an impression to the public and in particular to the appellant and

his family that he was put on trial before a tribunal which might be prejudiced against him. There is no provision in Fiji law for a challenge as such to assessors but there is no doubt that under section 3(3) of the Criminal Procedure Code (Cap 21) the Court may exercise, in cases not otherwise provided for, the jurisdiction in procedural matters observed by the High Court in England. The position of an assessor, although not identical, is akin to that of a juror in the English jurisdiction, and there, as elsewhere, a juror may be challenged either peremptorily or for cause. Consistently with this it has been the practice in Fiji to recognize that counsel for the parties, both prosecution and defence, have the right to object prior to the opening of a case to one or more of the proposed assessors whose names will, in accordance with court practice, have been furnished to counsel prior to trial. The existence of this practice of entertaining objections before trial was recognized by this Court in Iliesa (1970) 16 F.L.R. 84. With due respect to the learned Judge who delivered that judgment we think the matter is overstated when it says :

> "....no person to whom counsel has objected is appointed as assessor"

The merits of a challenge to a juror for cause are always examined and the court has a discretion to allow or reject. To hold otherwise would be to encourage obstructive and frivolous objections - so it should be with assessors.

Plainly, in the present case, particularly in view of the overnight postponement it would have been possible to provide some "stand by" assessors from the gazetted list in the event that the Judge decided to exercise this power. The objection to the proposed assessor was made responsibly, both as to the person and as to timing. A substitute assessor could conveniently have been appointed, and as is mentioned in Archbold (41st edition) at para. 4-16 a challenge "propter affectum" is a valid ground for challenge for cause, whether it be for actual or merely presumed partiality. In view of the attitude taken by the

Crown it would not have been surprising if the Judge had indeed, as a matter of additional caution, decided to substitute another assessor. That might have been the preferable course. But that is not to say what we think that the refusal to do so has led to a miscarriage of justice. It was a matter of discretion and there is nothing before us to suggest that this discretion was not exercised in accordance with appropriate principles.

Before closing on this topic we mention, as a matter of interest, that there are two decisions of the Court of Appeal of New Zealand - Papadopoulos (No. 2) (1979) 1NZLR 629 and Bradley (unreported) - (14th of April, 1981. C.A. 275/80) where attempts to upset verdicts on appeal have been unsuccessful in cases where the complaint was made after trial. Different considerations apply in New Zealand of course because there there is a right of challenge - which had not been exercised. However, the Court of Appeal there said that there was no reasonable ground for suspecting bias on the part of a juror who in one of the cases, was the superior officer of an analyst who was a witness, and in the other case was an ex-policeman. In respect of the latter it was said there was no reasonable basis for suspecting that the verdict was improperly influenced by reason of the background of the ex-policeman juror. Those cases differ from Hood (1968) 1W.L.R. 773; and Box (1964) 1 QB 430 where the jurors had knowledge of the accuseds' previous convictions and similar matters. The practice of entertaining objections to assessors is a recognized one, but nothing should be done to encourage frivolous objections; nor in cases such as the present should it be said that apprehension on generalized grounds such as those advanced should always disqualify. Each case should be treated on its merits and we see no ground to interfere on this basis.

GROUNDS 2 TO 5 -

These all relate to the admission, after the trial within a trial, of the alleged confessional statements. It will be

remembered that there are two matters each of which requires consideration in this area. First, it must be established affirmatively by the Crown beyond reasonable doubt that the statements were voluntary in the sense that they were not procured by improper practices such as the use of force, threats of prejudice or inducement by offer of some advantage - what has been picturesquely described as "the flattery of hope or the tyranny of fear". Ibrahim v. R. (1914) AC 599. DPP v. Ping Lin (1976) AC 574. Secondly even if such voluntariness is established there is also need to consider whether the more general ground of unfairness exists in the way in which the police behaved, perhaps by breach of the Judges Rules falling short of overbearing the will, by trickery or by unfair treatment. Regina v. Sang (1980) AC 402, 436 @ C - E. This is a matter of overriding discretion and one cannot specifically categorize the matters which might be taken into account.

