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IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0024 OF 2000S
(High Court Criminal Appeal No.HAA016 of 2000)

BETWEEN:

VINOD KUMAR

Appellant

AND:

THE STATE

Respondent

Coram:

The Rt. Hon. Sir Maurice Casey, Presiding Judge
The Hon. Sir Rodney Gallen, Justice of Appeal
The Hon. Mr. Justice John E. Byrne, Judge of Appeal

Hearing:

Monday, 21 May 2001, Suva

Counsel:

Mr. V. M. Mishra and Mr. L. S. M. Vaurasi for the Appellant
Mr. K. Tunidau for the Respondent

Date of Judgment: Thursday, 24 May 2001

JUDGMENT OF THE COURT

This is an unusual case. On the 7th of July 1995 a bank robbery took place at Suva when a very substantial amount of money was taken from the Australia and New Zealand Bank Walu Bay. Four persons were subsequently charged with robbery with violence in respect of this incident. They were Abdul Munif, Hem Bahadur, Shamsheer Ali and the above-named appellant. Bahadur and Ali pleaded guilty before the Magistrate and were each sentenced to 5 years imprisonment the maximum term which he could impose. Munif disputed the sum which was actually taken. What was described as a Newton hearing was held in order to determine the amount. At the conclusion of this hearing Munif pleaded guilty and was sentenced to 4 years imprisonment. The appellant had also been charged with the robbery it being contended that he had provided the get-away car

and had driven the other participants away after the robbery had taken place. The case against him did not proceed and he remained on bail. His case was called before the Chief Magistrate at Suva on the 18th of March 1998 and adjourned on a number of occasions until a bench warrant was issued on the 28th of September. In the meantime the appellant appeared voluntarily before the Chief Magistrate and the bench warrant was cancelled. Bail was extended and the hearing actually commenced on the 17th of June 1999. At that hearing the State wished to tender a statement which it claimed the appellant had made to the police which contained admissions. The Defence sought a trial within a trial to determine the admissibility or otherwise of the statement. The prosecution advised the Chief Magistrate that the Court was bound by a direction from the Chief Justice which provided that trials within trials should no longer be held in Magistrates Courts. The direction went on to provide a procedure which was to be followed in cases where previously a trial within a trial might have been held. This provides that the prosecution is to call all its witnesses. After all witnesses for the prosecution have been called the defendant is to be given the opportunity to give evidence if he wishes exclusively on the taking of the caution statements. He can then be examined and cross-examined only on matters concerning the taking of the statement. The defendant may also call witnesses to give evidence before the Court exclusively on the taking of the caution statement. This procedure contains an important safeguard for an accused person. An accused may give evidence as to the admissibility of the statement without losing the right to make an unsworn statement from the dock or to decline to give evidence in the case generally. Unfortunately in this case the procedure laid down by the Chief Justice was not followed.

The prosecution led its evidence but the appellant was given no opportunity to give evidence relating exclusively to the taking of the statement. Nor does any ruling appear to have been given as to the admissibility of the statement although this was plainly put in issue by the request of the Defence for a trial within a trial. The prosecution continued calling the evidence upon which it relied and this included the evidence of one Shamsheer Ali who was plainly an accomplice who had already been convicted of the robbery and was at the time serving a 5 year prison sentence imposed in respect of his part in it. By the time he gave evidence he conceded under cross-examination that he had been released from jail as an extra mural prisoner. This release occurred on the 3rd of March 1999. Ali had made an original statement to the police on the 8th of July 1995. In this statement he neither named nor referred to the present appellant. On the 28th of January 1999 he made a second statement. In this statement he implicated the present appellant by name and said that the robbery had been planned at the home of the appellant. He also indicated that the accused was to provide a taxi as transport for the robbery and all would share equally in the proceeds. At the conclusion of the State case the Defence made a submission of no case to answer. This submission was rejected by the Chief Magistrate and the Defence case then proceeded. The appellant gave evidence under oath and was cross-examined. The Defence also called other witnesses. At the conclusion of the Defence case the trial was adjourned to allow written submissions to be made and the Chief Magistrate gave his decision resulting in conviction of the appellant on the 24th of January 2000. The decision concluded in the following terms:

"PW6 [the interviewing police officer] was thoroughly cross-examined by Defence Counsel. However, in my view, nothing was

shown to entitle the Court to reject PW6's evidence. There was no credible evidence presented to entitle the Court to reject PW6's evidence. In my view, the accused's confession was voluntarily given. No credible evidence was given to show that the confession was unfairly obtained. I therefore have no alternative, but to accept PW6's evidence and accept that the accused voluntarily confessed to the crime on 7th July 1995.

