IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)
AT LAUTOKA
Appellate Jurisdiction
Criminal Appeal No. 15 of 1978

BETWEEN:

SURESH LALJI s/o Lalji — Appellant

- and -

R E G I N A N — Respondent

Dr. M.S. Sahu Khan, Counsel for the Appellant
Mr. D. Williams, Counsel for the Respondent.

JUDGMENT

The appellant appeals against his conviction for receiving 11 x 5 gallon drums of salad oil contrary to Section 347(1)(a) of the Penal Code on 20/7/76.

His first ground is the very wide one that there was no evidence that the property was stolen.

The salad oil was allegedly imported from overseas by P.W. 1, Sarvan Singh, who, had ordered 11 x 44 gallons and 47 x 5 gallon drums of salad oil. When he checked at the shipping agents in July 1976, 33 x 5 gallon drums were missing and at that time he also observed a hole in the fence near the spot where the drums of salad oil were being stored. The prosecution called no evidence of the off-loading. The delivery mark on the side of the drums was SARVAN, LAUTOKA.

The accused first appeared in the Magistrate's Court on 4/8/76. His case was heard on 13/12/77, 16 months later.

P.W. 1's evidence is that he received 33 drums less than he had expected but he was unable to say that they had been delivered. Dr. Sahu Khan for the appellant has pointed this out and has properly submitted that one has to look elsewhere for the evidence necessary to ascertain whether any part of the consignment had been stolen or whether there had simply been a short delivery.

In that respect P.W.2, Savenaca, who had pleaded guilty to stealing 12 drums of salad oil from the wharf in July 1976 said he took them to his home. Next day the stolen drums were taken to a shop at No. 80 Naviti Street where his companion Sevuloni delivered them and then gave him $25.00.

Sevuloni (P.W.6) gave evidence but did not corroborate P.W. 2 Savenaca in any way.

P.W. 5, a carrier driver, said that on 19 or 20th July 1976, at 12 mid-night he was hired by P.W. 6 and others and he drove his vehicle to the wharf where he loaded some drums similar to Ex.A and took them to a house in Waiyavi Street. P.W.2's house is in Waiyavi Street. In cross-examination P.W. 2 was asked if he knew the drums were stolen and he said he did not. P.W. 2, may well have thought the question was "Did you know that you were stealing stolen property?" He had already said in-chief that he stole them from the wharf and he was convicted thereof on his own plea. The Magistrate had evidence on which he could find that the 12 drums referred to in the evidence were stolen.

On 20/7/76, 11 such drums were recovered from the bulk store attached to the shop at 80, Naviti Street by the police.

P.W.7, D/Corpl. Raju, who searched the bulk store and found the 11 drums of salad oil says there was no other salad oil either in the shop or in the 2 bulk stores attached to the shop.

The evidence that the 11 drums of salad oil stolen from the wharf were taken to 80 Naviti Street and that they were recovered from there within hours by the police was overwhelming if the prosecution evidence were accepted by the magistrate.

Ground 1 fails.

Ground 2 is that the Magistrate erred in finding that it was the accused who received the 11 drums. The drums had found their way into the bulk store of premises at 80 Naviti Street, owned by the accused's firm which is known as LALJI'S. In that connection P.W.3, a constable, stated that he was a customer at Lalji's and that he dealt directly with Suresh Lalji - the accused. He saw the accused working there in July 1977 but agreed in cross-examination that the accused's mother and others also worked in the store.

The evidence of P.W.4, D. Corporal Eroni, who held the search warrant indicates that on 20/7/77 the accused was in-charge of the shop at 80, Naviti Street and the business connected therewith. It was the accused who gave him permission to search and before the search commenced the accused told P.W.4 that he had no such drums. The search of the shop was negative. The accused was then asked for the key to the bulk store and after some prevarication he produced it. The 11 drums were found in one of

the bulk stores. A search of the second bulk store revealed no more such drums.

P.W. 7, Police Corporal Raju, was with the search party. The accused told him his father was in-charge of the shop, but that the accused was managing the business. The accused said they had no such drums of salad oil when the police questioned him but when the 11 drums were located in the bulk store the accused said they belonged to the firm and said "we ordered them from overseas". His answer suggested that he knew where they came from and in reply to the obvious question he said he did not know where the invoices were and could not say which company they had been purchased from. The accused told P.W.7 that the 11 drums had been in the bulk store for a long time and P.W. 7 then pointed out to accused that there was no accumulation of dirt on the drums and no marks left on the floor when they were moved to suggest that the 11 drums had been there for any period of time.