A useful collection of authorities and a precise statement of the underlying philosophy in this matter can be found in the judgment of the New Zealand Court of Appeal delivered by Cooke J. in R. v. Horsfall (1981) 1NZLR 116. The following passage commencing at p. 121 may be found to repay study :-

> " Clearly the law of New Zealand is that there are two broad grounds on which in a criminal trial a confession obtained by the police from the accused may be ruled out by the trial Judge. One is that the Crown has not proved the statement to be voluntary; this ground is subject to the provisions of section 20 of the Evidence Act 1908 and need not be discussed further here. But in addition the Judge has a discretion to refuse to admit in evidence a statement which has been obtained unfairly. As in many other branches of the law, the requirements of fairness cannot be captured in a rigid code; "...unfairness to the accused is not susceptible of close definition". (King v. The Queen [1969] 1 AC 304, 319; [1968] 2 All ER 610, 617, per Lord Hodson delivering the judgment of the Privy Council).
>
> It is elementary that the Judges' Rules are not rules of law, nor to be applied in any strict way in disregard of their spirit. But they are guides to matters bearing on fairness and breaches of them are not lightly condoned. In this Court in the first of the cases about to be cited Turner J. cited with approval an Australian dictum that proof

of a breach does not throw any burden on the Crown of showing some affirmative reason why the statement should be admitted. On the other hand McCarthy J. accepted that a departure from the standard of conduct aimed at by the Rules goes a long way towards establishing that admissions have been unfairly obtained and having them excluded. The present case does not call for a pronouncement on onus. Indeed we are disposed to think that it would seldom be helpful to approach this discretionary question in that way.

What is clear is that the law has been repeatedly stated by this Court to the effect that the jurisdiction to exclude confessions arises on two broad grounds and that the Judges' Rules are relevant to the second. It is enough to refer to R. v. Convery (1968) NZLR 426 passim; Naniseni v. The Queen (1971) NZLR 269, 270 - 271; R. v. Hartley (1978) 2 NZLR 199, 218 - 219; R. v. Rogers (1979) 1 NZLR 307, 312 - 316. In Australia also it is well settled that there is a discretion to exclude a voluntary admission if it has been obtained unfairly. Full recent discussions can be found in the judgments in Collins v. The Queen (1980) 31 ALR 257. The law of England is the same in principle. It is true that in R. v. Prager (1972) 1 All ER 1114, 1118; (1972) 1 WLR 260, 265 - 266, there is a passage in the Court of Appeal's judgment indicating that ultimately all turns on the Judge's decision on voluntariness. But this does not appear to be in accord with the general trend of the English authorities. And in R. v. Sang (1980) AC 402; (1979) 2 All ER 1222 the House of Lords have recognised that, with regard to evidence obtained from the accused after commission of the offence, a Judge has a discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The question before the House did not require detailed consideration of the role of the trial Judge in that field, but the formal answer of their Lordships to the question before them, an answer which Lord Diplock states to have been suggested by Viscount Dilhorne and which is set out in Lord Diplock's speech at p. 437; 1231, recognises the discretion in express terms. "

That statement of the principles followed in England, Australia and New Zealand applies equally in Fiji.

We think it necessary to say however that the existence of two matters requiring consideration should not encourage the belief that consideration of the general discretion calls for duplication of matters already disposed of under the question of voluntariness. Questions of an accused being overborne by police bullying will primarily and more clearly be dealt with on a submission on voluntariness and where a conclusion has been reached beyond reasonable doubt that the suspect's resistance to questioning has not been undermined by oppressive behaviour, there seems little justification for reventilating that sort of ground on a discretion submission.

Grounds 2 and 3 were argued together and in support Mr. Koya submitted that the onus of proving voluntariness had not been discharged. In the written notice these grounds were itemized with some particularity, amounting at times to repetition. In submissions a number of these were argued together and we propose to treat them similarly.

The first submission was that in giving his ruling the learned trial Judge said that there was a wide discrepancy between the evidence on each side, and obviously either the police witnesses or the two accused had committed perjury. The police evidence was that this appellant in particular had been questioned at great length for many hours and had steadfastly maintained that the receipts were genuine and that the money had been paid; but when the witness Bhan Pratap was brought in and confronted the appellant, and said that the relevant payment had not been made, the appellant's denials collapsed and he made a clean breast of the matter.

