A

VERENIKI VUETI MERUMERU

v.

REGINAM

B [COURT OF APPEAL, 1968 (Gould V.P., Hutchison J.A., Marsack J.A.), 1st October]

Criminal Jurisdiction

Criminal law—summing up—evidence of witnesses serving sentences of imprisonment—warning to assessors—Penal Code (Cap. 8—1955) s.271.

C *Criminal law—evidence and proof—evidence of persons serving sentences as convicted prisoners—summing up—warning to assessors by trial judge.*

Criminal law—witness—persons serving sentences of imprisonment—summing up.

The appellant, while serving a sentence of imprisonment, was tried for the offence of assault occassioning actual bodily harm to the Deputy Controller of Prisons. The alleged offence took place in the prison and

D witnesses were called, both by the prosecution and for the defence, who were convicted persons serving sentences. In his summing up the trial judge told the assessors that they must give such weight as they thought appropriate to the evidence of those witnesses, but warned them that it was evidence from a source which put them on their guard and should be scrutinised with care and examined to see if it was

E corroborated by or consistent with other evidence which they felt able to accept.

Held: There was no doubt about the right of a judge so to warn the assessors and, while the warning was a strong one, it did not go beyond what a judge might say in the exercise of his discretion.

F Appeal against conviction and sentence in the Supreme Court.

S. M. Koya for the appellant.

T. U. Tuivaga for the respondent.

The facts sufficiently appear from the judgment of the Court.

Judgment of the Court (read by HUTCHISON J.A.) : [1st October, 1968]

G

Appellant was convicted by the Chief Justice on the 18th January, 1968 on a charge of assault occasioning actual bodily harm, contrary to Section 271 of the Penal Code. Appellant was a prisoner at the Suva gaol and the person allegedly assaulted was Eric Reginald Smith, the Deputy Controller of Prisons. The assault as alleged consisted of appel-

H lant's throwing a basin full of scalding water upon the Deputy Controller, the defence being that the water fell upon him as the result of an accident. Among the witnesses for the prosecution was Hari Pal, a prisoner. Appellant gave evidence on his own behalf and he called certain witnesses, mostly prisoners, of whom Waisaki Madiqi, Viliame Vakarewakuila and

Vereti Ralulu were the principal ones. Each of the three assessors had given his opinion that appellant was guilty on the Count on which he was convicted.

The case for appellant in this Court was set out in certain additional grounds of appeal as follows :-

"(a) (i) *THAT* the learned trial Judge erred in holding the view that the evidence of the convicted prisoners who gave evidence for the Prosecution and the Defence at the trial should only be accepted if it was corroborated or was consistent with other evidence. Consequently there has been a substantial miscarriage of justice."

(b) (ii) *THAT* the learned trial Judge erred in his summing-up to the Assessors and misdirected himself by emphasising the fact that the three witnesses for the Defence, namely *WAISAKI MADIQI, VILIAME VAKAREWAKUILA* and *VERETI RALULU* were men of bad character and therefore their evidence, without corroboration, was of questionable quality. Such an approach to the evidence of these witnesses (and presumably to the Appellant's evidence) was highly prejudicial to the case for the Defence. In addition, in dealing with the evidence of *VERETI RALULU* the learned trial Judge erred in directing the Assessors that "If on the other hand it is only consistent with the evidence of witnesses such as *VILIAME VAKAREWAKUILA* and *WAISAKI MADIQI* and if you should have already considered them not to be witnesses of truth, what confidence do you feel able to place in Ralulu's evidence." These errors and misdirections on the part of the learned trial Judge disabled the Assessors from giving their proper opinions or aid to the learned trial Judge and he in turn disabled himself from receiving such opinions or aid. Consequently there has been a miscarriage of justice."

