NARENDRA PRASAD

v.

REGINAM

[COURT OF APPEAL, 1979—(Marsack, J. A., Henry J. A., Spring, J. A.,) 9, 25 July]

Criminal Jurisdiction

Criminal Law— Conspiracy—Overt Acts may show action in concert. Where two or more persons are acting in concert, declarations of one are admissible against others whilst so acting.

K. C. Ramrakha with A. Singh for Appellant
M. Jennings for Respondent

Appeal against conviction for conspiracy to commit a felony viz to steal money of an employer, contrary to Penal Code S.420. Other defendants pleaded guilty to this charge. The appellant was one of four attendants mentioned below.

The facts were that four registered bowser attendants at the Marina Service Station devised a method of reversing the meter which, on a bowser recorded the petrol sold to customers. The amount recorded would than be less that actually sold, so that the attendants including the appellant, would not have to account for all the takings. The court mentioned aspects of the relevant law viz—

1. Overt acts may lead to the inference that alleged conspirators were acting in concert pursuant to an agreement to do an unlawful act. If so, the charge lie notwithstanding no proof of formal agreement.

2. Where two or more persons are engaged in a common enterprise the acts and declarations of one in pursuance of the common purpose are admissible against the other.

Cases Referred to:

R. v. Murphy (1837) 8 C and P 297.
R. v. Hammersley & Ors. 42 Cr. App. R 207.
R. v. Gunewardene 35 Cr. App. R. 80.
Tripodi v. R. (1961) 104 C.L.R. 1.
Davies v. Director of Public Prosecutions (1954) 1 All E.R. 507.
R. v. Meyrick and Ribuffi 21 Cr. App. R. 94

The judgment at the Court was delivered by SPRING J. A.

The appellant Narendra Prasad appeals against his conviction in the Supreme Court of Fiji at Suva on 24th January 1979 on a charge of conspiracy to commit a felony, that is, to steal contrary to section 420 of the Penal Code. The appellant was tried jointly with one Peter Paul Chang and the information laid by the Director of Public Prosecutions reads as follows:—

"SUDHIR LAL (s/o Ram Pyare,),
NARENDRA PRASAD (s/o Phalad), and
PETER PAUL CHANG are charged with the following office:—

STATEMENT OF OFFENCE

CONSPIRACY TO COMMIT FELONY: Contrary to Section 420 of the Penal Code.

PARTICULARS OF OFFENCE

SUDHIR LAL (s/o Ram Pyare), Narendra Prasad (s/o Phalad), and Peter Paul Chang, on divers days between the 18th day of November 1977, and the 11th day of May 1978, at Suva in the Central Division, being employed as service station attendants by BP South-West Pacific Limited, at the Marina Service Station, Edinburgh Drive, conspired together, and with Kamal Prakash, (s/o Ram Narayan) to steal the monies of their said employer, namely sums of money attributable to the proceeds of sale of Supreme Motor Spirit."

Sudhir Lal, one of the accused above named, pleaded guilty before the Supreme Court in January 1979 and was convicted and sentenced to 15 months imprisonment.

Kamal Prakash pleaded guilty in the Magistrate's Court in July 1978 to a charge, similar to that faced by appellant, and was convicted and sentenced to 15 months imprisonment.

The facts briefly stated are as follow:—

Between 18th of November 1977 and 11th of May 1978 there were four regular bowser attendants at the Marina Service Station—the appellant Narendra Prasad, Peter Paul Chang, Kamal Prakash and Sudhir Lal. Both Kamal Prakash and Sudhir were called as witnesses for the prosecution against the appellant and Chang.

The Marina Service Station opened from 7 a.m. to 9 a.m. each day and the attendants worked two shifts; there being two attendants on each shift except Sunday when only one was on duty.