PW11's evidence further corroborated the accused's confession to PW6. PW11 was the Walu Bay ANZ Bank Security Guard, on 7th July 1995. He was earlier convicted and sentenced to 5 years imprisonment for the same ANZ Bank robbery. He gave evidence for the State.

On oath, PW11 said that, the accused, himself and two others planned and executed the robbery on the Walu Bay ANZ Bank on 7th July 1995. He said on oath that, two weeks prior to the robbery, he along with the accused and two others planned the robbery at the accused's home. It was agreed at the meeting that the accused would provide taxi BF970 as the transport for the robbery. He said that all agreed to share equally in the stolen money after the robbery.

PW11 was thoroughly cross-examined by Defence Counsel. However, his evidence was unshaken. I am therefore left with no alternative but to accept PW11's evidence.

In my view, having accepted PW6's and PW11's evidence, the prosecution has provided the necessary link between the two men who violently robbed the ANZ Bank staff at Walu Bay on 7th July 1995 and the accused. The accused confessed to the crime to PW6 (the interviewing police officer). He did so voluntarily. PW11 (a convicted bank robber) implicated the accused on oath. PW6 and PW11's evidence, were in my view not discredited. The prosecution has therefore proven beyond reasonable doubt that the accused, was party to those who violently robbed the ANZ Bank staff, at Walu Bay, on 7th July 1995. I therefore find the accused guilty as charged."

The appellant then appealed to the High Court and the State cross-appealed contending that the 2 year sentence imposed upon the appellant was inadequate. The

Judge in the High Court came to the conclusion that the failure of the Chief Magistrate to follow the procedure set down by the Chief Justice when determining the admissibility or otherwise of the confession statement, together with a concern that the Chief Magistrate may have placed an onus on the appellant to prove that the statement was given involuntarily, were sufficient to exclude the statement from consideration.

He then considered the only other evidence against the appellant which was the evidence of the accomplice Shamsheer Ali. The Judge in the High Court said :-

"21. The evidence given by Mr. Ali is important. Apart from the alleged Confession Statement it is the main plank of the Prosecution Case.

Mr. Ali was an accomplice in this Bank Robbery, and he is presently serving a 5 year prison sentence after pleading guilty before the Magistrate. Mr. Ali described how, as an employee of the Bank he was concerned in the Robbery. Two of his Co-Defendants (Hem Bahadur and Abdul Munif), who entered the Bank, threatened Staff and appropriated the Bank money. Mr. Ali described how a 4th Person was involved in the robbery itself and in the pre-planning for it - namely this Appellant.

Mr. Ali described to the Magistrate how the four of them met at Mr. Kumar's house and that Mr. Kumar (a part-time taxi driver was recruited as the driver for the 'getaway' car/taxi to be used in the Bank Robbery on 7th July 1995.

22. Mr. Kumar (the Appellant), according to Mr. Ali's evidence, was outside the Bank during the robbery and that after the money was removed he (Kumar) drove the two (Munif and Bahadur) away from the scene. The plan was for the Appellant to collect and return the thieves (Munif and Bahadur) from and to his house and to share the money between the four of them. Mr. Kumar was the 'getaway' driver - and played an essential and important part in the Robbery Scheme.

23. I have carefully read the record of Mr. Ali's evidence, in which he implicates the Appellant. I also note the references made by the Magistrate in his Judgment (at pages 210 and 211 of the Bundle). The Magistrate has indicated that Mr. Ali's evidence was corroborated by the alleged confession made by the Appellant. I have already explained my ruling concerning the non-acceptance into evidence of the Caution Statement given to the Police by the Appellant. However, the Magistrate plainly looked carefully at the evidence given by Mr. Ali. He would have been aware that Mr. Ali was an accomplice in the Bank Raid but decided he could accept the evidence given as accurate and true.

24. There were further parts of the Magistrate's Judgment Summary which I wish to mention. Dealing with the evidence of Mr. Ali (the Accomplice) the Magistrate says (at page 211):

"PW.11 (Mr. Ali) was thoroughly cross-examined by Defence Counsel. However, his evidence was unshaken. I am therefore left with no alternative but to accept PW.11's (Ali) evidence."

