A

REGINA

v.

PANAPASA SILOSOMO

[SUPREME COURT, 1976 (Grant C.J.), 28th May]

B

Revisional Jurisdiction

Criminal law—practice and procedure—obligatory for prosecutor to put before the court any vital piece of evidence which might have a bearing on the case in general and the innocence of the accused in particular.

C *Criminal law—identification—accused identified in court by witness who failed to identify him at identity parade held within 24 hours of offence—obligatory for prosecutor to reveal this information to court of trial.*

Criminal law—practice and procedure—joint charge when only one accused present—procedure to be adopted.

D

In the Magistrate's Court the respondent who had been charged with assault occasioning actual bodily harm was convicted after a trial in which the main prosecution witness identified him in the dock as having taken part in the attack. No mention was made in the prosecution's case of the fact that the same witness had failed to identify the accused at a formal identity parade held within 24 hours of the assault.

E

Held: It was obligatory upon the prosecuting officer to have made this fact known to the court. All relevant evidence, whether it be against the interests of the accused or in his favour should be available.

Per curiam: Where two accuseds are jointly charged and only one appears, the prosecution should either issue a warrant for the arrest of the defaulter and wait for
F his presence, or withdraw the joint charge and prefer a charge that the present accused "with another not before the court" committed the offence.

Cases referred to:

R. v. Hardeo Singh & Ors Suva Magistrates Criminal Case 1242 of 1967—unreported.

G *R. v. Timoci Vatudua* Suva Criminal Appeal 25 of 1976—unreported.

Reference to Supreme Court in its revisional jurisdiction of case of defendant convicted in Magistrate's Court.

GRANT C.J.: [28th May 1976]—

H On the 2nd January 1976 at Suva Magistrate's Court the respondent was convicted after trial of assault occasioning actual bodily harm contrary to section 277 of the Penal Code and was sentenced to two years' imprisonment.

The charge was not preferred against the respondent alone but against the respondent and another accused jointly. On the date of the hearing only the respondent was present and the court proceeded to hear the joint charge in the absence of the co-accused. This was not a proper procedure. If the prosecution wished to continue against both accused jointly an application should have been made for a warrant of arrest to issue for the absent co-accused and for the trial to be adjourned until both accused were present. Alternatively, if it was considered desirable to proceed to the trial of the respondent the charge should have been severed, application being made to withdraw the joint charge and to prefer a charge against the respondent that he "with another not before the court" committed the assault.

On the 13th May 1976 the co-accused was brought before Suva Magistrate's Court to be dealt with, but upon the senior magistrate observing that the joint charge had already been heard by another magistrate in the absence of the co-accused, and upon noting from the record the irregularities to which I shall now turn, he very properly referred the matter to this court in its revisional jurisdiction.

On the hearing the prosecution called only two witnesses, namely a shopkeeper and an assistant in his shop. The shopkeeper testified that on the day in question three Fijians entered his shop and one of them, who was not the respondent, assaulted him, that his assistant was also assaulted, after which the three Fijians ran away. He identified the respondent, who was in the dock, as having guarded the door during the incident and as having held his assistant while she was being assaulted by another. The shopkeeper was not asked and did not say how he was able to identify the respondent in the dock. The shop assistant made no mention of having been held by the respondent at the time she was assaulted. She testified that it was not the respondent who assaulted her and that she did not see him in the shop.

The prosecution then closed its case without calling evidence of arrest, charge, or of any statement made by the respondent.

The respondent gave evidence denying any knowledge of the incident, and testified that on the day of his arrest he took part in an identification parade at the police station at which the complainant failed to identify him.

The complainant was then recalled on the basis that this was a fresh matter raised by the respondent in his defence. It is not clear from the record whether the prosecution were permitted to recall him in rebuttal under the provisions of section 202 of the Criminal Procedure Code, which they should not have been as the evidence of the respondent relating to the identification parade was not "new matter which the prosecutor could not have foreseen"; or whether the trial magistrate recalled the complainant, as it was proper for him to do, under the powers vested in him by section 136 of the Criminal Procedure Code to enable a just decision on the case to be arrived at. In the event, when the complainant was recalled, he admitted that at the police station he had inspected an identification parade in which the respondent was present, and that he had failed to identify him. He further testified that, from the time he saw the respondent in the identification parade and failed to identify him, he had not seen him again until he identified him at the trial. According to the complainant the identification parade took place on the day following the incident, that is to say when the incident was fresh in his mind and when, if he was in a position to identify the respondent at all, one would have expected him to do so; and yet five months later he purported to identify the respondent at the trial.

The failure of the complainant to identify the respondent at an identification
A parade on the day following the incident was a vital piece of evidence, striking at the foundations of the purported identification of the respondent at the trial, and it was obligatory upon the police prosecuting officer to put this evidence before the trial court. This he failed to do, resulting in the respondent being convicted on evidence of identification which was, in the circumstances, unworthy of credence.

Prosecuting officers should be well aware of their duty to make all relevant
B evidence available to the court whether it be against the interests of an accused person or in his favour, their obligations being highlighted in a judgment of Suva Magistrates Court in *R. v. Hardeo Singh & Ors.* (Criminal Case No. 1242 of 1967).

The conviction of the respondent is quashed, his sentence set aside and he is released forthwith.

In view of the disturbing features of this case I direct that it be referred to the
C Director of Public Prosecutions.

I might add that it could hardly escape my attention and perhaps it is re-assuring to note that the irregularities in *R. v. Hardeo Singh & Ors.* (supra), in *R. v. Timoci Vatudua* (Suva Crim. App. No. 25 of 1976) and in the trial the subject matter of this appeal, were not committed by three police prosecuting officers, but by the same one.

D *Conviction quashed, and sentence set aside.*