Petrol tankers called regularly and the tanker driver and one attendant would dip the underground petrol tank and record the quantity of petrol showing on the totaliser fitted to the petrol pump; this information was recorded at the foot of the delivery docket. After discharging the fuel into the tanks the underground tanks were re-dipped and the totaliser re-read and the details recorded. Evidence was given by one Weir, a chartered accountant, who carried out an audit into the supply of, and sales of, petrol at Marina Service Station for the period 18th November 1977 to 11th May 1978, he found from a study of the delivery dockets, the totaliser meters, and other documentation covering the delivery of and sales of petrol that 96,000 litres of petrol delivered to the station during the above period could not be accounted for; in other words 96,000 litres

more of petrol had been delivered to the station during the above period than were recorded as having been sold through the metered pumps. The servicing supervisor of BP South-West Pacific Limited, one Osborne, stated in evidence that the totaliser meter would continue to record the litres of petrol that were sold—the totaliser meter would never go back or into reverse; it only went forward or stopped if a defect arose.

The witness Weir, found fifteen instances during the above period when the totaliser meter reading at the end of the day was lower than the reading recorded earlier on that particular day after the petrol tanker had discharged fuel into the tanks. Kamal Prakash and Sudhir Lal stated in evidence that the locked glass face over the totaliser meter was removed and a sharp nail used to reverse the reading on the totaliser meter with the result that it would show a smaller quantity of motor spirit as having been sold than had in fact been sold. Sums of money were then removed from the cash register at the service station equal to the value of the fuel which had been sold but not recorded; this practice continued during the period mentioned.

Neither the appellant nor Chang gave evidence on oath; they both made an unsworn statement from the dock. The assessors expressed the unanimous opinion that the appellant and Chang were both guilty and the learned trial Judge concurred in this finding. Both accused were duly convicted and sentenced to 2 years imprisonment. The appellant Narendra Prasad appealed to this Court against his conviction and sentence; the appellant later abandoned his appeal against sentence; there was no appeal by Chang against either his conviction or sentence.

Four grounds of appeal were argued by Counsel for the appellant; the first ground reads:—

"the Crown failed to prove any evidence of conspiracy against the appellant."

Mr Ramrakha on behalf of the appellant submitted that no agreement or common design had been proved between the three persons named in the charge and Kamal Prakash to steal moneys from their employer BP South-West Pacific Limited by altering the figures on the totaliser meters; that it was essential for the Crown to prove some agreement or a nexus between the appellant and the other accused whereby they entered into an agreement to steal; he submitted that the evidence merely established isolated instances of thefts of moneys from the employer, but that there was no proof of any concluded agreement between the appellant and the other accused which could form the basis of a conspiracy; that it was incubent upon the Crown in bringing a charge of conspiracy against the appellant and the other accused to prove the making of such an agreement whereby they agreed to carry out the unlawful acts alleged.

Mr Jennings acknowledged that the evidence did not disclose the making of any such agreement between the appellant and the other accused; in other words there was no evidence of the appellant and the other accused formally concluding such an agreement. The Crown submitted, however, that there was ample evidence before the learned trial Judge and Assessors from which an inference could properly be drawn that the appellant and the other accused had embarked on a plan or common design to steal moneys from their employer by turning back the totaliser

meter on the petrol pumps so that the meter by being reversed would show a lesser quantity of petrol sold. At the beginning of a shift the attendants on duty at the service station would record the totaliser reading on the petrol pumps showing the quantity of petrol in the tanks, and, at the end of the shift they would repeat this operation and record the totaliser meter reading—the resulting difference was the quantity of petrol which had in fact been sold on metered through the pumps. The glass cover on the totaliser was removed and the reading reversed so as to show a lesser quantity sold; an amount in cash equivalent to the value of the petrol sales that were suppressed was taken from the cash register and divided between the appellant and the other accused.

Kamal Prakash and Sudhir Lal, both of whom were called by the prosecution, gave evidence that Peter Chang had shown them how to reverse the totaliser meter on the pumps and obtain moneys from the cash register.

The Crown submitted that the evidence clearly established a common enterprise or plan devised by the appellant and the other accused and Kamal Prakash to steal money from their employer which continued from the 18th November 1977 to 11th May 1978; that the removal of moneys from the cash register was not to be treated as isolated and individual thefts, but part and parcel of common design plan or scheme. Further, proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the accused done, in pursuance of an apparent criminal purpose, in common between them.

