IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. AAU0011 OF 1996
(High Court Criminal Case No. 17 of 1995)

BETWEEN:

AMINA BEGUM KOYA

APPELLANT

-and-

THE STATE

RESPONDENT

Mr. G.P. Shankar, Mr H. K. Nagin, Mr. H. A. Shah and Ms F. Munam for the Appellant
Mrs. N. Shameem, Director of Public Prosecutions and Mr. S. Senaratne for the Respondent

Date and Place of Hearing : 6 and 14 May 1997, Suva
Date of Delivery of Judgment : 16 May 1997

JUDGMENT OF THE COURT IN THE APPEAL AGAINST CONVICTION

The appellant was charged in the High Court in Lautoka with one offence of arson, namely "wilfully and unlawfully setting fire to the office of Messrs Koya and Company situated in the Popular Building, Vidilo Street, Lautoka on 23 March 1994". All the assessors expressed the opinion that she was guilty of that offence. Lyons J. agreed with their opinions, found her guilty, convicted her of the offence charged and sentenced her to serve three years' imprisonment. He declined to impose a suspended sentence. This appeal is against the conviction and the sentence.

Twenty one prosecution witnesses gave evidence; the appellant made an unsworn statement; then three defence witnesses gave evidence.

The appellant is the widow of the late Mr. S. M. Koya, who died in April 1993, and the executrix of his estate. Mr. Koya was a barrister and solicitor who practised in Lautoka and Suva under the firm name Koya and Company. His office in Lautoka was situated in Popular Building in Vidilo Street; the building was constructed of iron and timber. On the evening of 23 March 1994 there was a fire in the office.

The son of one of the owners of Popular Building, Mr Mohammed Janif, gave evidence that the office had been let to Koya & Company for some years. By late 1993 the rent was seriously in arrears. The appellant had been supervising the firm's office since her husband's death. It had been agreed that the firm should vacate the office on 31 March 1994. This witness said that the office was on the upper floor of the building, which had two storeys. Access to it from the street was through a double door giving access to a staircase, then up the stairs and along a corridor on the upper floor. There were other offices on that floor; the access to them was from the same corridor. At one end of the corridor there was a door which led to an outside staircase into the backyard of the buildings. Mr. Janif said that the door could be secured by padlocked tower bolts on the inside, that it was rarely, if ever, opened and that he did not know who had the keys to the padlocks. The double door at the bottom of the stairs which opened onto the street could be secured by a deadlock and a night latch. All the tenants of offices on the first floor of the buildings had keys to the deadlock and

the night latch of the double door. Mr Janif acknowledged that a month or so before the fire another nearby building belonging to the same owners had been destroyed by fire.

Evidence about the security of Koya and Company's office was given by a clerk who had been employed by the firm for 23 years, Mr Kailash Nadan, and a typist who had worked for the firm for ten years, Ms Veena Kumari. Their evidence was that to gain access to the firm's office from the corridor it was necessary to pass, in turn, through a metal-grilled security gate, a solid wooden door and a glass door. There was a padlock by which the security gate could be secured; the wooden door could be locked by a key. The glass door could not be locked. The appellant and Mr Nadan each had a key for the padlock and a key for the wooden door. No one else had a key for the padlock but Ms Kumari had a key for the wooden door. In the office there were more than a thousand law books which had belonged to Mr. Koya and had formed part of his estate. They were to have been removed to the appellant's house by 31 March 1994; by 23 March 1994 some of them had already been removed.

These witnesses gave evidence that on the evening of 22 March 1994 they left the office at about 5 pm; the appellant was still there. Mr Nadan said that he reminded her to lock up when she left. On the morning of 23 March, when they arrived for work, they found the security gate and the wooden door unsecured. That evening, they said, the appellant left the office at about 4.30 pm and Mr Nadan left it at about 4.45 pm. Soon afterwards, Ms Kumari said, she locked the wooden door and secured the padlock of the security gate and left the building. She said that the appellant's "office bag" was still in the office. Mr. Nadan said that he did not return to the building until about

7.30 pm, after he had been told of the fire. His cross-examination was not directed towards laying on him any blame for the fire.

He gave evidence that on a day shortly before the fire occurred the appellant borrowed his keys for the double door of the building. A locksmith, Mr Bhupendra, gave evidence that on 22 March 1994 he cut keys for the appellant. He identified them as keys which the investigating officer, Assistant Superintendent Ami Chand, stated were obtained from the appellant and by which the locks of the double door of the building could be opened.

The son of the tenant of one of the other offices on the upper floor of Popular Building, Mr. Rakesh Vagh, gave evidence that at about 6.15 pm on 23 March 1994 the appellant came to his house, which was about 100 metres from the building, and said that she was looking for his father to help her get into the building, as she needed to retrieve her briefcase from her office, but had been unable to open the locks of the double door of the building. His father was not at home but Mr Vagh had keys to the double door; so he agreed to go with the appellant in her car to let her into the building. He gave evidence that he accompanied her to Koya and Company's office. It was then about 6.20 pm, or possibly 6.30 pm. He unlocked the double door and went into the building. The upper floor corridor was in darkness. He remained near the entrance to her office while she went in. She then came out with her briefcase and they left the building. He locked the deadlock and the padlocks of the double door.

Mr Vagh was asked whether the appellant locked the doors of her office but that question was accompanied by another question. He is recorded as replying "I paid attention". He was then asked "She could have locked it but you don't know why?" and replied simply "Yes". In a witness statement made to the police on 24 March 1994 the appellant said that she locked the security gate. In her cautioned statement she confirmed that she went to the office with Mr Vagh and, asked whether she locked the security gate, adopted what she had said in her witness statement. Mr Vagh gave evidence that, after he had locked the double door, the appellant got into her car and drove off. He went home. About half an hour later he heard the siren of a fire engine, went out and saw smoke coming from the building. He went there and, as the firemen were pushing the double door, he offered to open the locks. To his surprise he found them already open.

The no.1 fireman, Mr Robinson, gave evidence that the fire brigade was informed of the fire at 7.15 pm. On arrival at the scene he inspected the building from the outside before entering and observed that the windows of Koya and Company's office were intact. He said that inside the building he smelled smoke and burnt kerosene; he had to use breathing apparatus. He located the fire in the office of Koya and Company. He found the security gate unsecured and the wooden door unlocked. He and his assistant entered the office and extinguished the fire, using a water hose. It took about ten minutes to do so, although not without difficulty as the fire kept reigniting. After extinguishing the fire he checked the building and found that kerosene had been spilt along the wall of the corridor right to the end. He gave evidence that he examined the padlock of the security gate to see whether it had been forced; he said that his experience as a fireman had given him the relevant knowledge of the operation of padlocks. He stated firmly that the padlock had not been forced. He

said that the fire had started in the typist's room in the office. It had burned the wooden partition and caused heat and smoke damage to the furniture and books in the adjoining room. It had not spread to the rest of the office or the rest of the building but the witness found match sticks lying on top of the kerosene that had been spilt along the corridor. He gave evidence also that the door leading from the corridor to the outside stairs was secured both inside and outside. Mr Vagh gave evidence that there was no smell of kerosene when he went into the building with the appellant at 6.20 - 6.30 pm.

