IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

Criminal Appeal No. 80 of 1959

Between:

1. ABDUL SATTAR
2. RAM GOPAL — Appellants

v.

REGINAM — Respondent

Riot—Unlawful assembly—proof required in cases of—whether proof can be implied from other evidence—fines principle to be applied in imposing.

Held.—(1) In cases of unlawful assembly the prosecution must first show:

(*a*) that three or more persons assembled;

(*b*) that they assembled with intent to carry out a common purpose; and

(*c*) that the persons assembled conducted themselves in such a manner as to cause persons in the neighbourhood reasonably to fear that they would commit a breach of the peace; or, that persons in the neighbourhood are caused reasonably to fear that the persons assembled will, by such assembly, needlessly and without reasonable occasion, provoke other persons to commit a breach of the peace;

(2) In cases of riot the prosecution must show:

(*a*) that an unlawful assembly has begun to do what it assembled to do;

(*b*) that they committed a breach of the peace in so doing; and

(*c*) that the execution of the common purpose by a breach of the peace was to the terror of the public;

(3) The common purpose need not be that for which the persons originally assembled;

(4) The common purpose can be implied from the actions of the assembly;

(5) Fear by persons in the neighbourhood can also be implied by the nature of the assembly, its conduct, numbers and such relevant matters;

(6) The relevant part of s. 78 of the Penal Code refers to persons who are in the neighbourhood and not to neighbouring residents;

(7) Terror to the public can be inferred from the nature of the breach of the peace by an unlawful assembly and other relevant factors;

(8) The law recognizes no right of public meeting in thoroughfares, which are dedicated only for public passage and re-passage;

(9) It is unnecessary to call direct evidence of the facts of a natural consequence of events so far as fear in or terror to the public is concerned.

(10) In some cases fear or terror might not be a natural consequence of events and direct evidence would be required;

(11) In cases of riot, no person who is alleged to have taken part should be convicted on the evidence of one witness alone where there is any possibility of mistake. In such cases there should be ample corroboration of identification;

(12) The practice of increasing a fine, in order to increase the period of imprisonment in default, should not be followed.

Appeal dismissed.

Cases cited:

Harrison v. Duke of Rutland (1893) 1 Q.B., 142; *R. v. Sharpe* (1957) 1 All E.R., 577, 579; *Field v. Metropolitan Police Receiver* (1907) 2 K.B., 853;

F. M. K. Sherani for appellants

J. F. W. Judge, Acting Solicitor-General, for respondent

LOWE, C.J. [22nd January, 1960]—

These appeals are consolidated. Both appellants were convicted of taking part in a riot at Suva on the 9th day of December, 1959. Each was fined £101 and, in default of payment of the fine, each was to serve six months imprisonment. The charges against the appellants were laid under section 80 of the Penal Code but in order to ascertain whether or not the prosecution has proved that the appellants took part in a riot it is necessary first to consider section 78 of the Code. That is as follows:—

> "When three or more persons assemble with intent to commit an offence, or, being assembled with intent to carry out some common purpose, conduct themselves in such a manner as to cause persons in the neighbourhood reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such assembly needlessly and without any reasonable occasion provoke other persons to commit a breach of the peace, they are an unlawful assembly.
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> It is immaterial that the original assembling was lawful if, being assembled, they conduct themselves with a common purpose in such a manner as aforesaid.
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> When an unlawful assembly has begun to execute the purpose for which it assembled by a breach of the peace and to the terror of the public, the assembly is called a riot, and the persons assembled are said to be riotously assembled."

It is clear from that section that the prosecution must first show—

(*a*) that three or more persons assembled;

(*b*) that they assembled with intent to carry out some common purpose; and

(*c*) that the persons assembled conducted themselves in such a manner as to cause persons in the neighbourhood reasonably to fear that they would commit a breach of the peace.

There is an alternative to (*c*), namely that persons in the neighbourhood are caused reasonably to fear that the persons assembled will by such assembly, needlessly and without reasonable occasion, provoke other persons to commit a breach of the peace.