A conspiracy is often proved by proving acts on the part of the accused persons which lead to the inference that they were acting in concert in pursuance of an agreement to do an unlawful act. Frequently the implementing action is itself the only evidence of the conspiracy and this has been referred to in numerous cases as the doctrine of overt acts. In *Reg. v. Murphy* (1837) 8 C. & P. 297 Colleridge J. said at page 311.

> "It is not necessary that it should be proved that these defendants met to concoct this scheme, nor is it necessary that they should have originated it. If a conspiracy be already formed, and a person joins it afterwards, he is equally guilty. You have been proved, you are satisfied that these defendants were acting in concert in this matter."

In *R. v. Meyrick and Ribuffi 21 C.A.R.* (1930) 94 at page 101:—

> "it was necessary that the prosecution should establish, not indeed that the individuals were in direct communication with each other, or directly consulting together, but that they entered into an agreement with a common design. Such agreements may be made in various ways. There may be one person to adopt the metaphor of counsel, round whom the rest revolve. The metaphor is the metaphor of the centre of a circle and the circumstance. There may be a conspiracy of another kind, where the metaphor would be rather that of a chain; A communicates with B, B with C, C, with D, and so on to the end of the list of conspirators. What has to be ascertained is always the same matter; is it true to say, in the words already quoted, that the acts of the accused were done pursuance of a criminal purpose held in common between them?"

If the conclusion to be drawn from the overt acts proved against the appellant and the other accused was that there was a conspiracy, then a charge of conspiracy will lie notwithstanding the lack of evidence of a formal agreement between the

appellant and the other accused persons concluding such a conspiracy. Where and when the conspiracy originated is often unknown and seldom relevant as conspiracy is often proved by overt acts from which an antecedant conspiracy is to be inferred. A

In *R. v. Hammersley and Others* 42 Cr. App. R. 207 at page 213—it is stated:

"The law is conveniently and I think accurately stated in Professor Kenny's book on the Criminal Law, (1952) 17th edition at p.395 by Mr Cecil Turner in which the learned author states it in this way: 'For it rarely happens that the actal fact of the conspiring can be proved by direct evidence, since such agreements are usually entered into both swiftly and secretly.'" B

The learned trial Judge in our view correctly stated the law in his summing up when he said:

"As counsel have told you, the charge is not one of stealing, but one of conspiring with each other and with Kamal Prakash and Sudhir Lal to steal money obtained from the sale of petrol at the Marina Service Station. The essence of the offence is the agreement the agreement to steal. C

In such cases, gentlemen, there is generally no written or formal agreement. Whether or not there was an agreement has to be inferred from the circumstances of the case and the conduct of accused as revealed by the evidence." D

In our opinion the evidence raised the inescapable inference that the appellant was acting in concert with the other accused and Kamal Prakash pursuant to an agreement or plan evolved between them whereby they sought to steal by falsifying the records and suppressing petrol sales sold through the pumps at the Marina Service Station. E

Accordingly in our opinion the first ground of appeal fails.

We turn now to the second and third grounds of appeal which can conveniently be taken together; the are as follow:—

"*(a)* The learned trial Judge erred in law and in fact in not directing himself and the assessors that Exhibit 11, and Exhibit 13 were extra judicial statements made by a co-accused, and did not constitute evidence against the appellant and thereby there was a miscarriage of justice. F

(b) The learned trial Judge erred in law in in fact in directing himself and the assessors that Exhibit 11, and other documents afforded evidence of corroboration against the appellant." G

At the trial a prosecution witness one Bower a sales represenatative for BP South-West Pacific Limited, produced exhibit 11 which was a cash sale docket; one Lee, an employee of the above company, found it under some books on a ledge or

counter at the Marina Service Station in March 1978 and handed same to Bower on the 13th May 1978. On the back of the docket in Chang's handwriting is written the following:—

"400 Litres IS YOURS
Narendra O.K.
300 ALSO Been
Adjusted for
SUDHIR
ALTOGETHER 700 LITRES
HAVE BEEN
EXAMPLE WHEN
YOU TAKE YOUR
1300 HRS METER IS 1,400
YOU PLUS +300
he defen
1,700"

Mr Ramrakha acknowledge, for the purposes of this appeal, that the writing on the back of the cash sale docket was in the hand writing of Chang, but submitted that this exhibit 11 was an extra judicial statement made by a co-accused Chang and, accordingly, was not admissible against the appellant; further that the trial Judge erred in treating this exhibit 11 as evidence against the appellant.