A shopkeeper with premises across the road from Popular Building, Mr Sesoni Naise, gave evidence that on the evening of 23 March 1994 at some time between 6.30 pm and 7 pm he saw the appellant arrive in her car on her own, stop the car outside the building beside a bus stop sign, get out of the car and go into the building. He said that he saw her come out again after about five minutes, get into her car, drive it a short distance and then park it and get out again. He said that she then walked to Popular Building; he was on the opposite side of the road and enquired of her by gesture whether anything was wrong. She told him that she had forgotten something in her office. She went into the building and he did not see her leave. His partner arrived soon afterwards and they closed the shop; he then left. Mr Naise's evidence differed to some extent from his witness statement recorded by the police; in the statement he was recorded as saying that he saw the appellant again in her car as he was closing the shop. Questioned about the inconsistency, he said that the police erroneously recorded that part of his statement.

An electrical installation inspector employed by the Fiji Electricity Authority gave evidence that the fire was not caused by an electrical fault and had cut off electric power to the

building by causing a fuse to blow. Another tenant of the building gave evidence that the fax machine in his office showed that it had ceased to operate at 6.53 pm. A ground floor tenant of the building who ran a takeway food shop there said that at 7.05 pm he saw smoke coming from the ventilators in the part of the building where Koya and Company's office was located. There was evidence from several witnesses that after the fire in the other building the appellant expressed her concern that Popular Building might also catch on fire. A former employee of an insurance company gave evidence that early in November 1993 the appellant renewed the insurance of the contents of Koya and Company's office, i.e. law books, office equipment etc., which had lapsed in 1992. The amount of cover was $100,000. He said that Koya and Company had had a running account with the insurer in respect of a number of policies of several types. After payment of $1573.05 by the appellant on 4 November 1993 the firm owed the insurer $5962.55. The witness also gave evidence that on 21 March 1993, two days before the fire, the appellant called on him to seek confirmation that, even though Koya and Company still owed money to the insurer, the policy was in force; he said that he confirmed that. She also enquired about the amount of the cover; he said that he told her that it was $100,000.

Mr Gates , a barrister and solicitor, gave evidence that in July 1993 after Mr. Koya's death the appellant asked him to come to Fiji and take over the practice. It was agreed that he should take over only the firm's Suva office; the appellant wanted to keep the Lautoka office operating for her sons to practise there when they qualified and tried to find a solicitor to take over Mr Koya's Lautoka practice on a temporary basis. She was unable to do so and, Mr Gates said, he agreed in November 1993 to take over all professional and financial responsibilities for the Lautoka

office. The agreement provided for him to purchase for $7500 the whole practice of the late Mr. Koya together with his law books, furniture, office equipment, etc. However, under the agreement the appellant was entitled, on giving three months' notice within five years, to have the practice handed over by Mr Gates to her sons together with the law books, furniture, office equipment etc.

As the law required that there be a barrister and solicitor in each of the Suva and Lautoka offices daily, Mr Gates tried to find one to be employed in Lautoka. He was unsuccessful. He attended at the Lautoka office himself about two days a fortnight, he said, but that was not proper compliance with the law. He, therefore, informed the appellant in February 1994 that the office might have to close at the end of that month. The decision was shelved until March, when he discovered that the landlord had sent a bailiff to levy distress because the rent was seriously in arrears. He arranged with the landlord to pay all the rent from the time he had taken over the practice and did so.

The Lautoka office of the practice not only was not staffed daily by a barrister and solicitor but also was being operated at a loss. Mr Gates gave evidence that he was not willing to continue keeping it open. He had kept it open only to try to assist the appellant to have a practice for her sons to operate when they qualified. He gave the landlord notice that the firm would vacate the office on 31 March 1994. He arranged with Mr Nadan to have a "closing down" meeting with him and the appellant on 24 March. He informed the appellant of the meeting, he said. However, Mr Nadan gave evidence that on 23 March the appellant told him that she was going to Suva next day to conduct some other business with a Mr Mahendra Chaudhary. He said that Mr Chaudhary was overseas and that he told the appellant so. The packing and moving out was to begin on that day.

After the fire, Mr Gates said, the appellant wished to complete the insurance claim but he considered that as principal of the firm, he should make the claim. If the claim had been met, he said, he would have paid to the appellant the amount recovered less the expenses he had incurred in paying the arrears of rent and discharging the debt owed to the insurer, which had to be paid before it would deal with the claim.

On 24 March 1994 the appellant made a witness statement to the police (Exhibit 12). She gave an account of her movements on 23 March 1993, including details of what she bought at a supermarket. She described going back to the office to collect her "office bag", which she required to take with her to Suva on 24 March 1994. Being unable to open the outer door of the building, which was locked, she went to Mr Vagh's house and asked for his help. He went with her to the building and opened the door. They then went to Koya and Company's office. After going into her office and collecting the bag, she locked the "main door" of the office with its padlock. She saw no one else in the building. They then left the building she said, and she went straight home. At about 7.30 pm, while she was at home, someone phoned and told her that the office was on fire. She said that the contents of the office had been insured for a long time but she could not say whether the insurance was still valid or what was the amount of the cover.

The appellant made another statement, after caution, on 10 June 1994 (Exhibit 19). It was exculpatory. She was asked whether she had locked the door of her office after collecting her bag on the evening of 23 March; she replied that it was in her witness statement. She said that there was still daylight when she went into the office. She denied that she subsequently went into the

building twice on her own and that she spoke to Mr Naise. She said that she had arranged to go to Suva on 24 March 1994 and Mr Chaudhary was in Fiji, not overseas.

In her unsworn statement the appellant simply denied having committed the offence.

The first defence witness was Mr Naise's partner, Mr Adam Ali. He gave evidence that on 23 March 1994 at about 6.30 pm he went to the shop opposite Popular Building, to close it and pick up Mr Naise. First, however, they went together to the hypermarket. Then they returned to the shop and closed it at about 6.40 pm. He then drove Mr Naise to his home. He said that he did not see the appellant or her car near the shop. In a statement to the police made on 9 June 1994 he said only that he picked Mr Naise up from the shop at about 6.40 pm and not that before that he had taken him to the hypermarket.

