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SURENDRA PRAKASH

v.

REGINAM

B

[COURT OF APPEAL—Roper, J. A., Mishra, J. A., O'Regan, J. A.]

Criminal Jurisdiction

C

Criminal Law—Forgery and uttering charges—necessity for directions as to the use of evidence against one who aids and abets—clear direction on corroboration lacking—direction on identification needed but not given—convictions "unsafe"—new trial ordered.

Hearing: 21 September 1987
Judgment: 25 September 1987

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D. V. Fatiaki for Appellant
K. Taylor for Respondent

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Surendra Prakash appealed against conviction and sentence on a charge of forging American \$100 banknotes and four of uttering such notes. The appellant was sentenced to 5 and 12 years imprisonment respectively on the charges, to be served concurrently.

There was one charge of Forgery and four of Uttering.

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The case for the prosecution had been that appellant was party to forgery in that he counselled and procured two directors of Budget Printers Ltd. of Lautoka, Surendra Nath (Nath) and Bal Krishna (Krishna) to forge some hundreds of U.S. \$100 bank notes by an offset printing process and thereafter uttered or was party to uttering of the notes or some of them at various resort Hotels.

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The Court was able to reduce the stated grounds of appeal to three, i.e. concerned with corroboration identification and parties to the alleged uttering.

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The principal evidence against appellant on the charge of forgery was that of Nath and Krishna who had pleaded guilty and had been sentenced on that charge prior to giving evidence for the prosecution. This evidence was of appellant coming to them with two genuine notes and asking them to produce copies which they did, then handed the forged copies to the appellant. These two being accomplices, appropriate direction was required of the trial Judge. The direction to the Assessors which apparently was to refer to corroboration was set out by the Court of Appeal—

"You have heard what Samuel Surendra Nath said about his conversations with the accused. You heard him say the accused promised to pay \$10,000 for the job, how when he was pressed for payment the accused said he was waiting for

the ship Oriana because he was sending the notes abroad by someone on the Oriana and was expecting money and he couldn't pay till he got money. Then you heard what Samuel Surendra Nath said about the cheque for \$5,000. that he wanted something to show the company from whom he was buying a car. and how in pressing the accused for money he agreed to take a postdated cheque, which was to be cashed when the accused got the money he expected.

Your will note that we only have Samuel Surendra Nath's account of this, although you have also seen the cheque and the cheque stub: the accused himself has said nothing about the cheque.

Well does this evidence and the evidence as a whole leave you in any reasonable doubt that the whole purpose behind the forgery was to defraud? And does not the existence of the cheque and cheque stub as described by Samuel Surendra Nath afford some corroboration of his evidence?

And then again if you accept the evidence I will come to in a moment, that within a short time after getting the bundle of notes the accused was seen cashing them. or even in the company of someone who was cashing them in various hotels and bars, is this not strong evidence not only that the whole intention of the exercise was to defraud, but evidence to corroborate Samuel Surendra Nath's and Bal Krishna's evidence of forging the notes for the accused, and of delivering them to the accused?"

Their Honours found these faults in it. The trial Judge did not define what corroboration meant. It was the trial Judge's duty to point to evidence capable of being corroboration than the Assessors' task whether it was in fact corroboration; yet the whole matter was by rhetorical questions left to them to decide if it was corroboration. The evidence of the cheque was not capable of being regarded as corroboration for the evidence of Nath. It did not by itself, confirm in a material way that forgery had been committed or that appellant committed it i.e. in the way alleged.

The evidence that appellant was in company of someone cashing the notes could not be evidence of forgery; nor was there evidence that the notes so uttered were those forged by Nath and Krishna. The latter were not asked to identify any of the notes exhibited. Nath said of the last two forged notes exhibited that they were not printed by his company. Two other notes he was shown were "very similar" to those he printed—he could not be definite. It seemed (from other evidence) that the latter two were not recovered from a hotel or its bank.

Held: The directions on corroboration as to forgery were inadequate and confusing. Corroboration was not defined. There was no direction as what evidence was capable of being corroboration. The evidence of the cheque supra was not capable of being corroboration.

As to the actual process of uttering charges there were two material complaints, inadequate directions as to parties lack of identification in respect of each hotel identification. The evidence was that on each hotel where cashing was achieved, appellant was present; sometimes he presented the notes, sometimes he stood by

- A while another did so. There was no direction about the aiding, abetting, counselling or procuring on such occasions. What was required was how the one standing by could become criminally liable.

Appellant said to have been at the hotels was in the presence of those who identified him but a short time. A warning was not given as to identification, and relating to the facts of each specific case (*R. v. Turnbull* (1976) 3 All E.R. 549).