The Crown submitted that exhibit 11 was a contemporaneous record made by Chang of a theft of petrol in furtherance of the common design, plan or scheme entered into between the appellant and the other accused and Kamal Prakash; further, having regard to the evidence of the overt acts proved against the appellant and his conspirators exhibit 11 lent support and corroboration to the evidence of Kamal Prakash and Sudhir Lal as to what had been happening at the service station, and, accordingly was admissible in evidence. Mr Jennings acknowledged that the evidence did not disclose that the appellant knew anything thereon until it was shown it him by the police, where upon, he denied any knowledge thereof.

We agree that a statement not on oath made by an accused implicating a co-accused is not evidence against the co-accused. *R. v. Gunewardene* 35 Cr. App. R. 80; however, where two or more persons are engaged in a common enterprise the acts and declarations of one pursuance of that common purpose are admissible against the other. In *Tripodi v. R.* (1961) 104 C.L.R. 1, it is stated:—

"When the case for the prosecution is that in the commission of a crime a number of persons have acted in preconcert, once reasonable evidence of the preconcert has been adduced, evidence of directions, instructions, arrangements or utterances, accompanying acts given or made by one of the persons in the absence of the other or other in furtherance of the common purpose which constitutes or forms an element of the crime becomes admissible against the other or others, assuming it to be not otherwise admissible. The basal reason for admitting such evidence is that the combination or preconcert to commit the crime is considered as implying an authority to each to act or speak in furtherance of the common purpose on behalf of the others."

In our view the direction given by the learned trial Judge on this matter was correct when he said:— A

> "If you are satisfied beyond reasonable doubt on this evidence that the note is in fact in Peter Chang's handwriting, then gentlemen, it certainly is a most significant document and provides ample corroboration of what Kamal Prakash and Sudhir Lal both say was going on the Marina Station. As I have said the essence of the offence of conspiracy is the agreement between the accused and others to commit an offence. You may consider there is enough evidence in the documents themselves to show that the totaliser was on several occasions turned back by person or persons. Kamal Prakash and Sudhir Lal admit working together in agreement to do just that and to pocket their employers' money. Their part in it is not challenged. Your function is to decide if you are satisfied beyond reasonable doubt that the two accused were also parties to that agreement as the prosecution allege." B C

Criticism was levelled by Mr Ramrakha that the statement taken by Detective Inspector Ram from the accused Chang was also an extra judicial statement made by a co-accused and did not constitute evidence against the appellant. This statement was produced as exhibit 13 and it consisted of a series of denials by Chang as to his involvement in the common enterprise, scheme or plan to steal moneys from BP South-West Pacific Limited. D

From a perusal of the statement it is obvious that it did not incriminate the appellant and in his summing up to the assessors the learned trial Judge did not refer to this statement although he said:—

> "The two accused have been tried together but you must consider the evidence against each accused separately in deciding whether or not he was a member of such a conspiracy. E

The appellant made an unsworn statement from the dock and the learned trial Judge in our view directed the assessors correctly as to the nature of such a statement and how it was to be treated by them in coming to their conclusion on the whole of the evidence in the trial; no complaint could properly be levelled as to the matter in which the trial Judge dealt therewith.

In our view, therefore, there is no substance in the submission that exhibit 13 should not have been admitted in the trial. F

Turning now to the question as to whether the other document admitted in the trial offerred evidence of corroboration against the appellant. The chartered accountant, Weir who carried out an extensive audit of the affairs of the service station, prepared a detailed summary showing that on no less than 15 occasions the reading on the totaliser taken at the end of the day by two attendants on duty was lower than the reading on the totaliser taken earlier in the day by them and the tanker drivers, after the delivery of additional fuel. The appellant was physically present, as an attendant at the station, on at least 6 of these occasions and his signature appeared on some of the documents recording the readings. In our view there was ample evidence which implicated the appellant in the common enterprise and corroborated the evidence given by Kamal Prakash and Sudhir Lal. G H

Accordingly therefore the second and third grounds of appeal urged upon us must fail.