The other two defence witnesses gave evidence only relating to the appellant's character. They described her as being of exemplary character and having served the public in numerous ways for many years.

The grounds of appeal, as amended with leave of the Court, were as follows:

> "1. *THAT the verdict summing up and/or judgment are unsafe and unsatisfactory and could not be upheld having regard to evidence, and inadequate directions.*
>
> 2. *THAT the learned trial Judge was wrong in leaving to the Assessors to decide whether fire in fact took place when Mr Chaudhary's fax machine was switched-off (P 523 of record) in the absence of admissible evidence of probative*

value to satisfactorily establish that the electronic equipment was giving accurate reading.

3.1 *THAT the learned Judge's summing up as to circumstantial evidence is wrong and/or misdirection and not according to the established principles.*

3.2 *THAT the learned Judge was wrong in directing the Assessors to take into consideration lies alleged to have been said by the Appellant. Alternatively the learned Judge's direction on "lies" was wrong, and/or inadequate.*

3.3 *THAT the learned trial Judge misdirected the Assessors on prior inconsistent statement, and failed to explain its effect on this aspect is in accordance with correct principles.*

3.4 *THAT the learned Judge failed to direct the Assessors that on the evidence as it stood, greater degree of certainty was required to establish the guilt of the Appellant beyond doubt, and also failed to direct that on the evidence there should be no other explanation than guilt reasonably compatible with the circumstances. The learned Judge also failed to direct the Assessors that if circumstantial evidence was consistent with innocence they must find her not guilty. The learned Judge failed to direct the assessors that Prosecution must eliminate other possible culprits, and the evidence must be "more consistent"to implicate the Appellant. The failure constituted non-direction and/or misdirection, and has caused substantial miscarriage of justice.*

3.5 *THAT the learned trial Judge failed to clearly and properly adequately direct the Assessors that:-*

(a) *The inconsistent statement (if any by the appellant) could not have been considered because she did not give evidence and its effect merely affected credibility.*

(b) *The alleged lies were not to be used to establish chain of proof of guilt.*

(c) *The learned Judge ought to have directed the Assessors to ignore the alleged lies or inconsistent statements because the alleged lies*

were not proved beyond reasonable doubt as a primary fact, and alternatively no inference of guilt could be drawn from it.

(R v. Toia 1982 1 NZLR 555.
R v. Samuels 1985 1 NZLR 350.
R v. Halligan 1973 2 NZLR 158).

3.6 *THE learned trial Judge's direction on "lies" deals with corroboration and not basis for establishing guilt. In any event the learned trial Judge failed to point out the particulars lies capable of constituting corroboration, or even incriminate the appellant. There has been substantial miscarriage of justice.*

3.7 *THE learned Judge in his summing up did not correctly direct the Assessors the proper method to consider evidence and the courses open to them.*

3.8 *THAT the learned Judge failed to fully properly and/or adequately direct the Assessors as to the effect of the appellant's good character and its effect in criminal trial, in accordance with established principles.*

4. *THERE is no direct evidence that the Appellant on the 23rd day of March, 1994, at Lautoka, in the Western Division, wilfully and unlawfully set fire to the office of Messrs Koya and Company situated in the Popular Building, Vidilo Street. (See page 494 of the Record).*

5. *THAT the learned trial Judge was wrong in rejecting the submission of no case to answer and in so doing applied wrong principles. In any event the learned trial Judge failed to fully properly and adequately consider the prosecution's evidence at the close of the Prosecution case particularly when the Prosecution case is based on circumstantial evidence and alleged lies treated as corroboration. There has therefore been substantial miscarriage of justice.*

6. *THAT the sentence is harsh and excessive and/or wrong in principle."*

Mr Shankar acknowledged that ground 4 was not a proper ground of appeal; it simply stated facts. However, he said, those facts were relevant to grounds 3 and 5 and he wished ground

4, as framed, to remain. We agreed to let it stand for the purpose for which Mr Shankar said that it was included.

Five days before the hearing of this appeal was due to commence the appellant lodged a notice of motion seeking leave to add "an additional ground, namely that the Learned Trial Judge was biased or alternatively there has been a likelihood of bias against the appellant". The notice was supported by affidavits sworn by the appellant and Mr I.Q.A. Khan, a barrister and solicitor who formerly lived and practised in Fiji but now lives in Australia and principally practises there. The hearing was adjourned to enable Mr Khan, who was in Fiji, to be cross-examined by Mr Senaratne of the office of the Director of Public Prosecution. Mr Khan, in his affidavit, said that he had learned only on 30 April 1997 during a chance telephone call from Mr Shah that the appellant's trial had been held and that Lyons J. had presided. He then expressed the view that the trial might have been vitiated by bias on the part of the judge. Under cross-examination he maintained the account of events given in his affidavit.

The appellant, in her affidavit, swore that until 30 April 1997 she was not aware of the matters deposed to by Mr Khan. She was not cross-examined. On the basis of her evidence, therefore, we accepted that she could not have included the additional ground in her appeal earlier. The only issue remaining that affected the question whether leave to amend should be granted to add the ground of appeal was the cogency of Mr Khan's evidence. We decided to grant leave and receive Mr Khan's evidence as part of the record of the appeal and to hear the parties on the new issue at the same time as they addressed on the other grounds.

Grounds 3.1, 3.4 and 3.7 are concerned with Lyons J.'s directions in respect of circumstantial evidence and the manner in which the assessors should evaluate it. Mr. Shankar submitted that the directions were inadequate, in particular that the assessors were not clearly told that, if they had any reasonable doubt about any of the facts which the prosecution sought to prove, they must resolve the doubt in the appellant's favour. He complained that the direction was not in terms of the prosecution having to establish beyond all reasonable doubt that there was no other reasonable hypothesis. In particular, he suggested that the assessors had not been adequately directed that they needed to be satisfied that no other person had set the fire. We do not find any force in those submissions. His Lordship explained to the assessors very fully the concept of alternative hypotheses; he illustrated it by an example taken from everyday life. He had already given a clear direction regarding the standard of proof required in a criminal trial.