When the prosecution has proved those facts, including one or other of the alternatives I have referred to, it has shown that there was an unlawful assembly even if the persons assembled lawfully in the initial stages.

In order to prove that there was a riot the prosecution must go on to show that three or more persons, still assembled unlawfully, have—

(*a*) begun to do what they assembled to do;

(*b*) committed a breach of the peace in so doing; and

(*c*) that the execution of the common purpose by a breach of the peace was to the terror of the public.

It is of assistance to any trial court if clear and direct evidence of all of the essential elements of an offence is led by the prosecution but in the instant case it is only shown by oral evidence that, at the material time and place—

(*a*) there were 2,000 to 3,000 people assembled in various groups;

(*b*) each appellant was actually in a large group of people which went to make up those numbers;

(*c*) all of the assembled people were disorderly and many were abusing about twenty members of the police force who were present;

(*d*) many of them were throwing stones at private property; and

(*e*) each of the appellants threw a stone, the first appellant was also "yelling and shouting" and the second appellant was stamping his feet on the ground, waving his fist and "looking fierce".

Apart from evidence of the identification of each appellant and of arrest, that is the sum total of the prosecution case.

The defence of the first appellant was that he was working in a yard at the corner of two roads when he heard shouting and two police constables (the prosecution said one constable) came into the yard, when the crowd was running in that direction, and arrested him. Neither he nor his witnesses were believed as to that but no doubt the trial Magistrate believed the witness Semesi Belo who said that he heard the noise of the crowd shouting and glass breaking and was frightened. The fact of him being frightened supports the inference which I am asked to draw, and which the Magistrate clearly must have drawn, that the execution of a common purpose (as to which I must also be satisfied) by a breach of the peace, which was clearly taking place at the time, was to the terror of the public. Both of the prosecution witnesses said that they also were frightened.

There is no doubt regarding the numbers present and the question then arises as to whether or not they assembled with intent to carry out a common purpose. The fact that, in the first instance, each of them went to a certain part of a public road in the city of Suva is of no importance so far as evidential value is concerned but when they got there they assembled in very large numbers and became disorderly; many of them shouting and some of them abusing the police. The defence did not cross-examine with a view to establishing the fact that there was no common purpose and appear to have accepted the fact that there was but, of course, the onus of proof remains on the prosecution. It is generally impossible, in the circumstances disclosed in the instant case, to ascertain the nature of the common purpose before the assembly has commenced to carry it out but the "shouting and yelling" and the abuse of the police show a common intent to defy law and order by resorting to disorderly conduct which is, in itself, an offence. In the absence of any evidence to the contrary and in view of the large numbers assembled, the trial court was entitled to infer that the purpose of those assembling at a certain place in large numbers was for a purpose common to all. As the learned author states in Russell on Crime (11th Edn.), 272:

> " Even though the parties may have assembled in the first instance for an innocent purpose, yet if they afterwards, upon a dispute arising amongst them, form themselves into parties, with promises of mutual assistance, and then make an affray, it is said that they are guilty of a riot, because upon their confederating together with an intention to break the peace, they may as properly be said to be assembled together for that purpose from the time of such confederacy, as if their first coming had been on such a design; and if in an assembly of persons met together on any lawful occasion whatsoever, a sudden proposal is started of going together in a body to pull down a house, or inclosure, or to do any other act of violence, to the disturbance of the public peace, and such motion is agreed to, and executed accordingly, the persons concerned are guilty of riot; because their associating themselves together, for the new purpose, is in no way extenuated by their having met at first upon another."

It is not suggested that any meeting was called and in fact the assembly was in a public road. The law recognizes no right of public meeting in thoroughfares, which are dedicated only for public passage and re-passage. *Harrison v. Duke of Rutland* (1893) 1 Q.B. 142.