Thus the accused admitted knowing the drums were there; he claimed to have the invoices for them and at no time protested that he was unaware of their presence. As manager of the business he was aware that 11 drums which had been delivered to the shop that very morning, 20/7/76, were in the bulk store although he had of course said they had been delivered long before 20/7/76. At first he had denied there were any such drums in the bulk store. His untruth to the police could be regarded as an attempt on his part, in the first instance, to dissociate himself from any knowledge that there were drums of salad oil in the bulk store, and that, of course, could be interpreted as guilty knowledge. His untruth that they had been there a long time could be similarly interpreted.

The accused did not give evidence or call witnesses. He made an unsworn statement which is not evidence. In it he said that the police did not open the other bulk store at the shop. This was in direct contradiction to the police evidence to the contrary.

There was abundant evidence to show from the accused's own statements to the police that he was fully aware that the 11 drums were in the bulk store but that he was not prepared to admit it until actually confronted with them. He produced the key to the bulk store. The 11 drums had been delivered a matter of hours beforehand. He purported to hold the invoices for them. Such actions and statements one associates with a person who is in

control or in a position of considerable responsibility. The prosecution are not expected to produce a cinematograph of the receiver actually taking possession of the stolen property. There was ample evidence on which it could be found that the accused received the property and knew it was stolen. The accused in Court purported to tender 2 invoices, which he said his mother had given to him, for the purchase that day, i.e. on 20/7/76, of the drums in question. He did not give evidence, he merely made an unsworn statement, and no one swore to the invoices or gave evidence as to the receipt of the goods referred to therein. Their value as evidence is consequently negligible.

Ground 2 fails.

Ground 3 is in four sections.

Para (a) says that the Magistrate wrongly placed an onus on the defence to show that the contents were not salad oil. The Magistrate was commenting on cross-examination of the prosecution witnesses suggesting that the drums did not contain salad oil. He stated that it was logical to expect the defence to follow up that cross-examination by evidence showing that the contents were other than salad oil. He did not say there was an onus upon the defence to call such evidence. However, it is obvious that if the defence fail by cross-examination to destroy the prosecution evidence that the drums contained salad oil then if it is the defence case that the contents were something entirely different then the defence should give evidence of the contents. Of course they are not obliged to do so but they then run the risk of the credibility of the prosecution witnesses being enhanced as a result of a cross-examination which has not been supported by evidence from defence witnesses. There is no doubt that the 11 drums were not empty. P.W. 4 said one of the drums was leaking and it was salad oil which was escaping; although he does not know the difference between various kinds of vegetable oil, he obviously saw it was oil. The accused in his unsworn statement also described the contents as oil. The 11 drums were traced, via the prosecution witnesses, back to the shipping agents and to a consignment of salad oil destined for P.W.1. A misdescription of the contents does not cancel out the evidence that the 11 drums and their contents were stolen from the wharf area and found their way into the premises managed and controlled by the accused.

Para (b) says the Magistrate placed an onus upon the accused to qualify his duties as Manager. He merely commented on the fact that the accused had not qualified his duties but he did not say that the onus lay upon the accused to prove his duties. In fact he referred, as I have done, to prosecution evidence showing the accused had control and guilty knowledge.

Para (c) alleges that the Magistrate placed an onus on the accused to have shown an invoice, Ex.1, to the police prior to its being tendered at the trial. The magistrate placed no such onus on the accused. He said that the accused had given unsworn evidence; he also referred to the accused's unsworn statement as evidence-in-chief. I draw the Magistrate's attention to the fact that an unsworn statement is not evidence. His reference to the invoices which was to the effect that they were hearsay in purporting to come from a person who did not tender it - and who had not given evidence- namely the accused's mother. In stating that it was of no evidential value the learned magistrate did indicate that if the police had been shown the invoice they may have adduced evidence as to its verocity. Such evidence may have been in accused's favour. The Magistrate certainly did not reject the invoice because it had not been shown to the police.

Para (d) alleges that the Magistrate held the view that the accused's mother ought to have given evidence. No where does such a statement appear in the judgment. The Magistrate rightly pointed out that the invoice was hearsay and it should be produced by the person who, according to the defence, tendered it, and could give evidence of its verocity. That person as the Magistrate pointed out was the accused's mother. The Magistrate simply stated that he could not accept hearsay which was put into the mouth of the accused's mother, particularly when she was not called.

Ground 3 fails.

Ground 4 is in four paragraphs.

Para (a) claims that the Magistrate wrongly rejected the invoices tendered by the accused. I have dealt with this.

Para (b) refers back directly to ground 3 which has been dealt with.

Para (c) complains that the Magistrate emphasised that the accused made an unsworn statement. It does not allege that he drew any unlawful conclusion therefrom.

Para (d) says that the Magistrate regarded the accused's lies as pointing to his own guilt without taking into account that he could have been lying to save some other person. Dr. Sahu Khan submitted that the accused might have been lying to save his mother. In that respect it is worth noting that the accused said he was the manager of the business; he falsely denied that there were any drums in the bulk store; he produced the keys to the bulk store, then he falsely claimed that the 11 drums had been there for a long time. His answers pointed to himself as manager and not to his mother. There was nothing in the evidence to cause the Magistrate to look elsewhere for someone who may have placed the drums in the bulk store and locked it with the key which the accused produced.