In Shepherd v R (1990) 170 CLR at 579 Dawson J. said:-

> *"Circumstantial evidence is evidence of a basic fact or facts from which the jury is asked to infer a further fact or facts. It is traditionally contrasted with direct or testimonial evidence, which is the evidence of a person who witnessed the event sought to be proved. The inference which the jury may actually be asked to make in a case turning upon circumstantial evidence may simply be that of the guilt of the accused. However, in most, if not all, cases, that ultimate inference must be drawn from some intermediate factual conclusion, whether identified expressly or not. Proof of an intermediate fact will depend upon the evidence, usually a body of individual items of evidence, and it may itself be a matter of inference. More than one intermediate fact may be identifiable; indeed the number will depend to some extent upon how minutely the elements of the crime in question are dissected, bearing in mind that the ultimate*

> *burden which lies upon the prosecution is the proof of those elements. For example, with most crimes it is a necessary fact that the accused was present when the crime was committed. But it may be possible for a jury to conclude that the accused was guilty as a matter of inference beyond reasonable doubt from evidence of opportunity, capacity and motive without expressly identifying the intermediate fact that the accused was present when the crime was committed.*
>
> *On the other hand, it may sometimes be necessary or desirable to identify those intermediate facts which constitute indispensable links in a chain of reasoning towards an inference of guilt. Not every possible intermediate conclusion of fact will be of that character. If it is appropriate to identify an intermediate fact as indispensable it may well be appropriate to tell the jury that that fact must be found beyond reasonable doubt before the ultimate inference can be drawn. But where - to use the metaphor referred to by Wigmore on Evidence, vol. 9 (Chadbourn rev. 1981), par 2497, pp. 412-414 - the evidence consists of strands in a cable rather than links in a chain, it will not be appropriate to give such a warning. It should not be given in any event where it would be unnecessary or confusing to do so. It will generally be sufficient to tell the jury that the guilt of the accused must be established beyond reasonable doubt and, where it is helpful to do so, to tell them that they must entertain such a doubt where any other inference consistent with innocence is reasonably open on the evidence."*

In the present case there was no intermediate fact which needed to be proved beyond reasonable doubt; the evidence consisted of strands in a cable. Nevetheless, Lyons J. directed the assessors that they must be satisfied beyond all reasonable doubt of every fact forming part of that cable. In doing so he was over-generous to the appellant.

We can find no merit in ground 2. We do not accept that the assessors could not properly make a common sense inference from the time shown on the fax machine that that was the

time when the electric power to it was cut off. The evidence was admissible as the basis on which the inference could be made. Even if it ought not to have been admitted because no evidence was presented to show that, before the power was cut off, the machine was showing the correct time, the ground would still lack merit. Other evidence clearly established that the fire was started between, at the earliest, 6.20 pm and at the latest, a sufficient period before 7.05 pm for smoke from it to be coming out of the ventilators of Koya and Company's office at that time. Proof that it started before 6.53 pm was not necessary to the prosecution's case that the appellant had the opportunity to light the fire.

Grounds 3.5(a) and (c) have more substance. Where there is evidence of an out-of-court statement by a witness, other than the accused person, which is inconsistent with the evidence given by the witness at the trial, a two-part direction must be given. First, the assessors must be directed that the fact of the inconsistency is relevant to the witness' credibility; second, they must be directed that the out-of-court statement is not evidence on which they can make a finding of fact (R v Golder [1960] 1 WLR 1169). Lyons J. directed the assessors properly on the issue of credibility but did not give the second part of the direction. However, the mere fact that there was failure to give that part of the direction does not of itself mean that the appellant was prejudiced by it. If the evidence given in court by a witness is more damaging to the defence case than his out-of-court statement, the accused person is less, rather than more, likely to be convicted if the assessors make their findings of fact on the basis of the out-of-court statement. In the present case the only witness whose evidence given in court was not more damaging to the appellant's case than his out-of-court statement was Mr Ali. As stated above, he gave evidence that at about 6.30 pm he took Mr Naise

with him from the shop and returned there with him at 6.40 pm, when they closed the shop and then left. In his out-of-court statement he said only that he parked his car near the shop at 6.35 pm, went to the hypermarket, returned to the shop at 6.40 pm and then picked up Mr. Naise from the shop. That evidence was relevant only to rebut Mr. Naise's evidence that he was at the shop until 6.40 pm. Mr. Ali's evidence that he did not see the appellant or her car in the vicinity, evidence directed to the issue of whether or not she had the opportunity to light the fire, was not inconsistent with his out-of-court statement. The appellant cannot, in our view, have been prejudiced by the failure of the learned trial judge to give the second part of the direction. If there was any prejudice, it was minimal and we would apply the proviso to s.23(1) of the Court of Appeal Act (Cap.12).

Grounds 3.2, 3.5(b) and 3.6 are all concerned with the directions given in respect of what the prosecution said were lies told by the appellant in her witness statement and her statement after caution. Mr. Shankar submitted that the learned judge did not draw to the assessors' attention what those alleged lies were, or did not do so adequately. We are satisfied that he did. He referred the assessors to the particular allegations made by Mr. Senaratne in his closing address and to the fact that Mr. Senaratne had addressed them about those allegations. That direction was, in our view, adequate to draw the assessors' attention to the specific alleged lies and the basis on which they were said to be lies.

Mr. Shankar also submitted that Lyons J. did not give proper directions regarding the possibility that, even if the appellant lied, her reason for doing so was something other than consciousness of guilt, and regarding whether the lies could amount to corroboration of other

evidence. He referred to two cases, one English and the other from New South Wales, in which the Courts stated how the matter should be put to a jury. His Lordship did not give his directions in the exact terms of the judgments in those cases. What he said was:-

> *"Now, it's for you to satisfy yourself beyond a reasonable doubt that these lies exist. They might not. That's for you.*
>
> *Now for these lies to be corroborative i.e. supportive of [Mr Senaratne's] case, you must satisfy yourself beyond reasonable doubt of these four matters, each of them in turn, beyond a reasonable doubt.*
>
> *You have to be sure of these four matters.*
>
> *You must be satisfied that the lie was deliberate beyond a reasonable doubt.*
>
> *You must be satisfied that it relates to a material issue. You must be satisfied of that beyond a reasonable doubt.*
>
> *You must be satisfied that the motive for lying was realisation of guilt or the fear of truth. You must be satisfied beyond a reasonable doubt on that point.*
>
> *Further that the statement given must be clearly shown to be a lie by evidence other than the person who made that statement. In other words you have to get evidence from somewhere else to satisfy you beyond a reasonable doubt that that statement is untrue."*

In **R v Lawrence** [1981] AC 510 at 519 Lord Hailsham L.C. observed:-

> *"It has been said before, but obviously requires to be said again. The purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case. The search for universally applicable definitions is often productive of more*

> ***obscurity than light. A direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's note book. A direction to a jury should be custom built to make the jury understand their task in relation to a particular case."***

In the present case, although Lyons J. did not give his directions on the possibility that the appellant lied for reasons other than consciousness of guilt in the terms of the judgments referred to by Mr. Shankar, they were, in our view, aptly suited to the facts of the case. The summing-up was of necessity lengthy; more detailed directions on this matter would have been likely to confuse the assessors rather than to assist them. His Lordship did not err in giving the directions which he did.