That approach is unfortunate. Just because the evidence was unshaken by cross-examination does not necessarily make it true. Liars can sometimes resist the most persistent cross-examination. However the Magistrate decided in the event to accept the evidence of Mr. Ali and I would not interfere with the Magistrate's decision on this point. He was entitled to accept the evidence of Mr. Ali even though (now that the Caution Statement was excluded) there was no corroboration.

25. The other matter was at page 40 of the Bundle where the Magistrate accepted into evidence the Statements to the Police given by Mr. Ali. The Magistrate was wrong to do this - because what Mr. Ali said in his Statements, as "Out of Court" Statements, was hearsay. They were evidence that what was in the Statements was said by Mr. Ali but not evidence of the truth of what was said.

26. With these reservations, and after careful consideration of Mr. Ali's evidence and the Magistrate's acceptance of it - I reject the 4th Ground of Appeal."

On the cross-appeal the Judge analysed the approach which the Magistrate

had adopted towards sentencing and concluded that the reductions which the Magistrate had given for what he saw as mitigating factors were manifestly excessive. He considered a total reduction of 3 years from a starting point of 5 was not appropriate and came to the conclusion that a proper sentence was 3 years and 9 months. He accordingly increased the sentence to imprisonment for that period.

The appellant now appeals to this Court against both the decision in the High Court confirming his conviction in the Magistrates Court and against the increased sentence imposed upon him.

The first and second grounds raised in support of the appeal submit that the Judge ought not to have relied on the uncorroborated evidence of the accomplice in discussing the appeal against conviction and that in the circumstances of this case the Chief Magistrate's reliance on that evidence was plainly influenced by the confession statement which he had before him and which the High Court has held ought not to have been admitted. We agree with the decision of the Judge that the confession ought not to have been admitted. The Judge nevertheless on his analysis of the decision of the Chief Magistrate came to the conclusion that the Chief Magistrate was entitled to rely upon the uncorroborated evidence of the accomplice Shamsheer Ali and the conviction could stand. We accept that the Chief Magistrate was entitled to rely upon the uncorroborated evidence of the accomplice if on a consideration of all the material before him he came to the conclusion that it was appropriate to do so bearing in mind the principle that it is dangerous

to rely upon the uncorroborated evidence of an accomplice. We are concerned however that in coming to his conclusion the Chief Magistrate first concluded that the confession of the appellant was voluntarily given and then considered that the confession was itself corroborated by the evidence of the accomplice. In the final paragraph of his decision the Chief Magistrate says "In my view having accepted PW6's and PW11's evidence the prosecution has provided the necessary link between the two men who violently robbed the ANZ Bank staff."

It is plain from this statement that the Chief Magistrate came to his conclusion with both statements of evidence in his mind. As the High Court Judge concluded, in our view correctly, he ought not to have had in mind the confession. Accordingly we must disagree with the Judge in the High Court that in the circumstances the Chief Magistrate's analysis of the evidence was sufficient to justify a conviction based on the uncorroborated evidence of the accomplice. It is impossible to say that in accepting that evidence the Chief Magistrate was not influenced consciously or unconsciously by his acceptance of the confession. Accordingly we consider that both conviction and sentence must be quashed. The question then arises as to what is an appropriate disposition of this matter. Having regard to the circumstances we consider that the matter ought to be remitted to the Magistrates Court for re-trial. The appeal will therefore be allowed. Both conviction and sentence are quashed. The matter is remitted to the Magistrates Court for a new trial at which the question of admissibility may also be raised. We make no comment on the sentence. If the appellant is ultimately re-convicted then quite different considerations may

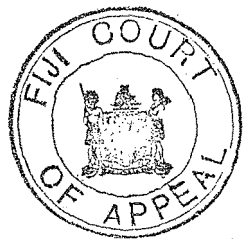
arise and this will no doubt be taken into account by whoever is required to sentence the appellant if this becomes necessary as a result of the re-hearing.

Result

Appeal allowed, conviction and sentence quashed. Matter remitted to Magistrates Court for a new trial.

M. G. Casey

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Sir Maurice Casey
Presiding Judge



R. Gallen
.....
Sir Rodney Gallen
Justice of Appeal

John E. Byrne

.....
Mr Justice John E. Byrne
Judge of Appeal

Solicitors:

Messrs. Mishra Prakash & Associates, Suva for the Appellant
Office of the Director Of Public Prosecutions, Suva for the Respondent