The learned Chief Justice, in summing up to the assessors felt it necessary to caution them against a too ready acceptance of the evidence of the prisoner witnesses, both Hari Pal and the three main witnesses for the defence. He did not apply this catuion to the accused himself, for he said :-

> "As far as the accused is concerned in this case, he is entitled to expect and the law expects both you, Gentlemen Assessors, and me to judge him in this case on the strength of the evidence and on the strength of the evidence alone. He is entitled to assume he will not be prejudged or prejudiced because at the time of this offence he was a convicted prisoner. It is essential that we bear this in mind and honour our obligations in this respect and I am confident that you will do so."

His warning, however, as regards the other witnesses was a strong one. There can, in our view, be no possible doubt about the right of a trial judge so to warn a jury or assessors. What is said, however, for appellant is that this wording went beyond a caution and became a direction, which was not justifiable by law.

The learned Judge said :-

> "As far as the other witnesses, both for the prosecution and the defence, who are convicted prisoners serving sentences in Suva jail you must give such weight to their evidence as you think is appropriate.

For example, Hari Pal is a witness for the Crown. He is a convicted prisoner. If the evidence in this case was nothing more than the sworn testimony of Hari Pal, a convicted prisoner, against the sworn evidence of the accused, another convicted prisoner, I think you would have considerable difficulty in finding that the case for the Crown had been proved beyond reasonable doubt. In these circumstances I have to warn and advise you to look for corroboration of Hari Pal's evidence before you accept and act upon it. He is a person, being a convicted prisoner, whose evidence should be treated with care and circumspection and it would be dangerous to act upon it without corroboration. If it is corroborated you may well accept it — again if it is consistent with other testimony from a more reliable source you may feel able to place more confidence in it than you would if it were standing on its own.

What I am trying to emphasise, Gentlemen, is this. You may accept and act upon the evidence of a convict. Jut because he is a convict does not make his evidence inadmissible or unbelievable. But it is testimony from a source which puts you on your guard. Scrutinise such evidence with care, examine it to see if it is corroborated by or consistent with other evidence which you do feel able to accept. These are prudent guide terms. If you treat such evidence with such circumspection then you may place in it such weight as you feel is appropriate in deciding what you believe are the facts in this case."

Later he dealt individually with the evidence of the defence witnesses. It is quite clear from his own Judgment that he did not believe the two principal defence witnesses Viliame Vakarewakuila and Waisaki Madiqi and it may well be that his summing up conveyed that to the assessors. But there is nothing wrong in that, provided he left the matter to the assessors to form their own opinions, and he did that. At the very beginning of his summing up he had said :-

"On matters of fact, however, it is for you to form your own opinions. If, therefore, I express any opinion on matters of fact and such issues as the credibility of witnesses such views are not binding upon you. You are free, and indeed it is your duty to make up your own minds on issues of fact. Please, therefore, do not be over influenced by any views on such matters that I may express in the course of my summing up."

The contention developed on both these paragraphs of the Grounds of Appeal, which are closely related, is that the learned Judge directed the assessors in the same way as he would have directed them if the witnesses had been witnesses for the prosecution and were accomplices of the accused. In support of this contention, Mr. Koya pointed to the words at page 80H of the record. "These are some of the considerations you must keep in mind in reviewing Ralulu's evidence," and "It is in such a way that you must consider the evidence of each of these witnesses in turn." As counsel read these lines, he emphasised the word "must," but we do not think this is legitimate. In the context it is the words "keep in mind" and "consider" respectively that we are sure would have the emphasis.

We do not think that what the learned Judge said to the assessors amounted to a direction, and we think that, while the warning was a strong one, it cannot be said that it went beyond what a Judge might give in the exercise of his proper discretion on the case before him. A

In so far as the argument challenges the judgment itself of the learned Judge, as district from his summing-up, we think that it is quite unsupportable.

Other grounds stated in the Notice of Appeal were purely on matters of fact, and counsel did not proceed with them, agreeing that, if he did not succeed on his amended grounds, he could not succeed on the original ones. B

There was also an appeal against sentence, but this again was not proceeded with.

C

The appeal is, therefore, dismissed.

Appeals dismissed.