The reliance which the prosecution placed on the alleged lies was that they disclosed deliberate planning of the offence by the appellant and an attempt to manufacture a false alibi. The evidence of them was, therefore, not to corroborate other evidence except by forming part of, and thereby strengthening, the cable of circumstantial evidence. Lyons J., in giving directions in respect of circumstantial evidence, very fully directed the assessors on the manner in which each fact might form what he referred to it as a link in "a chain of circumstances". He, therefore, did not need to direct them on the question of the alleged lies as corroboration more fully than he did.

In respect of ground 3.8, Mr Shankar submitted that Lyons J. should have directed the assessors that the appellant's good character was relevant to her credibility and also to the question whether she was likely to have committed the offence. We accept that such a direction should have been given (R v Vye [1993] 3 All E.R. 242) and that it was not given. However, as we pointed out to counsel at the hearing, the evidence of the appellant's character was given by the last

two defence witnesses. Mr Shah would have been aware of the relevance of the evidence and doubtless addressed the assessors on it: but he did not draw the learned judge's attention to the omission in the summing-up. Mr Senaratne referred us to page 531 where Lyons J., towards the end of his summing-up, said that Mr Senaratne had reminded him that he should give a certain direction to the assessors. Mr Senaratne said that His Lordship had invited counsel to tell him if he had omitted anything that should have been included in the summing-up and that it was in response to that invitation that he had raised the matter referred to at page 531. Mr Shankar did not dispute that but simply reiterated that the failure to give proper directions on character deprived the appellant of a fair trial.

In Australia defence counsel, as well as prosecuting counsel, have a duty to bring to a judge's attention the omission of any direction which he should have given. But in England, while prosecuting counsel has that duty, it has been said in an obiter dictum that defence counsel does not (R v Cocks 63 Cr App R.79). However, the Courts have encouraged defence counsel to bring omissions to the judge's attention (R v Southgate 47 Cr App R.252) and in R v Edwards 77 Cr App R.5 Goff L.J. in the Court of Appeal observed that defence counsel in the case before him would have drawn an omission to the attention of the judge if he was acting in the accused person's best interests and had not "formed a view as to the overwhelming nature of the evidence", i.e. that the jury could not be expected to do otherwise than convict even if the direction omitted were given. We consider that the situation in the present case was similar to that referred to by Goff L.J. We shall deal with the strength of the evidence more fully when dealing with grounds 1 and 5 but in our view the evidence in the present case, although circumstantial, was overwhelming and it can be inferred

that Mr Shah saw no point in asking the judge to rectify his omission. In any event, because of the strength of the evidence, even if the appeal might otherwise succeed on ground 3.8, we should apply the proviso to s.23(1) of the Court of Appeal Act.

We defer consideration of the remaining ground based on a specified alleged error of the learned trial judge, ground 5, until we have dealt with ground 1. In the terms in which ground 1 is expressed it is, strictly, not a ground on which an appeal can be based. Section 23(1)(a) of the Court of Appeal Act provides that this Court shall allow an appeal if it "thinks that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard for the evidence..." Those are the terms in which a ground of appeal such as ground 1 should be couched. However, we understood Mr. Shankar to say that the ground was intended, as well as covering all the matters raised in grounds 2 to 5, to raise the issue whether the evidence was capable of supporting a finding that the appellant committed the offence, so that the learned judge should not have left the assessors to give opinions whether she was guilty or not. We are dealing with it on that basis.

We have set out above a summary of the evidence. None of the evidence of any of the prosecution witnesses was inherently incredible. Their credibility was a matter for the assessors to evaluate, as it was for the judge, as the actual adjudicator, when he gave his judgment. The evidence of the prosecution witnesses, if believed, established that the appellant was one of only two persons who had keys to both the security gate and the wooden door of Koya and Company's office. The other person, Mr Nadan, gave evidence that he was at home from about 5 pm and did not come to the scene until 7.30 pm; he was not cross-examined to suggest that he was not telling the truth on

that matter or that anyone else had access to his keys. The evidence of the prosecution witnesses, if believed, also established that the appellant entered Popular Building on her own at about 6.40 pm and that she had done so, also on her own, at about 6.30 pm and come out of the building. That was evidence of opportunity. Mr. Vagh's evidence, if believed, established that she had entered building earlier, at about 6.20 pm or slightly later, gone into Koya and Company's office and taken her office bag away with her. In her witness statement she said that she locked the padlock of the security gate when she left. She subsequently gave no explanation of why she went into the building twice more so soon after going there with Mr. Vagh. There was evidence of financial difficulties and the closing down of Koya and Company's practice and of her anxiety on 22 March 1994 to obtain confirmation that the contents of the office were insured and information about the amount of the cover. But in her witness statement she said that she did not know the amount of the cover. All that was evidence that she had a motive to set fire to the office. It was also evidence that she lied to the police about the state of her knowledge of the amount of the cover. If someone else set the fire, he or she must have either been in the building when the appellant entered it for the third time or entered it after she left and he or she must either have picked the padlock of the security gate and the lock of the wooden door of the office or found them unlocked before entering it and setting the fire. There was no evidence that anyone else was seen there by Mr. Vagh or Mr. Naise and no evidence of anyone having any reason to wish to damage or destroy Koya and Company's office. If anyone had wished simply to damage or destroy the building, he or she need not have wasted time gaining entry to Koya and Company's office. The assessors could, therefore, properly conclude beyond all reasonable doubt that there was no reasonable hypotheses that anyone other than the appellant set the fire. That that was the only alternative hypotheses which needed to be considered; it was so obvious that there was

no need for the judge to stress it. The evidence, if believed, was overwhelming.

We turn now to ground 5. As we pointed out to counsel at the hearing, the evidence of the appellant and the defence witnesses did not plug any gaps in the prosecution evidence. That was at least as strong at the close of the prosecution evidence as it was at the end of the defence case. That being so, what we have said above in respect of ground 1 is applicable to ground 6. At the close of the prosecution case the evidence was capable of sustaining a finding of satisfaction beyond all reasonable doubt that the appellant committed the offence with which she was charged. The learned trial judge could not properly have done otherwise than reject the submission of "no case". It is immaterial, therefore, whether in considering the submission he applied an incorrect test, as asserted by Mr. Shankar.