- B The conclusion was that it would be unsafe to allow the convictions for uttering to stand.

Appeals upheld.

New trial ordered on counts 1, 2, 3 and 6.

C

Cases referred to:

R. v. Turnbull (1976) 3 All E.R. 549; 63 Cr. App. R. 132

ROPER,—J. A.

D

Judgment of the Court

This is an appeal against conviction and sentence on one charge of forging American \$100 banknotes and four of uttering such notes. The Appellant was sentenced to 5 years imprisonment on the forgery charge and 2 years on each of the uttering charges, to be concurrent in themselves, but cumulative on the 5 years.

- E The Crown case against the Appellant was that he was a party to the forgery in that he counselled and procured two directors of Budget Printers Ltd. of Lautoka, Surendra Nath and Bal Krishna, to forge some hundreds of \$US100 banknotes by an offset printing process and thereafter uttered, or was a party to the uttering of the notes at various resort hotels in the Western Division.

- F Eight grounds of appeal were advanced dealing in the main with the Trial Judge's directions to the Assessors, but this appeal can be disposed of by concentrating on only three of them, being those which bear on the issues of corroboration, identification, and parties to the crime of uttering.

- G The main evidence against the Appellant on the charge of forgery was that of Surendra Nath and Bal Krishna, who had both pleaded guilty to, and been sentenced on that charge prior to giving evidence for the prosecution. They told how the Appellant had come to them with two genuine \$US100 banknotes and asked if they could print copies from them. They agreed, the job was done and the Appellant was handed the bundle of forged notes. It was of course a case where an accomplice warning and a careful direction on corroboration were called for. In his summing-up the Trial Judge introduced the subject by telling the Assessors of the witnesses' pleas of guilty, that they were accomplices, and that their evidence must be treated with caution because they might have reasons of their own to give false evidence
- H against the Accused. He then continued—

"And although there is nothing in the Penal Code or the Criminal Procedure Code on this and no requirement by law, nevertheless it is necessary that I warn you and be sure that you are aware of the danger of convicting the accused on the evidence of an accomplice unless it is corroborated in some material respect by independent evidence tending to implicate the accused. So first of all you must be satisfied as to the credibility of the accomplice evidence, because if you don't believe it in the first place it cannot be corroborated. And then if you find it credible you should look for corroborating evidence as I have said. And then because both Samuel Surendra Nath and Bala Krishna are both accomplices you should not treat one as corroborating the other because there might be some reason for them to conspire together."

It is not clear what the Trial Judge meant by his reference to there being "no requirement by law" in that passage because an accomplice warning is a requirement of the law. It may be that he was intending to convey that despite the warning it was competent for the Assessors to convict without corroboration but it was, if that was the case, not expressed in a very helpful way.

The Trial judge then posed a number of rhetorical questions which must surely have left the Assessors with the impression that Nath and Krishna must indeed be witnesses of truth. This is the passage in the summing up—

"Well you have seen and heard both give evidence, you have seen and heard both being subjected to cross-examination by defence counsel. Defence counsel has pointed out to you certain discrepancies in their evidence. But would you consider those discrepancies to be material, or do they give you any reason to reject the substance of their evidence as unreliable? Or would you say they were the sort of discrepancies that are always likely to be found when witnesses are cross-examined at length by defence counsel, and particularly when they are cross-examined maybe 18 months after the event? In fact if there were no discrepancies would it not look more suspicious in all the circumstances?"

And you might ask yourselves what possible reason could there be for both of those persons to give false evidence against the accused so as to implicate him? No reason has been revealed or suggested for this. And you might also ask yourselves what they can now possibly hope to gain, since they have already been dealt with and sentenced.

If you accept their evidence, or at least the substance of it, are you left with any doubt that the forgeries were carried out at the request of the accused, and that a bundle of about 500 notes was then handed over to the accused."

The Trial Judge then gave a direction on intent to defraud and returned to the question of corroboration but in an indirect way as follows—

"You have heard what Samuel Surendra Nath said about his conversations with the accused. You heard him say the accused promised to pay \$10,000 for the job, how when he was pressed for payment the accused said he was waiting for the ship Oriana because he was sending the notes abroad by someone on the Oriana and was expecting money and he couldn't pay till he got money. Then you heard what Samuel Surendra Nath said about the cheque for \$5,000, that he wanted something to show the company from whom he was buying a car, and how in pressing the accused for money he agreed to take a postdated cheque, which was to be cashed when the accused got the money he expected."