The appellant in his evidence denied that Bhan Pratap had said this at the police station, and he said that the only reason for his confession towards the end of his interview was that the police had at that time become exasperated with him, and had beaten him severely and made threats of more violence.

Although it is not relevant to the present appeal Shiu Charan gave similar evidence concerning his confession. In discussing this conflict the learned Judge said that it was difficult to make a conclusion on demeanour alone and that he looked for extrinsic evidence. In particular, he analysed claims made by each accused that they were strangers to each other, and from evidence before him which could not be challenged he concluded that that was quite untrue. He then went on to say :

> " I am satisfied that Accused No. 2 is deliberately not telling the truth on this issue and that in his evidence Accused No. 1 was also not telling the truth. Obviously this is not only a lie, but, a concerted lie and designed by the two accused to support each others position on the main trial. I am able to say that persons who are prepared to deceive this Court to that extent are not credible witnesses and anything they may say cannot be accepted unless it is subjected to the closest scrutiny. "

The learned Judge then recited factors which he said he took into account :

> "(1) that both accused have been shown to be untruthful on a material point;
>
> (2) that their demeanour in the witness box generally was unconvincing;
>
> (3) that the injury sustained by Accused No. 1 could have been as a result of an accident after his release on bail;
>
> (4) that no complaints were made following these assaults;
>
> (5) that it is most unlikely that the police would have either the energy or the skill to fabricate the statements in the hope that they would be signed by the accused.
>
> I am satisfied that it is right to reject entirely the evidence of the two accused.
>
> It follows that I am satisfied that no irregularity attended upon the taking of the statements that they were made voluntarily. I admit them in evidence at this trial. "

Mr. Koya's complaint, indeed his major complaint, on these grounds is that a rejection of the evidence of the appellant (and of the other accused) did not necessarily mean that the opposing view of voluntariness had been established beyond reasonable doubt. We accept the proposition made by Mr. Koya that in some circumstances, particularly when a number of matters are in issue, the rejection of the evidence of, say, a defendant, does not necessarily mean that his opponent has discharged the onus of proof in respect of all the matters which he has to make out. But it will depend on the circumstances in the particular case and the scope of the issue in question. We think Mr. Gates's reply is valid, namely that here the learned Judge had already in his ruling correctly recited the onus and the standard to which voluntariness must be proved; he had discussed the conflicting, indeed the diametrically opposed evidence on this narrow topic of compulsion by ill-treatment; and in the context of the matter engaging his attention the total rejection of one side of the evidence established the acceptance of the other; and it is clear that that is what the Judge was doing in the last two short paragraphs of the passages quoted above. In particular, he had quoted that the accused were untruthful, that their demeanour was unconvincing, that no complaint had ever been made to anybody about alleged injuries and further that there was detail in the statement which the police could not have fabricated. It is acknowledged that the Judge erred in referring to an injury to accused no. 1 instead of accused no. 2 but this does not affect our view that there was ample material for totally rejecting the appellant's version. Given that rejection the acceptance of this as a non-offending interview was the only view open.

It was strongly argued by Mr. Koya that the change of story by the appellant was only explicable on the basis that something fresh had intervened - namely police brutality - but that overlooks the confrontation evidence when Bhan Pratap, in appellant's presence, denounced him. Nor is the practice of confrontation, provided it is done fairly and not

oppressively, disapproved of by this court, as Mr. Koya would have us hold.

Another argument advanced on this ground was that in accordance with the Judges' Rules interrogation should not continue in respect of a man who has asked for a solicitor to be present; the appellant claimed in his evidence that he had so asked and had been refused. The simple answer of course is that this claim was denied by the police witnesses and again the disbelief by the Judge of the appellant removes this objection.

