IN THE SUPREME COURT OF FIJI
Appellate Jurisdiction
Criminal Appeal No. 101 of 1980

Between:

CHANDRA BHAN SINGH s/o CHATTUR SINGH

and

REGINAM

Mr. V. Parmanandam for Appellant
Mr. A. Gates for the Respondent

JUDGMENT

On 15th July 1980 appellant was after trial convicted by the Suva Magistrate's Court of larceny as a servant and received a suspended prison sentence of nine months and was also fined $70 or in default two months' imprisonment.

The appellant appeals against his conviction on the following grounds:-

(a) The learned trial Magistrate erred in law in holding that the discrepancies between the various witnesses do not affect their credibility, when such discrepancies in fact must have, hence there has been a substantial miscarriage of justice.

(b) The learned trial Magistrate erred in failing to take into account the fact that the appellant could not have left the scene without being apprehended by PW.2 (and others) and as such his acceptance of PW.2 (and others) as a witness of truth is wrong. Hence there has been a substantial miscarriage of justice.

(c) The learned trial Magistrate erred in law in rejecting the evidence of the security guard PW.5 in view of the fact that his evidence was completely contrary to the other prosecution

witnesses and should have been looked at in the light of the whole of the prosecution case particularly because of the fact this was the only independent prosecution witness.

Grounds (a) and (b) which were argued together related to issues of fact while (c) averred that the learned Magistrate erred in law in giving no weight to the evidence of PW.5 who was the only independent witness in the case and whose evidence materially contradicted that given by PW.2, the main prosecution witness. I will advert to these grounds later but meanwhile it is necessary to review the evidence upon which the learned Magistrate based his findings of fact.

Narayan Singh (PW.1) the manager of Niranjan Ltd. gave evidence to the effect that on 19th December 1979 appellant was employed in the spare parts department of the company at Grantham Road. Six salesmen worked in the same department. For some time the company had engaged outside security services because spare parts had been missing from the department. On that day at about 5pm a surprise check of employees was organised by the security officer on duty. PW.1 was present when this was done. Employees were told to form into a line as they came out of the shop. According to PW.1 appellant was in the middle of the line before he broke off from it and went to the toilet nearby. PW.1's son (PW.2) followed appellant there. A little after appellant returned and was searched by the security officer. When PW.2 returned he brought a spare part with him and reported to his father (PW.1) where he found it. Next day PW.1 confronted appellant with the spare part and accused him of stealing it. Appellant denied taking this. PW.1 did not accept appellant's denial and sacked him from his job. The matter was reported several days later to the police following pressure from appellant's Union.

Nirmal Niranjan (PW.2) a student who was at the time holidaying in Fiji from Australia and son of PW.1 said that on

19th December 1979 he was present when a security check on employees from spare parts department was made. The employees were in a queue. The appellant stood in rear with the spare parts manager who had followed appellant out of the shop. Appellant left the queue before he was searched to go to the toilet. PW.2 followed him. According to PW.2 appellant did not go into the toilet but made for the hand basin beneath which was a bucket. PW.2 said he saw appellant pull out something from the top of his trousers at the waist band and drop it into the bucket. Having done that appellant turned back and walked out passing PW.2 as he did. No one else was in the toilet at the time. PW.2 went straight for the bucket which was filled with muddy water and emptied it and inside he found a fuel coil which was valued at $37. PW.2 reported his finding to his father. Together with the security officer they looked for the appellant but he was by then no longer in the premises.

Brij Kumar (PW.3) a salesman at Niranjan's Autoport for more than three years said that at about 4.45 p.m. on 19th December 1979 he was closing the windows in the shop when he saw appellant putting a fuel coil which was in a plastic bag inside his trousers at the waist band. He said he reported the matter to one of the salesmen named Sharda who in turn reported it to the security guard. PW.3 said that at 5 p.m. the employees formed into a line for a security check which was required. He said he saw appellant leave the line and went to the toilet. Appellant returned three seconds later and was checked by the security guard and went away. PW.3 saw PW.2 follow appellant to the toilet and when PW.2 returned he brought with him a fuel coil similar to the one he had seen on the counter and which appellant had put inside his trousers.

In cross-examination PW.3 said appellant was about three feet away when he saw him put the coil in his trousers. He said appellant took the coil from the shelf. There were four salesmen serving at the counter at the time. Appellant was not a salesman but an employee in the department. PW.3

said PW.2 came out of the toilet a few seconds behind the appellant.

