CHATTUR LAL

v.

REGINAM

[SUPREME COURT, 1964 (Hammett P.J.), 7th, 21st August]

Appellate Jurisdiction

Criminal law—practice and procedure—witness—leave to prosecution to call witness after close of case for defence—new matter which the prosecutor could not have foreseen—Penal Code (Cap. 8) s.106—Criminal Procedure Code (Cap. 9) s.202.

At the trial of one Shiv Nath for the offence of selling liquor without a licence the appellant gave evidence for the defence that he had conspired with a police constable to manufacture a false case against Shiv Nath. At his own trial for perjury in relation to this evidence and during his cross-examition the appellant for the first time put forward the allegation that he had told Inspector Raikoso of the alleged conspiracy. Inspector Raikoso had given evidence at a trial within a trial during the prosecution case, but not during the trial of the main issues. The magistrate gave leave, after the close of the defence case for Inspector Raikoso to be called by the prosecution in order to deny the appellant's allegations.

Held: The magistrate properly exercised the discretion given to him by section 202 of the Criminal Procedure Code.

Appeal against conviction by a Magistrate's Court.

F. M. K. Sherani for the appellant.

B. A. Palmer for the Crown.

HAMMETT P.J.: [21st August 1964]—

The appellant was convicted by the Magistrate's Court of the First Class sitting at Nausori on two counts of perjury contrary to section 106 of the Penal Code.

He appealed against conviction only on five grounds. One ground of appeal was abandoned and no argument was adduced in support of another ground of appeal. Neither of these grounds had any merit and counsel for the appellant said he relied on the following grounds only.

"1. The learned Magistrate erred in law in allowing Police Inspector Jeremaia Raikoso to be recalled after the close of the case for the defence.

2. As a result of the contradictions and inconsistencies in the evidence of Shiri Chand Shandil and between Shandil's evidence and the evidence of other witnesses no reliance on Shandil's evidence could have been placed and the learned trial Magistrate erred in holding to the contrary.

3. The verdict is unreasonable and cannot be supported having regard to the weight of the evidence adduced."

As an alternative to the first ground of appeal, two subsidiary grounds of appeal were put forward, which appear to be particulars of the last ground of appeal and were so considered.

The charge arose out of the evidence given by the appellant as a witness for the defence in the case of *Regina v. Shiv Nath,* a criminal case heard by another Magistrate in the Magistrate's Court at Nausori on 5th April, 1963. In that case Shiv Nath, a retail storekeeper, was charged with the offence of selling liquor without a liquor licence contrary to section 76 (1) (a) of the Liquor Ordinance, 1962. The case against Shiv Nath was that on 5th April, 1963, at his retail store at Naselai, Nausori, he sold a half a bottle of liquor to a number of persons who came to his store that night in a taxi driven by one Shiri Karan. At the time of the sale Chattur Lal, the appellant, handed one Shiri Chand Shandil a £1 note and this was used by one Ram Shankar Maharaj to buy the liquor from Shiv Nath. The liquor had just been taken to the car when a Police Constable, who with a Special Constable, had been keeping the store under observation, came to the car and took possession of the liquor. He then spoke to Shiv Nath who admitted he had sold the liquor and said he would not do so again. All these facts were supported and asserted by the appellant in his statement to the Police later that evening at the Police Station.

Shiv Nath was later charged, and at his trial the appellant gave evidence for the defence in direct contradiction of this previous statement to the Police. He then swore that in fact no liquor had been sold by Shiv Nath that night. He gave evidence to the effect that, he, the appellant, and the Police Constable had conspired to manufacture a false case against Shiv Nath, for which purpose the Constable had provided him with a £1 note and the bottle of liquor concerned. He said that the party went in the taxi to Shiv Nath's shop, where one man was sent with this £1 note to buy some mineral drinks. When the Constable arrived the appellant said he produced from the taxi the bottle of liquor supplied by the Police Constable and falsely said this had been bought from Shiv Nath.

During the course of his evidence at that trial the appellant gave the testimony which, on his later trial for perjury, was alleged to be false.

The particulars of the First Count complained that the appellant "wilfully knowingly and falsely swore that on 5th day of April, 1963, he the said Chattur Lal on the arrival at the shop of Shiv Nath s/o Mahabir *'took out a pound note and gave it to the driver that was not my own pound note. It belonged to Constable Andrew Prasad. He had given me the one pound note in the evening. He gave me instructions about one pound note'* ".

The particulars of the Second Count complained that the appellant "wilfully knowingly and falsely swore that on 5th day of April, 1963, *'he'* (Police Constable Andrew Prasad) *'had given me that bottle of Gin at Wainibokasi Landing after he had given me the one pound note'* ". A

Turning to the first ground of appeal, it appears that during his cross-examination at his trial, the appellant, for the first time in the case, put forward the allegation that he had told Inspector Raikoso of the alleged conspiracy between the appellant and the Police Constable concerned. At the close of the case for the defence the prosecution applied for leave to call Inspector Raikoso, who had given evidence in the "trial within a trial" which was held when the admissibility of the appellant's statement to the police was challenged, but who had not in fact given evidence in the trial of the main issues. Leave was granted. Inspector Raikoso then gave evidence flatly denying that the appellant had ever told him any such thing. It is now submitted that in granting leave to call Inspector Raikoso after the close of the defence the learned trial Magistrate erred in law. This is not so. B C

Section 202 of the Criminal Procedure Code reads:

> "202. If the accused person adduces evidence in his defence introducing new matter which the prosecutor could not have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut the said matter." D

I have considered all that has been urged in support of this ground of appeal and it appears to me that the learned trial Magistrate properly exercised the undoubted discretion given him by section 202 of the Criminal Procedure Code in these circumstances. E

The second and third grounds of appeal are based on fact. There was ample evidence before the Court below, which, if believed, was more than sufficient to support these convictions.

It is the contention of the appellant that this evidence was not believed because in the course of his judgment the learned trial Magistrate, when referring to a part of the appellant's evidence which was confirmed by Shiri Chand Shandil, commented about Shiri Chand Shandil as follows: F

> "who, incidentally appears to be the only witness who comes out of this matter with credit."

Counsel for the appellant asks that this Court should, on this casual and somewhat loosely framed observation by the learned trial Magistrate, treat all the other witnesses for the prosecution and the defence as witnesses who did not come out of the matter with credit. He asks this Court to hold that the learned trial Magistrate was wrong in convicting the appellant on the evidence of witnesses that it is submitted that he did, by implication, say were not worthy of credit. G H

This observation was undoubtedly unfortunately phrased, timed and expressed, but is not unequivocally open to the construction

sought to be placed upon it. To read it as is suggested, out of its context, would be to disregard the rest of the judgment where an attempt was clearly made to set out that part of the evidence before the Court which was believed and that which was not.

A

The learned trial Magistrate appreciated and recorded that the prosecution had to prove—

1. that the statements were made by the appellant on oath,
2. that they were made knowingly, wilfully and falsely,

B

3. that they were material in the Court proceedings in which they were made,

and 4. that the evidence of their falsity must be corroborated.

There was ample evidence on all these matters to support the conviction, which was clearly accepted, believed and acted upon by the learned trial Magistrate.

C

For these reasons the appeal against the conviction on each count is dismissed.

Appeal dismissed.