Alternatively, Mr. Koya submitted that although a conclusion may have been reached on voluntariness, the learned Judge should have exercised his discretion against admission, on the basis of unfair practice. Again, we can see no ground to accept this submission that there was material demonstrating unfairness. The principal matter advanced was that this was a very long interview. But the Judge appears to have accepted the claim by the police that there was no duress. It will be observed that there were a number of breaks during the period, when the suspect was offered refreshment and food, and that it was claimed he was not in distress. In parting with this topic it could perhaps be noted that this was indeed a very long interview, with continual denials for many hours, and it seems there should be some point during such proceedings when it becomes apparent that further questioning is fruitless and that may lead to a valid suggestion of oppression, but in this case that conclusion was rejected by the fact finding tribunal.

The final issue on this topic is contained in ground 5. It relates to the wording used by the Judge when he made his ruling. This has already been recited in the first of the two passages quoted above. Mr. Koya's point is that not only did the Judge say that the accused were lying but they were doing so to support each other "on the main trial", and that persons who are prepared to deceive a court may

> "find that anything they may say cannot be accepted unless it is subjected to the closest scrutiny. "

The claim made is that these remarks would indicate that the Judge had predetermined that this man would not be capable of telling the truth at any part of the trial and would give the impression of a Judge who made up his mind too soon.

Mr. Gates referred us to Turner v. Allison (1971) NZLR 833 @ 848 where Turner J. (as he then was) cited with approval a passage from an earlier unreported Court of Appeal case of Griffin & Sons Ltd v. Judge Archer and anor. in which the subject of bias, had been considered.

It reads :

> " Something more was necessary than the mere expression of a preconceived opinion (though in that case the preconceived opinion had been a fairly definite one); it must appear that the tribunal intends to adhere to the point of view which has been expressed, uninfluenced by further evidence or argument addressed to it. "

It is of the nature of the ruling which a trial Judge must give in many trials within trials that a decision will be reached on an accused person's credibility, and that decision must be pronounced.

In so doing care must be taken to limit the finding to the matters in issue at the voir dire.

Mr. Koya's complaint is that in the passage quoted above the learned trial Judge went further and made observations which could be taken as saying that the accused would not be

believed in any later evidence, and he submits that this may have influenced them in their subsequent election not to give evidence. There is nothing before us to say that this in fact was the operative reason for the decision they took but nevertheless the point is well made. Accordingly, we wish to say that it has always been thought desirable that findings adverse to an accused person, if they must be pronounced during the course of a trial, should be as economically worded as possible; sometimes it is preferable merely to make the ruling and then to give reasons for the same at the conclusion of the trial.

In a number of cases on judicial bias, emphasis has been placed on the fact that, not only is it necessary that there should not be a likelihood of bias, but also one must avoid a reasonable suspicion of it. The history of this development and a helpful discussion of relevant authorities are to be found in the judgment of Mahon J. in Police v. Pereira (1977) 1 NZLR 547.

However in the trial within a trial situation in criminal cases, it is sometimes inevitable that a Judge will be obliged to take an adverse view of the accused person's credibility at a stage part-way through a trial; the pronouncement of his ruling will, of necessity, disclose that fact. Hence the need for particular restraint at that stage. This is especially so in the assessor system as it prevails in this country, for the Judge is part of, indeed may be the ultimate, fact-finding tribunal.

On the other hand it must be pointed out that in this case there is no indication of any prejudice emanating from the Judge in his summing-up, which was restrained and even-handed. Nor could the assessors who were unanimous in their opinions have been in any way affected by the preliminary pronouncements on credibility for they were of course excluded from the trial within a trial.

But a suspicion must remain that the accused persons sensed that they were faced with a tribunal which would not accept any evidence they might give, and may have elected not to give sworn evidence, which might, for all we know, have changed the views taken by the assessors. We think alone, of the various grounds put forward in relation to the admission of the confessional statements, this factor may have so influenced the subsequent proceedings as to lead to the conclusion that there was a miscarriage of justice. On this ground the appeal must be allowed.

Ground number 6 was worded very briefly and not enlarged upon in submissions. It was a complaint that the trial Judge did not direct that the falsity of each receipt had to be separately proved beyond reasonable doubt. Examination of the summing-up shows that there is no foundation for this submission. The Judge gave full and proper directions about separate consideration of each charge and of their constituent parts. Indeed he leaned favourably towards the defence case when he said that if the assessors formed the opinion that one of the six receipts was genuine they were all likely to be genuine. We say no more on this point.