Shardha Nand (PW.4) a salesman for Niranjans in the spare parts department said that on 19.12.79 when he went to put away his time card he saw appellant tucking something inside his trousers. He could not see what it was. He said when he saw the security guard he informed him about it. PW.4 said at 4.55 p.m. they were told to form a queue to be searched by the security guard. He said appellant was in front of him. PW.4 said when the security guard was about to check appellant, appellant moved back behind him and left for the toilet. PW.2 followed him there. Appellant who was away for about two to three seconds came back from the toilet just before PW.2. When PW.2 came back he brought with him a fuel coil.

The main features of the prosecution evidence which I have outlined in the foregoing seriously incriminated the appellant with regard to the charge before the Court. However in his submissions in regard to grounds (a) and (b) in the petition of appeal counsel for appellant made the point that the discrepancies in the evidence between the main prosecution witnesses were such that they could not be regarded as witnesses of truth or in any event as reliable witnesses. Moreover counsel argued that the prosecution evidence relating to the time appellant and PW.2 were seen to follow each other to the toilet and back could not possibly be correct or true because if the witnesses were telling the truth or were reliable it would have been possible to confront and even apprehend appellant for alleged stealing of the fuel coil that same afternoon. No such thing was done. It is claimed therefore that the trial Court was wrong in giving credence to their evidence. Having carefully considered all the submissions presented in this case I accept that there were discrepancies in the evidence of prosecution witnesses. I also accept that there was something faulty about the time given by the witnesses for the occurrence of the toilet incident, if I may so express myself. However, in the end I have come to the firm view that these points of contention were essentially matters relating to details upon which recollection

is always known to be less than perfect and could never be absolutely accurate. Experience has shown time and time again how imperfect the human memory is in recalling details of incidents particularly as in this case the witnesses have been asked to recall events which allegedly took place several months before. In this connection it is worthy of note that the main witnesses have not been shaken on the broad matters of their evidence concerning what allegedly occurred at Niranjans on the day in question. Accordingly I am unable to accept that these prosecution witnesses were unreliable and could not be believed.

This brings me to ground (c) in the petition of appeal which dwells on the contradiction to be found between the evidence of PW.5, the security guard and PW.2. PW.5 said that the fuel coil was found in the toilet in his and PW.1's presence by PW.2 after he had checked all the employees. With regard to PW.5's evidence the learned Magistrate dealt with it in this passage from his judgment:

> " I can only say that, despite the fact that he had been 29 years in the police force prior to being a security guard, I found PW.5 was a bad witness.
>
> His manner in the witness box did not impress me as that of a man who took care with his evidence. I am certain that he is wrong in his account and that PW.2 is correct. "

In this assessment of PW.5's evidence this Court obviously has not the advantage of the learned Magistrate who saw and heard PW.5 give evidence and for that reason was, I think, better placed than this Court could ever be to properly evaluate his evidence. In any case PW.1, PW.3 and PW.4 all gave evidence which corroborated PW.2's evidence that he found and brought the fuel coil from the toilet. In these circumstances I do not think there is any proper basis for this Court to reject the assessment by the learned Magistrate of PW.5's evidence. PW.5 did see appellant in the queue before he was searched and later after he had returned from the toilet. Such evidence was itself damning particularly when viewed in

the light of the evidence given by PW.3 and PW.4 both of whom it will be recalled said they saw appellant put something inside the top front part of his trousers before leaving the shop and before the spot check was carried out. PW.3 went further and said it was a fuel coil that appellant tucked inside his trousers. No sound reasons have been given why PW.3 and PW.4 should not be treated as independent and reliable witnesses. Their evidence strongly implicating appellant with stealing a fuel coil from the spare parts department coupled with the evidence of the finding of a fuel coil in a bucket in the toilet soon after appellant had gone there is, ~~I think~~ in my view conclusive of the guilt of the appellant on the charge before the Court.

Another consideration which this Court has taken into account in reaching its conclusion in this case was the fact that the appellant did not offer to give any evidence or statement on his own behalf but elected to remain mute. Admittedly appellant was exercising his constitutional right and this of course he was perfectly entitled to do. However the question must be asked that in the face of extremely damaging evidence adduced by the prosecution against him why appellant did not feel it incumbent upon him to answer or explain away the grave allegations which had been levelled against him, particularly by PW.2, PW.3 and PW.4. Appellant's position was indeed very bleak at the conclusion of the prosecution case because of the evidence given by PW.3 and PW.4 which had remained unshaken and uncontroverted.

In all of the circumstances of this case I am abundantly satisfied that there are no proper grounds for this Court to interfere in this case.

In the result the appeal is dismissed.

(T.U. Tuivaga)
Chief Justice

Suva,
23rd January 1981.