The last ground of appeal reads as follows:

A "The learned trial Judge ought to have directed the assessors that Michael Lee was an accomplice."

Michael Lee, an employee at the Marina Service Station until March 1978 was called as a witness for the prosecution. He maintained that he knew nothing about the happenings at the service station in relation to the thefts of money although he admitted receiving moneys or "tips" as he called them from the appellant, Chang, Kamal Prakash and Sudhir Lal from the end of January 1978 until he saw Chang B tampering with the totaliser meter late in February 1978. After questioning Chang he was shown and advised how money could be obtained be reversing the reading on the totaliser meter with a sharp nail; thereafter Lee refused to accept any more "tips". He found the cash sale docket—exhibit 11—and handed same to his superior Bower. Lee insisted that he knew nothing about the common enterprise scheme or plan evolved by the appellant, Chang, Kamal Prakash and Sudhir Lal until infor- C med by Chang.

Mr Ramrakha on behalf of the appellant argued that Lee should have been treated as an accomplice and that the learned trial Judge erred in not so directing the assessors.

The Crown submitted that Lee was not an accomplice and that Lee fell into the category of the second class of witnesses as mentioned in *Davies v. Director of Public* D *Prosecutions,* [1954], 1 All E.R. 507 at page 514 where Lord Simonds said:—

> "But, it may reasonably be asked, who is to decide, or how is it to be decided, whether a particular witness was a "particeps criminis" in the case in hand? In many or most cases this question answers itself, or, to be more exact, it is answered by the witness in question himself, by confessing to participation, by pleading guilty to it, or by being convicted of it. But it is indisputable that there E are witnesses outside these straightforward categories, in respect of whom the answer has to be sought elsewhere. The witness concerned my never have confessed, or may never have been arraigned or put on trial, in respect of the crime involved. Such cases fall two classes. In the first, the judge can properly rule that there is no evidence that the witness was, what I will, for short, call a participant. The present case, in my view, happens to fall within this class, and can be F decided on that narrow ground. But there are other cases within this field in which there is evidence on which a reasonable jury could find that a witness was a "participant". In such a case the issue of "accomplice vel non" is for the Jury's decision and a Judge should direct them that if they consider on the evidence that the witness was an accomplice, it is dangerous for them to act on his evidence unless corroborated: though it is competent for them to do so if, after that warning, they still think fit to do so."

G The learned trial Judge in his summing up dealt with Lee's involvement in the conspiracy when he said as follow:—

> "From this evidence, gentlemen, it is for you to decide if you should treat Lee as an accomplice. If you are of the view that Lee knew that he was getting his "tips" from stolen money or that he was knowingly involved in stealing the money, you would treat him as an accomplice. Similarly, you will treat him as an H accomplice if you are of the view that he has some purpose of this own to serve in implicating two accused. It is only if you are fully satisfied that he had no know-

ledge of the criminal activity of the four attendants until he found Peter Chang tampering with the totaliser and only if you consider that he had no purpose of his own to serve in giving evidence against two accused that you will treat him as an untainted witness. A

Should you come to the view, gentlemen, that he is not in fact an accomplice, his evidence them provides more than ample corroboration of the evidence given by Kamal Prakash and Sudhir Lal.

If, on the other hand you are not satisfied beyond doubt that he is an untained witness, you will treat him also as an accomplice in which the amounting to corroboration of Sudhir Lal's and Kamal Prakash's evidence will then require corroboration from some other independent source." B

In our view, the trial Judge directed the assessors and himself correctly on the issue as to whether Lee was an accomplice or not.

Accordingly in our view this ground of appeal fails. C

Critical observations have been urged upon us by learned Counsel for the appellants as to summing up by the trial Judge. The treatment by the trial Judge of the evidence was impeccable and his charge to the assessors was stated clearly and with precision; no grounds exist in our opinion for criticism as to the manner in which this case was tried.

Accordingly the appeal is dismissed. D

Appeal dismissed.