Ground 4 fails.

Ground 5 alleges that the Magistrate erred in holding that the drums contained salad oil. This is dealt with in ground 3(a) as pointed out by Dr. Sahu Khan in his submissions on ground 5.

Ground 7 is an echo of ground 4(d) and has been covered.

Ground 8 is the general ground that the verdict is unreasonable. The evidence was ample and pointed to the accused. Any reasonable tribunal would be fully justified in coming to the same conclusion as the learned magistrate. I was referred to authorities saying that where a judgment contains a number of minor defects anyone of which could be overlooked when standing alone, their accumulation may make it unsafe to let the verdict stand. The answer to that is there was not an accumulation of defects. In fact none of the alleged defects have been substantiated and ground 8 fails accordingly.

Ground 6 refers to an alteration of the charge which had been made on 13/12/77 the day of the hearing. The charge as originally drafted alleged that the 11 drums were "the property of H.M. Customs Department". The words in inverted commas are now deleted and the particulars of the charge now allege that the accused "did receive 11 x 5 gallon drums of salad oil valued at $165.00 knowing the same to have been stolen" without any reference to ownership.

Dr. Sahu Khan referred me to S.204(1) C.P.C. which states that if a charge is defective in substance or in form the

Court may alter it or substitute or add another charge provided the accused is allowed to plead to the altered charge. The Fiji Court of Appeal had held in Hari Pratap v. R. 14 F.L.R. 93 that following such amendment a failure to take the accused's plea to the amended charge was fatal to the entire proceedings which were reduced to a nullity. Four alternative counts were added in the charge in H.Pratap's case and the accused's plea taken to them. He had pleaded Not Guilty to the four original charges. He was convicted on the four original charges to which he had pleaded Not Guilty. The Fiji Court of Appeal stated that the evidence supported the convictions but the trial was a nullity because the accused had not pleaded once again to the four original counts when the new counts had been added. They held that the word "charge" meant "the indictment" containing all the counts. The Privy Council held that s. 204 C.P.C. meant "count" when it referred to alteration of a charge and therefore the four original counts had not been altered.

The part of the headnote of the Fiji Court of Appeal's judgment on which this appellant relies as not having been over-ruled by the Privy Council says at p.94.

> "3. As no plea was taken at the time of the amendment to the original counts the appellant was not properly before the Court and the proceedings were null and void."

The Privy Council did not have to consider this latter part of the Fiji Court of Appeal's decision. However, that part of the decision quoted above has now been the subject of a specific decision by the Court of Appeal, Criminal Division, in R. v. Williams 1977 1 A.E.R. 874. It follows eleven years after the Fiji Court of Appeal's decision. In R. v. Williams it was held that where an accused intended to plead Not Guilty the failure to take his plea did not vitiate his trial provided a plea of not guilty had been vicariously offered or tacitly conveyed or a formal arraignment had been impliedly waived by the accused. In Williams's case the trial proceeded as if he had pleaded Not Guilty and he did not demur. The Court of Appeal in holding that the trial was valid stated at p. 879 that such an approach was consonant with the Law of England as well as with good sense for no detriment can enure to a defendant in

implying a plea of not guilty from his conduct. The appeal against conviction was dismissed.

I am inclined to the view that if the judgment in Williams' case had been delivered prior to 1966 the decision of the Fiji Court of Appeal that failure to take a plea inevitably and invariably vitiates the proceedings would have been worded somewhat differently.

In the instant case the accused had pleaded Not Guilty to receiving 11 stolen drums of salad oil. After the charge had been amended the trial continued on the basis of a plea of Not Guilty. The accused was represented by Dr. Sahu Khan in the court below as well as at the Appeal. To use the words of Shaw L.J. in Williams's case at p. 878 i,

> "There was a mutual assumption between the Crown and the appellant that the prosecution were put to proof of their accusation so that a trial of the issues was necessary. "

The judgment at p. 879 f/g quoted with approval the following passage:-

> "and even though accused has not pleaded, waiver will be implied where he and his counsel were present, were aware of the charge, and proceeded to trial as if he had been duly arraigned without objecting or in any manner calling to the attention of the Court the fact that he had not been arraigned. "

In my view it follows that the proceedings were not a nullity and ground 6 fails.

The appeal is accordingly dismissed.

LAUTOKA,
26th May, 1978.

(Sgd.) J.T. Williams
JUDGE

Messrs Sahu Khan & Sahu Khan, Counsel for the Appellant
Director of Public Prosecutions for the Respondent.

Date of Hearing: 28th April, 1978.