The ground of bias relied on by the appellant was pre-judgment of the issues by the trial judge. Mr Khan in his affidavit said he had discussed the appellant's case with the trial judge while he was a member of the Queensland Bar (para. 12) and had "in a very detailed manner" briefed him with "the general thrust of the prosecution evidence against" the appellant (para.13) and that they had agreed that the case against her was "very weak" (para. 15), after Mr Lyons had played "the devils advocate" (para. 14). Mr Khan said that if he had appeared at the trial he would have objected to Mr Justice Lyons hearing the case because he had previously had apprised the Judge "of all the relevant facts for and against the appellant" (para 34). He said that "due to unforeseen circumstances" he could not appear at the appellant's trial (para. 28). The appellant's affidavit was in the same terms (para 3 (h)). There are difficulties with the appellant's case on this ground

It emerged in Mr Khan's cross-examination that the "unforeseen circumstances" were that Mr H. Shah, the appellant's Fiji counsel, did not tell him that a date had been fixed for her trial or what that date was. If this was the fact (and we cannot be satisfied that it is) it reflected an extraordinary dereliction of professional duty on the part of Mr Shah who appeared as one of the appellant's counsel on the appeal, but did not give evidence to corroborate Mr Khan.

The committal proceedings against the appellant, when she was represented by Mr Khan, concluded on 7 April 1995 and the Magistrate reserved his decision to 20 June. He found that there was a prime facie case and committed the appellant for trial. Mr Khan said in cross-examination that he learned that the appellant had been committed to trial when he telephoned the Magistrates' Court to learn the result. We would have expected that Mr Shah, who was present when the decision was given, would have informed Mr Khan of the result. On 6 February 1996 Sadal J. fixed the case for trial on 10 June. We would have expected that Mr Shah would have communicated with Mr Khan in advance to ascertain his availability on the likely hearing dates. We would also have expected that Mr Shah would have promptly notified Mr Khan of the actual hearing date and that, if there had been any difficulty, he would have applied without delay to change the date. According to Mr Khan the only communication he ever received from Mr Shah between April 1995 when the committal proceedings ended and April 1997 was a telephone message sometime between January and April 1996 left with his secretary in Brisbane "when you come to the trial, please do not forget to bring your practising certificate". He rang Mr Shah's office two days later on a Saturday morning but Mr Shah was not available and Mr Khan left no message.

The trial commenced on the date fixed. Mr Shah appeared for the appellant and sought leave from the trial judge for the appellant to be allowed to leave the dock and sit at the bar table so that she could more easily instruct him during the trial. The basis of this application was that Mr Shah " had thought another counsel" was going to lead him, "that attempts to communicate" with other counsel in Australia "failed to arouse any response" and as a result he was in some difficulty. The judge allowed this application over opposition from the prosecution. In cross-examination Mr Khan said that in June 1996 "I was available to conduct the defence".

There are further difficulties. Mr Khan came to Fiji in 1996. Initially he said that he saw Mr Shah during that visit and also saw the appellant when she brought him the letter from the judge which is annexed to his affidavit.

Later he said that he was in Fiji between 30 November and 8 December 1996, and again in January - February 1997, and that he did not speak to Mr Shah during these visits, or during his visit in February 1996. He knew that Mr Lyons had been appointed to the High Court at Lautoka, and was likely to be assigned to the appellant's trial but thought he would disqualify himself. If he, Mr Khan, had appeared at the trial he would have objected to Mr Justice Lyons hearing this case. He learnt in his later visits from a police officer that the appellant had been convicted and sent to the prison, but had appealed. He made no further inquiries.

Mr Khan said he first learned that Mr Justice Lyons had been the trial judge when Mr Shah telephoned him in Brisbane on 30 April this year to ask him to obtain some legal text books for

him. This was their first contact for two years.

Although Mr Khan said in his affidavit that he had "apprised" the judge " of all relevant facts for and against the appellant", his cross-examination demonstrated that this statement should not be taken literally. He appeared for the appellant on 9 January 1995 on the return day of the proceedings before the Magistrates' Court. He spoke to Assistant Superintendent (then Detective Inspector) Chand, the police prosecutor, and obtained copies of ten or eleven typed witness statements, some of which were not signed. He took these back to Brisbane with him studied them, and discussed them. He did not receive the rest of the witness statements until the "paper" preliminary inquiry in April 1995. He did not discuss these additional statements with Mr Lyons. There were 24 prosecution witnesses in all but 30 statements because some witnesses gave more than one. He said that in January 1995 he knew "80% of the prosecution case" because Detective Inspector Chand had told him what other prosecution witnesses would say. Mr Khan said that he told Mr Lyons "the gist" of the prosecution case and discussed "the prosecution case" with him.

Mr Lyons referred him to certain legal authorities to cite to the magistrate "in support of the contention that the case against the appellant ought to be thrown out at the Magistrates' Court level" (para 16). Mr Khan used those authorities at the preliminary inquiry. The last time he spoke to Mr Lyons about the appellant's case was before the preliminary inquiry. At that stage Mr Lyons was prepared to come to Fiji to appear for her at her trial without fee provided his expenses were paid.

Mr Khan did not suggest that he had taken detailed instructions from the appellant as to her defence, or had taken statements from any potential defence witness. He did not suggest that he had ever discussed the appellant's defence with Mr Lyons or that he had been in a position to do so.

The evidence for the appellant on this ground , taken at its highest, is that between January and March 1995 Mr Khan discussed with Mr Lyons in Brisbane the prosecution case as contained in 10 to 11 statements out of total of 30, supplemented by information given orally by Detective Inspector Chand said to make up "the gist" of the prosecution case. Any opinion expressed by Mr Lyons as to the insufficiency of the case thus outlined was necessarily provisional. Any gaps in the prosecution case that he identified may well have been closed by the additional witness statements. Moreover, any opinions expressed by Mr Lyons were opinions on a question of law, namely whether the evidence for the prosecution disclosed in the witness statements and outlined by Mr Khan established a prime facie case.

The witness statements were made public during the committal proceedings and became part of the record of the Magistrates' Court which was made available to the trial judge before the trial.

The normal practice in Fiji is for trial judges to read the record of the Magistrates' Court before the trial. See **Rajend Kumar v. The State** (Court of Appeal 5 May 1997 at p. 5). The trial judge followed that practice in this case because he said so on page 2 of his ruling on 11 June 1996 by which he allowed the appellant to sit at the bar table to instruct Mr Shah.