In view of the very large assembly it is reasonable to suppose that when those so assembled conducted themselves in concert, and noisily, people in the neighbourhood would fear that they would commit a breach of the peace. That also is a reasonable, in fact an inescapable, inference to be drawn from the evidence. A man is presumed to have intended the natural and probable consequences of his act. That, as stated in Russell, 37 " is a presumption adopted in the interests of the administration of justice ". Although a crowd might not, and possibly at times would not, intend that persons in the neighbourhood would be put in fear, a similar principle applies in that the trial court is entitled to conclude that natural and probable consequences flow from the event in riot and similar cases. The same principle also applies in relation to the words " to the terror of the public " in the last paragraph of section 78.

Counsel for the appellants argued that, on the authority of *R v. Sharpe* (1957) 1 All E.R., 577, 579, there must, in this Colony and because of the terms of section 78, be express evidence that persons in the neighbourhood were in fear as a consequence of the assembly and that, as a result of a riot, the execution of the common purpose was, in fact, to the terror of the public. I do not find that to be so. In that case the Court of Criminal Appeal (*Lord Goddard, C.J.*), in dealing with a case of affray, and after reviewing the opinions of certain authors on the subject, referred to the case of *Field v. Metropolitan Police Receiver* (1907) 2 K.B., 853, in which the Divisional Court laid down what were the necessary elements to constitute a riot, one of which was (in England) " force or violence displayed so as to alarm at least one person of reasonable firmness and courage ". The judgment goes on:

> " From this it is deduced that evidence to that effect must be given, though not necessarily, we think, by calling a person to say: " I was terrified." It might be enough for a witness to say that persons appeared to be alarmed. Now it is true that affrays are usually classed along with unlawful assemblies, riots and routs as offences against the public peace but in this appeal we have to deal only with an affray."

Later in the judgment the learned Chief Justice said that the question of proof of the element referred to in *Field's* case may require consideration at some future time, which *dictum* gives an indication that the Court of Criminal Appeal was not in agreement with the finding that express proof was necessary. The learned Chief Justice later said:

> " If there were a repetition of the Trafalgar Square riots which took place towards the end of last century when most of the club windows in Pall Mall were smashed by an angry mob it would seem superflous if someone had to go into the witness box and say that he or some passers-by felt, or appeared, afraid or apprehensive."

I am, with the greatest respect, in complete agreement with the *dictum* and would add that under the law as at present in force in Fiji, if evidence shows that events took place which, of their very nature, must have put people in fear or terror it is not only superfluous but also unnecessary to call direct evidence of the fact of a natural consequence of those events so far as fear in or the terror of the public is concerned.

That is the position in this case, and I am fortified in my view by a passage in Russell, 270, where it is stated:

> " Riot must be *in terrorem populi*, i.e. in every riot there must be such actual force or violence, or at least such apparent tendency thereto, as would naturally strike terror into the people; "

It is significant that the learned author has chosen the word " naturally " and did not say " as would strike terror into the people ".

I would make it clear that I am not generalizing because there might be cases of unlawful assembly or riot where such consequences might be anything but natural and certain. In such cases it might be essential to bring oral evidence of the existence or the likelihood of the existence of fear. Counsel for the appellant claimed that evidence of fear whether express or implied must relate, in the case of unlawful assembly, to persons who actually lived in the neighbourhood but that is quite untenable and section 78 does not imply that such should be the case. It relates to any persons who happen to be in the neighbourhood of the assembly at the time of the event. In the instant case the two prosecution witnesses and one defence witness were in the neighbourhood and admitted to being afraid.

When the police arrived on the scene the unlawful assembly started to throw stones and sticks and that was accompanied by abuse of the police. There was so much of it that the evidence could leave no doubt that a common purpose of defying law and order had begun to be carried out and as this was accompanied by disorderly conduct and the throwing of stones at private property with no evidence or suggestion of provocation from the owners, breaches of the peace were taking place. The noise of the crowd shouting and of breaking glass was shown, by cross-examination, to have frightened the defence witness to whom I have referred and as there were 2,000 to 3,000 people in the groups assembled, shortly before 7 p.m., that is not surprising. Even without the evidence of that defence witness it was shown by the prosecution that conditions were such that an unlawful assembly had developed into a riot as defined in the last paragraph of section 78.