A You will note that we only have Samuel Surendra Nath's account: of this, although you have also seen the cheque and the cheque stub: the accused himself has said nothing about the cheque.

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B And then again if you accept the evidence I will come to in a moment, that within a short time after getting the bundle of notes the accused was seen cashing them, or even in the company of someone who was cashing them in various hotels and bars, is this not strong evidence not only that the whole intention of the exercise was to defraud, but evidence to corroborate Samuel Surendra Nath's and Bal Krishna's evidence of forging the notes for the accused, and of delivering them to the accused?"

C It was the duty of the Trial Judge to direct the Assessors what parts of the evidence, if any, before them was capable of being corroborative, and it was for them to decide whether it was in fact corroborative. Again by rhetorical questions, the Trial Judge really left the whole issue to the Assessors. In fact, the evidence relating to the cheque was not capable of being corroborative of Nath's evidence. Divorced from Nath's evidence that it was paid on account of the forgery work it did not confirm in a material way that forgery was committed or that the Appellant was a party to it and indeed the Trial Judge did not really define with precision what was meant by corroboration, but simply said it was "independent testimony tending to implicate the accused". As for the Trial Judge's query of the Assessors as to the corroborative effect of the evidence of the appellant cashing forged notes, or being in the company of someone who was, two observations can be made, first, that the evidence that the Appellant was simply "in the company" of someone who was uttering could not be corroborative of forgery; secondly, that to be corroborative of the evidence as to forgery there would have to be proof that the notes uttered were those forged by Nath and Krishna, and there was no such proof.

D Krishna was not asked to identify any of the notes exhibited and Nath said that two forgeries he was shown were not printed by his firm, and two others were "very similar" to the ones he printed but he could not be definite. It appears from the record that the latter two were not uttered notes recovered from a hotel or its bank.

The directions given the Assessors on the question of corroboration were quite inadequate and confusing and the conviction on the forgery charge cannot stand.

E As for the uttering charges there are two main complaints, a failure to give an adequate direction on parties to the offence, and a careful direction on identification in respect of each hotel identification by hotel staff who cashed forged banknotes.

F If it was the Appellant who was present at each of the hotels then the evidence was that on every occasion he was accompanied by another man, said to be one Virendra Singh. The evidence was that on some occasions the Appellant stood by. There was no direction to the jury on aiding and abetting, or counselling and procuring. At one point the Trial Judge said:

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"Shortly after the accused took delivery of the forged notes he appears in the Nadi Hotel and various hotels along the Coral Coast cashing new forged US\$100 notes, or with someone cashing new forged US\$100 notes. And those forged notes all either bear the serial number B46414144B or L20920440A, and were forged using an offset printing machine, and have similar defects as described by Carter Kim.

What the Crown says—and asks you to draw this as an inescapable conclusion—is that the timing and various events and circumstances are more than mere coincidence and therefore the only conclusion to be drawn is that these were the notes forged at Budget Printers for the accused and that the accused was seen in the process of using some of the notes."

What was required was a direction as to how "a bystander" may become criminally liable for an offence being committed in his presence.

As for the identification point, all the identifying hotel witnesses were strangers to the Appellant and it appears that the person who uttered was not long in their presence. The circumstances were such that a careful warning in accordance with the guidelines in *Turnbull* (1976) 3 All E.R. 549, and relating to the facts of each identification was called for. No such direction was given until the very end of the summing-up and then at the request of the Prosecutor. There was no verbatim report of what the trial Judge said, but from the record it appears that it was simply a general statement of the care needed in assessing evidence of personal identification and the reasons for it. The direction does not appear to have been related to the specific instances of identification.

Our conclusion is that it would be unsafe to allow the uttering convictions to stand.

We therefore allow the appeals against conviction and order a retrial of Counts 1, 2, 3 and 6. We allow the appeal against conviction on Count 5 but do not order a new trial as the evidence concerning it is such that no reasonable Assessors properly directed could convict upon it. The Trial Judge pointed out the problem in the evidence in this passage:

"The takings for the Naviti Hotel for 11.8.85 show that two counterfeit US\$100 notes were included, and for 10.8.85 also two counterfeit US\$100 notes were included. But you will remember that Vinod Chand, the head teller at the ANZ Bank, gave evidence of receiving various foreign currency notes from Sigatoka, and he said that the consignment he received on 12.8.85 included 5 counterfeit US\$100 notes, but also included 3 genuine \$US100 notes. So is it possible to say definitely even if you believe Timaima Feoko that the note changed by Virendra Singh and the accused was one of the forged notes."

The answer to the question posed by the Trial Judge could only be "No".

Appeal allowed; retrial not ordered.