There could be no suggestion that the trial judge was disqualified by apprehended bias from hearing this case merely because he had read the record of the Magistrates' Court before the trial commenced, and no submission to that effect was made. The appellant's case, at its highest, was that Mr Khan had made Mr Lyons aware of 80% of the prosecution case and had discussed its deficiencies with him. As we have said there has been no claim, and there is no acceptable evidence, that the appellant had disclosed any information about her defence to Mr Khan which was passed on by him to Mr Lyons.

This ground of appeal alleges apprehended bias by pre - judgment. The pre-judgment did not relate to any issue of fact in the case nor to the credibility of any witness. The pre-judgment relied on was on an issue of law. No authority was cited, and none is known to the Court, which establishes that a judge is disqualified from hearing, or continuing to hear, a case because he has decided a question of law or ruled that a prime-facie case has been established. Mr Shankar for the appellant fairly conceded that a magistrate who had ruled at a preliminary enquiry that a prime-facie case had been established and was then appointed to the High Court bench, would not be disqualified from hearing the trial. We agree. Similarly a trial judge who rules at the end of the prosecution evidence that there is a prime-facie case is not thereby disqualified from continuing to sit.

The proper legal test in Fiji for apprehended bias in a judicial officer or assessor is not yet settled. The test in England is that established by R v. Gough [1993] AC 646 at 670 - namely whether, having ascertained the relevant circumstances, there was a real danger, in those

circumstances, that the member of the tribunal " might unfairly regard with favour or disfavour the case of a party to the issue under the consideration."

The test in Australia confirmed in **Webb v. The Queen** (1994)68 AL JR 582 at 605 is "……that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it."

The High Court refused to follow the decision in **R. v. Gough**, with Mason C J. and McHugh J. saying at 586:-

"…… public confidence in the administration of justice is more likely to be maintained if the Court adopts a test that reflects the reaction of the ordinary reasonable member of the public to the irregularity in question …… it is the court's view of the public's view, not the court's own view, which is determinative. If public confidence in the administration of justice is to be maintained, the approach that is taken by fair-minded and informed members of the public cannot be ignored."

Auckland Casino Ltd v. Casino Control Authority [1995] 1 NZLR 142, at 149 the Court of Appeal said that " there is little if any practical difference between the tests"

In our view it is not necessary to decide which is the correct test for Fiji in the present appeal and we will not do so. If the true test involves the Court expressing its own view we have no hesitation in saying that in our view there was no real danger or real likelihood of bias on the part

of Mr Justice Lyons against the appellant.

If the test involves the Court expressing its view of what a reasonable fair- minded observer in Fiji would think, the result is same in this case. There is no evidence (we put aside the generality of para 34) that Mr Justice Lyons obtained any information from Mr Khan that he would not have obtained in any event from reading the record of the Magistrates' Court. Any opinions formed and expressed by Mr Justice Lyons were formed on incomplete materials and were opinions on a question of law. The judge had no opportunity to form and did not form any opinion on any question of fact which would arise for decision by him at the trial. The fair-minded observer in Fiji must be assumed for this purpose to know that High Court judges read the record of the Magistrates' Court before the trial, and must rule on legal questions arising during the trial (including the question whether the prosecution has established a prime-facie case) and can do so without disqualifying themselves. Such an observer would not think that Mr Justice Lyons would or might be biased against the appellant because of his discussions with Mr Khan. This ground of appeal must therefore be rejected.

Decision on appeal against conviction:-

Appeal dismissed.

M & Casey

Sir Maurice Casey
Judge of Appeal

I. R. Thompson

Mr. Justice I. R. Thompson
Judge of Appeal

K R Handley

Mr. Justice Handley
Judge of Appeal

JUDGMENT OF SIR MAURICE CASEY AND MR JUSTICE HANDLEY IN THE APPEAL AGAINST SENTENCE

In sentencing the appellant to 3 years imprisonment His Lordship discussed at some length the matters he saw as tending to aggravate or mitigate the offence. Among the former he mentioned that it was committed for the financial benefit of herself and her family; that she embarked on a scheme of deception involving others in order to deflect suspicion from her; that she intended the fire to go beyond the Koya premises by spreading kerosene along the passage; and that she put the businesses and livelihoods of other tenants in the building at risk and betrayed the respect and

trust in which they held her. Although he mentioned a restaurant on the ground floor where people could have been at risk, the fire was promptly detected and there was no suggestion in the evidence that lives were in danger. On the positive side he referred to the appellant's otherwise excellent character and her long history of involvement in community and religious affairs together with the assistance she had given to others less fortunate than herself. Other matters he saw as weighing heavily in her favour were the support she had given her husband in his law practice over many years and the way she had discharged her family responsibilities.

His Lordship rightly stressed the seriousness of arson, emphasising that the Court must ensure that its sentence delivered the right message to the community by marking its condemnation of such conduct and acting as a deterrent to others. Against these considerations he sought to balance what he called the appellant's "personal unique requirements". These were primarily her age and state of health. She was born on 20 June 1930 and was 66 at the time of sentencing, being now just short of 67. A medical report of 14 May 1996 described her as suffering from undiagnosed abdominal pains, hypertension and depression for which she was under medication. There is no medical evidence indicating that a prison term is likely to affect her expectation of life or her ability to serve a 3-year sentence.

The judge also took into account the stress to which she would have been subject from the time her husband died in April 1993, when she attempted to keep his practice intact for their two sons. It failed within 12 months, and it can be accepted that the prospect of losing the benefit of all the work she had put into it must have affected her judgment and driven her to this uncharacteristic

act of criminal folly. Regrettably, of course, she is not the only person who has resorted to fire insurance fraud to recoup business losses.

As His Lordship noted, she has persisted in maintaining her innocence despite what can only be described as an overwhelming circumstantial case against her, reflected in the fact that the assessors took only 15 minutes to reach their verdicts. The lack of a responsible acknowledgement of guilt - or indeed of any expression of remorse for her conduct - precluded the Court from reducing her sentence to reflect such an attitude.

After taking all these matters into account, including the effect on the appellant's family, His Lordship refused the request for a suspended sentence made by appellant's counsel, who accepted that a range of 3 to 5 years imprisonment was otherwise appropriate for offending of this character. He imposed a term at the bottom of that range to reflect the mitigating factors. Without them, and in the absence of a plea of guilty, a term of 5 years would not have been inappropriate for such offending, involving damage of over $90,000 to the landlord alone.