In Ground number 7 it was submitted that the Judge erred in not treating the evidence of Bhan Pratap and Tulsi Ram as that of accomplices, and failed to give the recognized warning on the need for corroboration in such cases. In the summing-up the Judge dealt with their evidence as follows:-

> " Now Bhan Pratap under cross-examination put forward the explanation that he believed Ganga Ram's tale about the $2,000.00. When he signed the letter which contained obvious falsehood he did not realise that the matter would reach the courts. He said that he would not be prepared to have lied on oath about such a matter. The point must be made gentlemen, that this witness by his own admission had been prepared to tell lies on behalf of Ganga Ram, therefore you must scrutinize his evidence in the Court given under oath and be satisfied what he now says is the truth before you accept his evidence.

> Tulsi Ram had a very similar tale to tell about the $3,000.00 said to have been paid in 1981. He went so far as to go to the office of a firm of solicitors and tell a clerk there a lie about this money. He did not sign any written statement. His position is somewhat similar to that of Bhan Pratap and you have to decide gentlemen if he can be presently relied upon as a witness of truth. If you accept the evidence of Bhan Pratap and Tulsi Ram it must support the view that these two particular payments were not in fact made by Ganga Ram. "

In brief, the Judge said that, because these men admitted they had been prepared to tell lies on behalf of Ganga Ram, their evidence should be scrutinized and that the assessors would have to decide whether these witnesses could be relied upon as witnesses of truth. If they were not witnesses in respect of whom a warning was required then this was an adequate comment. If they were, then it fell far short of putting the assessors on guard of the peril of trusting their evidence.

Now the question arising on this ground is whether such a warning was required. There have been a number of cases in recent years in which courts of the highest authority have considered in what circumstances the "accomplice" warning should be given. For some years the leading case has been : Davies v. DPP (1954) AC 378. Next were R. v. Prater (1960), 44 Cr. App. R. 83 and DPP v. Kilbourne, (1973) AC 729; more recently R. v. Whitaker (1976), 63 Cr. App. R. 193 and R. v. Beck, (1982) 74 Cr. App. R. 221.

Davies case defined three categories of persons in respect of whom such a warning is required, namely :

(a) persons who were parties to the offence,

(b) persons who were receivers in respect of the prosecution of the thief, and

(c) persons who were parties to offences similar to the offence charged, evidence of which had been admitted for one of the recognized purposes eg. proving system, or intent, or negating accident or mistake.

That case also restated the rule that it is for the Judge to rule whether there is evidence that a witness may be an accomplice, and if there is such evidence, it is for the jury to find whether he is indeed an acomplice. In such cases the warning must be given, and failure to do so will lead to the conviction being quashed even if there was corroboration, except for cases where the proviso can be invoked - which will be rare. The Court further held that there should be no further extension of the categories, although submissions were made by the Crown that a warning might also be desirable with "tainted" witnesses (p.390).

Before legal principles are discussed further in the context of the present case it is desirable to examine the actions of Bhan Pratap and Tulsi Ram.

It will be seen that their expressions of willingness to support the appellant's claim concerning payments were made after the appellant's affidavit had been filed in the interim injunctions proceedings; hence they would not come under the first category of the Davies classification.

The civil litigation was continuing. It is clear that, but for the intervention of the police investigation, presumably on complaint from Mr. Singh, the main hearing of the action would have taken place some time after May 1982. It is equally clear that the appellant was preparing his case and had his solicitors engaged on that work. It was obviously for the purpose of obtaining evidence for the main civil trial that the appellant was attempting to suborn perjured evidence from Pratap and Ram. Indeed reference to Pratap and Ram having allegedly been present on the occasion of two payments had already

been deposed to by the appellant in his February affidavit, suggesting that there may already have been contact by him with those two potential witnesses. However that may be, the Court properly admitted evidence that the appellant was invoking support for his earlier affidavit statement : i.e. he was conspiring with others for further perjury to be committed. Pratap and Ram in their evidence made it quite clear that they had agreed to support the appellant with statements, if not with actual evidence, that they knew were untrue : that evidence must have rendered them liable to be charged with conspiracy with the appellant to commit perjury or some similar offence. And that clearly brings them within the third category of the Davies classifications, and hence the accomplice warning was required.