The only ground of appeal which I find it necessary to set out is ground (i) which is as follows:

> " The Law relating to cases of riot is very clearly laid down by His Lordship the Learned Chief Justice of Fiji in Criminal Appeal No. 13 of 1958 between Ram Phal and others, Appellants, and Regina, Respondent as follows:—
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> > ' In cases of riot, it is an accepted principle that without ample corroboration, no accused person who is alleged to have taken part in the riot should be convicted on the evidence of one witness alone. It would be unsafe to act otherwise.'
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> The learned trial Magistrate erred in law in failing to direct himself accordingly."

It would make the work of this Court much easier if the law relating to cases of riot was as brief as Counsel for the defence implied but, of course, that is not so. As to the *dicta* referred to in Criminal Appeal No. 13 of 1958, that was an intended statement of a principle of practice which is generally followed by the Courts in such cases. Unfortunately, because of an omission, it is a misstatement as should have been apparent to Counsel from another portion of the same judgment in which it is clearly stated:

> " It would be extraordinary indeed if, following such events, there were no inconsistencies in the evidence but it must be remembered also that because of the confusion and the excitement it can be expected that the trial Magistrate would look with great care at the evidence of identification because that identification was, generally speaking, in the heat of the moment. However, it is true that some of the witnesses knew many of the appellants personally."

Including the omission from the portion of the judgment referred to in the ground of appeal, the accepted principle, as I understand it, is that in cases of riot no person who is alleged to have taken part in a riot should be convicted on the evidence of one witness alone where there is any possibility of mistake. In such cases there should be ample corroboration of identification.

In the instant case each appellant was satisfactorily identified by police constables who watched the appellants for sufficient time to have " pin-pointed " them in the crowd and, no doubt following orders which they had already received, when the constables were instructed to charge the mobs each constable went after the particular appellant he had " pin-pointed " and the evidence shows without doubt that they were the men arrested. The learned Magistrate was justified in these circumstances in accepting the evidence of identification.

As each appellant took an active part by throwing stones and conducting himself in a disorderly manner in common with many others the trial Magistrate had no alternative but to convict. Counsel for the Crown has urged that, generally speaking, a fine is inappropriate as a punishment for rioting and has asked this Court to set aside that present sentence and to substitute a term of imprisonment. I have given careful thought to that question but I have come to the conclusion that it would be unjust in all the circumstances to accede to the request. I know from the records of lower court cases which have come before me that several other persons were treated by the lower court in similar manner and I would not feel justified in treating the appellants more harshly than those who were dealt with by the

lower court in respect of the same event and who have paid their fines or have accepted the penalty for non-payment. Furthermore, the legislature has seen fit to make a wise provision which permits the trial Magistrate a discretion in the matter and I cannot say that the trial Magistrate has acted other than correctly within that discretion as between the alternatives of fine or imprisonment. He has, however, acted on a wrong principle. I was informed by Counsel for the appellants that the amount of £101 was determined by the lower court in order that the term of imprisonment which he could order in default of payment would be six months, having section 30 of the Code in mind. There can be no doubt that the ability of the appellant to pay a fine should be a consideration although such a principle cannot always be applied because of a lack of certain knowledge of such ability and other relevant factors but the unusual amount of the fine shows that the prime reason for such a sum was the question of possible or likely imprisonment in default. That is a principle which should not be followed. The trial court should fix a penalty which meets the crime irrespective of the default which non-payment of a monetary penalty carries. The top limit of the term of imprisonment in default is determined by the legislature in section 30 and there should not be any artificial penalty imposed to increase the term. In other words, the fine is the punishment on conviction and the default for non-payment is incidental. I have not been given any reason which would justify a true reduction of the fines.

As will be already apparent, I have not been satisfied by Counsel for the appellants that there is anything wrong in law with the conviction of each appellant. Although they are not the subject of an appeal, the fines in each case are reduced to £100 and the default portion of the sentences to three months imprisonment. In other respects the appeals are dismissed.