In this Court Mr Nagin criticised the Judge's general approach to sentencing, but we are satisfied that he took all relevant matters into account and indeed went to considerable lengths in explaining his reasons. The seriousness of the crime, its careful planning and execution and the lack of any expression of remorse, together with the need to send a clear deterrent signal to others, were potent factors militating against a suspended sentence and we think the judge was right to reject that option. Immediate imprisonment was called for, and in all the circumstances we cannot regard the

term of 3 years as manifestly excessive or wrong in principle. On the cases referred to us by counsel it is clearly within the range of a properly exercised sentencing discretion for arson of this type.

The real issue on appeal was the propriety on humanitarian grounds of sending a widow of the appellant's age and background to prison for as long as 3 years. There is no doubt that such a term will bear more harshly on her than it would on a younger person, especially as she is approaching the closing years of her life and may have to face the prospect of dying in prison, as Mr Nagin emphasised to us. He asked the Court to extend mercy, which it may do, notwithstanding that the sentence imposed was in all other respects a proper one.

The sentencing of the elderly to prison is always of concern to the Court. There are the conflicting demands between the need to impose a punishment which is seen to reflect the gravity of the crime regardless of the status of the offender; and the ordinary impulses of humanity in considering the impact of a substantial prison term on people less able on account of age to bear it. The Judge recognised this by selecting the minimum from the range of sentences for comparable offences reflected in reported cases. After anxious consideration we have decided that having regard to the appellant's age and in the light of her previous unblemished record, this is a proper case for extending the Court's mercy by reducing the term to 2 years. We would allow the sentence against appeal accordingly.

Sir Maurice Casey
Judge of Appeal

Mr. Justice Handley
Judge of Appeal

JUDGMENT OF MR JUSTICE THOMPSON IN THE APPEAL AGAINST SENTENCE

On the question of sentence I regret that I am not able to agree with the decision reached by the majority of the Court. In my view the sentence of three years' imprisonment imposed by the learned trial judge was manifestly excessive.

I agree with him that it is necessary to consider first the scale of sentences generally imposed for offences of the same type and quality. At the trial Mr Shah said that for offences of arson it was imprisonment for three to five years. Mr Senaratne did not disagree with him. It is proper, therefore, to take that as the scale.

It is then necessary to decide where in the scale the offence comes. The appellant's offence clearly comes towards the top of the scale. It was planned in advance and was committed for gain. It damaged the landlord's property and put at risk the property, and possibly the livelihood, of other tenants. The total value of the property put at risk was at least several hundred thousand dollars. On the other hand it appears that no lives were endangered, although as in most fires there could have been risk to the life and limb of persons fighting the fire and there may have been people in the take-away food shop on the ground floor. In my view 4½ years' imprisonment would be the appropriate sentence in the absence of aggravating and mitigating circumstances.

The next step is to examine those circumstances and to increase or reduce that sentence accordingly. There were no aggravating circumstances separate from the matters I have referred to above as relevant to the seriousness of the offence. The appellant did not plead guilty or do anything to show that she was suffering remorse. No doubt her financial problems played an important part in her decision to commit the offence. But that is not a mitigating circumstance. Many offences of arson for gain, and indeed many other offences of a dishonest nature against property, are committed because of financial problems; to accept financial problems as a mitigating factor would send the wrong signal to persons tempted to commit such offences because of their financial problems.

However, there were a number of mitigating factors to which, quite rightly, His Lordship said considerable weight had to be given. First, there were the appellant's age and ill health. Then there was the sudden death of her husband, a respected barrister and solicitor and former leader of the parliamentary opposition in Fiji, less than a year before and the impending closure of his legal practice in Lautoka which she had hoped would be taken over by their sons in a few years' time; the bottom had fallen out of the appellant's world. There can be no doubt that that would have caused her great distress. There was no psychiatric evidence, however, that it caused her to act irrationally. Finally, she was not only of previous good character but had made significant contributions to society in Fiji, particularly the Islamic community. As Lyons J. noted, throughout her life she had assisted those in the community less fortunate than herself. While a greater sense of responsibility and

observance of the law is rightly expected of people who hold prominent positions in the community, such a person is entitled to be given credit for the contribution which he has made to society.

I find nothing wrong in Lyons J.'s taking into account all the factors which he did. Where I consider that he erred was in the weight which he gave them. He may have erred on the side of severity in order that the Court might not be perceived to be favouring the appellant because of Mr Koya's close connections with the administration of justice over many years or her own prominent position in the community. Whatever the reason may have been, I have no doubt that he did so err.

The object of the sentencing process is to ensure both that sentences in different cases are consistent with one another and that in each case the sentence is appropriate both to the offence and to the offender and the circumstances in which the offence was committed. If at the end of the process the sentence is clearly not appropriate to one or other of those, something has gone wrong with the process of calculating the sentence. In my view something has clearly gone wrong with that process in the present case.

I consider that the error lay in the weight given to the age and ill health, albeit not very serious ill health, of the appellant, a person entitled to be given some credit for her significant and lengthy contribution to society. A reasonable member of the public would not, I believe, regard a long sentence of imprisonment as appropriate in the case of a person in the late stages of his or her life and in ill health, except in special circumstances. I suggest that those circumstances are:-

(1) where the person is likely to commit further serious offences if at large;

(2) where the person has obtained gain from his or her offence and has not repaid it; and

(3) where the offence is so repugnant to reasonable people in society that they would be offended by the person being at large among them.

One matter to be taken into account in sentencing for an offence is whether the sentence needs to act as a deterrent to others. In my view, in most cases the imposition of any custodial sentence of substantial length is likely to be a sufficient deterrent to elderly persons of previous good character. Imposing shorter sentences on the elderly than on younger persons would not reduce the deterrent effect on younger offenders of the longer sentences imposed on such younger offenders for offences of the same degree of seriousness.

I have come to the conclusion, therefore, that if proper weight is given to the mitigating factors of the appellant's age, ill health and lengthy period of service to the community, the correct sentence to impose on her is imprisonment for one year.

I have no doubt that a custodial sentence had to be imposed and that it ought not to be suspended. That would be too lenient and remove the deterrent effect of the sentence on other elderly persons. On the other hand, if as Mr Nagin predicted, serving a custodial sentence in prison has a serious adverse effect on the appellant's health, there is provision in Part XI of the Prisons Act (Cap.86) for the prison authorities to permit her to serve the sentence extramurally.

I would, therefore, allow the appeal against sentence, set aside the sentence of imprisonment for three years and impose a sentence of imprisonment for one year.

I. R. Thompson

Mr. Justice I. R. Thompson
Judge of Appeal

ORDER OF THE COURT

The appeal against conviction is dismissed and in accordance with the majority opinion of the Court the appeal against sentence is allowed by reducing the term of imprisonment from three years to two years.

M E Casey

Sir Maurice Casey
Presiding Judge