Before leaving this topic, we record that Mr. Koya in part relied upon a submission that corroboration was required because these witnesses "may reasonably be regarded as having a purpose of their own to serve". This phraseology is taken from a proposition in para. 1425(a) of Archbold (40th Edition) that the class of persons whose evidence calls for corroboration has been extended to include witnesses so described.

We merely wish to say that this suggested extension, based as it is on the decision in Prater (supra), has been the subject of substantial criticism in the cases of Whitaker and Beck (supra) : it is noteworthy that the relevant passage in Archbold supporting the proposition has been omitted from the 41st Edition - presumably because of the criticism in Beck.

The state of judicial authority now is that there is no need for the warning in cases of "persons with a purpose of their own". The authority of Davies remains unimpaired.

It is true that there was other evidence as to the falsity of the receipts. In the first place there was Peshra Singh and secondly there was the confessional statement to

the police acknowledging the same. In some rare cases the proviso is applied to excuse a failure to give the appropriate warning, but that is rare and only in cases where there is overwhelming and undisputed evidence. That is not the position here. One cannot speculate as to which of the witnesses were accepted and which witnesses were doubted by the assessors. As the learned trial Judge said in his summing up, money lenders are, generally speaking, unpopular and for all we know the assessors may not have accepted Peshra Singh's evidence standing alone. Also as mentioned by the Judge, there were disquieting features about the police conduct and that too may not have been totally persuasive to the assessors. For all one knows the acceptance of the evidence of Bhan Pratap and Tulsi Ram may have been crucial in tipping the scales against the appellant. In the absence of the requisite warning by the Court we cannot say that the assessors would inevitably have come to the same conclusion.

There is a further subsidiary point. In the Fiji Penal Code, (Cap 17) as in most others, a conviction for perjury cannot be entered on the evidence of one witness alone (Section 124), and it is necessary in a trial where there are a variety of witnesses, for a summing up to point out that a conviction cannot be returned unless there is credible evidence from more than one sour Such a warning was not given here and this too might be regarded as an omission, but the point has little relevance, because although on this narrow issue the conviction for perjury could not stand, the same rule does not apply in respect of forgery or uttering.

In view of the fact that Court is obliged to quash the conviction of the appellant and order a new trial the question of the appeal against sentence does not fall for consideration but we note that Mr. Gates for the Crown conceded that in all the circumstances, three years imprisonment was a severe sentence.

It is now necessary to give consideration to the position of the other accused person Shiu Charan whose appeal against conviction still lies in the court. We have found it appropriate to uphold the appeal by Ganga Ram primarily on the basis of the failure to give a warning in respect of the two witnesses whom we class as accomplices, but also because of the possibility that miscarriage flowed from the voir dire pronouncement.

Now an examination of the record shows that the evidence of these two witnesses did not tell against Charan. There is no suggestion that there was any contact between them and him. Strictly speaking Charan's conviction depended solely on the evidence of Singh and of the police concerning his confessional statement. One of the successful grounds which has favoured Ganga Ram does not apply to Shiu Charan. Even if that was the only basis for allowing Ganga Ram's appeal it would have seemed unfair that he should be retried on the question of whether or not he uttered false documents, in which enquiry the crucial issue would again be whether they were indeed false, giving him the opportunity of being acquitted on that score. Yet the conviction of Charan for forging the same documents would stand with his consequent imprisonment.

However we also have upheld one of the submissions on the voir dire proceedings and its effect on the subsequent part of the trial. This is equally applicable to the case of Shiu Charan and we propose to have his outstanding appeal listed, and subject to anything the Crown may submit, to order a joint retrial for the two men.

In view of this, there is to be no publication in the press or elsewhere of the contents or import of the alleged confessional statements of either man.

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Vice-President

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Judge of Appeal

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Judge of Appeal