A

DIRECTOR OF PUBLIC PROSECUTIONS

v.

THIRPATHI GOUNDER AND ANOTHER

B

[SUPREME COURT, 1971 (Moti Tikaram J.), 23rd July, 19th August]

Appellate Jurisdiction

Criminal law—evidence and proof—submission of no case to answer in Magistrates Court—principles upon which court should act—Penal Code (Cap. 11) ss. 294(1), 347(1) (a)—Criminal Procedure Code (Cap. 14) ss. 200, 201, 300(1) (b).

C

On a submission of no case to answer at the close of the prosecution case in the Magistrates Court the onus is upon the prosecution to satisfy the Court that the evidence presented in support of the charge is sufficient to require the accused to make a defence; but the decision should depend not so much upon whether the court (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If it might convict on the evidence so far laid before it there is a case to answer and the proper course is for the court to direct the magistrate to continue the hearing of the case by complying with section 201 of the Criminal Procedure Code.

D

Appeal by the Director of Public Prosecutions against an acquittal in the Magistrates Court on a submission of no case to answer.

E

J. R. Reddy for the appellant

S. Prasad for the respondents.

19th August, 1971

MOTI TIKARAM J.:

F

This is an appeal by the Crown against an order of acquittal by a First Class Magistrate made in Lautoka criminal case No. 187/71 upholding a defence submission of no case to answer at the conclusion of the prosecution's case.

Both the respondents were jointly charged as follows:—

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FIRST COUNT

STATEMENT OF OFFENCE

LARCENY: Contrary to section 294(1) of the Penal Code.

PARTICULARS OF OFFENCE

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THIRPATHI GOUNDER s/o PERSAMI GOUNDER and GOVINDAN s/o NAGA, between the 17th day of January, 1971 and 18th day of January, 1971 at Lautoka in the Western Division stole 3 tyres complete with rims, 3 seats, 1 battery, 1 radiator, 1 rear wind-screen and 1 jack of the total value of ONE HUNDRED AND FIFTY DOLLARS ($150), the property of RICHARD FREDERICK MITCHELL.

A

SECOND COUNT (Alternative)

STATEMENT OF OFFENCE

RECEIVING STOLEN PROPERTY: Contrary to Section 347 (1) (a) of the Penal Code.

B

PARTICULARS OF OFFENCE

THIRPATHI GOUNDER s/o PERSAMI GOUNDER and GOVINDAN s/o NAGA, between the 17th day of January, 1971 and 18th day of January, 1971 at Lautoka in the Western Division received 3 tyres complete with rims, 3 seats, 1 battery, 1 radiator, 1 rear wind-screen and 1 jack together with a total value of ONE HUNDRED AND
C FIFTY DOLLARS ($150), the property of RICHARD FREDERICK MITCHELL, knowing the same to have been stolen."

The grounds on which this appeal is brought are as follows :—

"(a) that the Learned Trial Magistrate erred in law and fact in holding that there was no case for the said THIRPATHI GOUNDER s/o PERSAMI GOUNDER and GOVINDAN s/o NAGA to
D answer in respect of the said charge of LARCENY;

(b) that the Learned Trial Magistrate erred in law and fact in holding that there was no case for the said THIRPATHI GOUNDER s/o PERSAMI GOUNDER and GOVINDAN s/o NAGA to answer in respect of the said alternative charge of RECEIVING STOLEN PROPERTY; and

E (c) that the said order acquitting both said THIRPATHI GOUNDER s/o PERSAMI GOUNDER and GOVINDAN s/o NAGA of the said charges of LARCENY and RECEIVING STOLEN PROPERTY is unreasonable and cannot be supported having regard to the evidence adduced for the prosecution."

I have carefully examined the evidence in the light of the ruling given
F by the Learned Trial Magistrate. His ruling was as follows :—

"

RULING

The accused are charged with the larceny of certain specified articles which had been taken from a wrecked motor car owned by the complainant, who gave evidence that the articles were removed
G from the vehicle some two days after an accident in which his car had rolled down a 40' gully — for a period of between 12 and 24 hours the car remained unattended in the gully until discovery of the missing articles on the morning of Monday 19th January, 1971. On the 26th January, 1971 the articles were discovered in the house of an accused's mother. To the charge of larceny both accused stated that they had bought the parts from an unnamed Fijian to
H whom they had paid $40.00. There is no other evidence whatever against either accused to substantiate a charge of larceny and I consider that there is no case for them to answer on the 1st count.

The alternative count against the accused is that of receiving stolen property knowing the same to have been stolen. To support

such a charge, first, it must be proved that the property was stolen which has not been done — for example it could be argued that a person finding a vehicle of that age — its number was F658 and down a 40' gully might well have thought it abandoned. Again it must be proved that accused knew it was stolen property. No evidence as to guilty knowledge has been adduced. For these reasons I find there is no case to answer on the alternative count.

The case is dismissed and the accused acquitted."

I have also borne in mind the submissions made by the opposing counsel in this appeal. Section 200 of the Criminal Procedure Code reads as follows :—

"If at the close of the evidence in support of the charge it appears to the court that the case is not made out against the accused person sufficiently to require him to make the defence the court shall dismiss the case and shall forthwith acquit the accused."

The circumstances in which the articles were allegedly obtained or purchased were not adequately considered and certain admissions made by the accused appear to have been overlooked by the learned trial Magistrate.

There is no doubt that on a submission of no case to answer the onus is on the prosecution to satisfy the court that the evidence presented by the prosecution in support of the charge is sufficient to require the accused to make a defence. However ". . . the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it there is a case to answer." This observation was made by Lord Parker, C.J. sitting in the Queen's Bench Division and is contained in Practice Note (1962) 1 ALL. E.R. 448. The considerations by which the justices should be guided were stated in this Practice Note the whole of which is reproduced hereunder as it will serve as a useful guide to magistrates in Fiji also —

"LORD PARKER, C.J. : Those of us who sit in the Divisional Court have the distinct impression that justices today are being persuaded all too often to uphold a submission of no case. In the result, this court has had on many occasions to send the case back to the justices for the hearing to be continued with inevitable delay and increased expenditure. Without attempting to lay down any principle of law, we think that as a matter of practice justices should be guided by the following considerations.

A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

Apart from these two situations a tribunal should not in general be called on to reach a decision as to conviction or acquittal until

A the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submisson is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case
B to answer."

In my view the prosecution had clearly by the evidence it had presented made out a case against each of the respondents sufficiently to require him to make a defence, either on the substantive charge or on the alternative count. The learned counsel representing the Crown strongly urged that this case be send back for trial before another magistrate. His
C applcation for trial before another magistrate if granted would amount to an order of a new trial — a course expressly prohibited by the following proviso contained in section 300(1) (b) of the Criminal Procedure Code :—

"The Supreme Court shall not order a new trial in any appeal against an order of acquittal."

D As the trial magistrate is available the proper course is to direct him to continue the hearing of this case by complying with the provisions of section 201 of the Criminal Procedure Code.

Consequently I allow this appeal and set aside the order of acquittal in respect of each respondent and remit the case to the Lautoka Magistrate's Court for a date to be fixed to enable the trail Magistrate to
E continue the hearing and to determine the case in accordance with law.

Appeal allowed.