IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 21 of 1966

Between:

RAM SUNDAR
s/o Pirmu Dayal

Appellant

and

REGINAM

Respondent

JUDGMENT

The Appellant was convicted on 11th August, 1966, before the Supreme Court sitting with three assessors of the offence of larceny by a public servant contrary to section 300 (b) (i) of the Penal Code and sentenced to twelve months' imprisonment.

On 7th February, 1966, appellant was Postmaster at Namaka, Nadi, in the Western Division. At 3 p.m. that day, the Senior Postmaster, Lautoka (G.A. Whiteside) conducted a surprise check on appellant's post office on instructions from Head Office. The safe was locked and, when Whiteside told appellant he had come to check appellant's cash and asked for the keys, appellant felt in his pockets for the keys, said he did not have them and that he must have left them at home or in the taxi he used at the lunch hour that day. Whiteside told him to go and get the keys. As he had not returned by 8 p.m., Whiteside sent Subramani, the next senior officer at the Post Office to the appellant, and a police constable, to his home and appellant returned with this officer at 8.30 p.m. According to Whiteside, appellant said he had not found his keys, that he had been to Kiwi Taxis at Namaka and Nadi town looking for the taxi concerned and that he had been to the Nadi Airport Club for a little time because he thought he might have to stay beside the safe all night. Whiteside then ordered him to leave the office and not to return until the duplicate keys were flown over from Suva next day. As

duplicate keys could not be found the safe was forced open on the afternoon of 8th February and it was found that there was a deficiency of $138 in the cash. On 9th February, appellant spoke to Whiteside on the telephone and asked the outcome of the check. When told, he said he did not know how the shortage came about, but that his family would make up the deficiency.

It was common ground that the appellant held the keys to the safe and was responsible for this money, although as expressed in the judgment, it is indisputable "that other persons had access to the safe between the relevent dates". The relevent dates were 31st December, 1965, when the money held was last checked and found correct, and 7th February when the surprise check was made. The evidence that led to this conclusion came from other persons employed at the office and the appellant. Subramani stated that, when appellant was ill, the latter would give the keys to Subramani, but that this had last happened about October-November, 1965. This witness also said that, in January or February, he had opened the safe on appellant's instructions and that the latter was generally present. He said there was complete trust between the staff members. He said the keys were sometimes left in the keyhole of the safe, which is in the appellant's office. He said that, between the relevant dates, he was on night shift and that, when on night shift, he did not have the keys at all and would leave the office when the appellant arrived to take over in the morning.

Vijay Bhan Singh, the counterclerk between the relevant dates, confirmed that Subramani would have the keys when appellant was sick. He said that no one other than appellant and Subramani was ever in charge of the Post Office, and that appellant would leave the key hanging in the safe when working in his office and "when he might be in the mailroom", although, in re-examination , he said that he had never seen the keys hanging from the safe when appellant was not in his office. He said the appellant never entrusted "us" with the safe keys. He also denied that appellant had instructed him to take stamps out of the safe himself. There was undisputed evidence that the barman at the Nadi Airport Club found the missing keys at 1 p.m. on February 8th when emptying out a rubbish drum in the toilet room at the Club. He did not know when the drum was last emptied.

On February 9th, appellant told a detective sergeant that, as a rule, no one but himself had access to the safe, but "a lot of times" he left the safe open when he went to the mailroom, toilet and Customs. He also told the sergeant that he had last used the key at 12.30 p.m. on February 7th and that he had it in his pocket when he went for lunch.

Appellant gave evidence on oath and stated that, when he went to the Customs Office or Airways Office in the course of his duties (which was apparently quite frequently) he would leave the safe keys with the senior clerk. He said he had given V.B. Singh the safe keys to take out stamps at 10 a.m. on February 7th and that this was normal practice. He also said that Subramani collected the safe key from appellant's house on February 2nd or 3rd. There was no evidence to show how cash was kept in the safe so as to indicate whether or not a person who went to the safe would have direct access to the cash.

On the evidence the trial Judge directed the assessors, and found that other people had access to the safe between the relevant dates and that the question of appellant's guilt rested on the Crown submission that appellant's behaviour, when he was unexpectedly required to open the safe, conclusively negatived the possibility that somebody other than appellant had taken the money. He advised the assessors that they should consider the question solely from that point of view.

The evidence of appellant's behaviour, apart from what has already been stated in this judgment, comes from the following evidence. Appellant deposed that he went to his house to look for the keys, and, when he did not find them, felt they may have dropped from his pocket in the taxi he used at lunch hour or at the Club, where he had had lunch. He told Whiteside that evening that he had gone to the taxi office, but, in his evidence, admitted that he had not gone there, although it was only a mile away from his house, but said he telephoned the garage and enquired. The taxi-driver remembered taking appellant at lunch time and gave evidence the effect of which apparently was that he received no enquiry about the key. Appellant said that he went to the Airport Club at 7 p.m. on the 7th but did not enquire about the missing key, although he remembered taking his handkerchief out of his pocket while in the toilet there, at lunch time.

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He went to the Club again at 5 a.m. the next morning, but did not enquire about the keys. He said he had gone there at that hour looking for transport to go and see if the staff were working at the office.

It was, of course, open to the assessors and the trial Judge on this evidence to find that the appellant was merely playing for time because of his knowledge of his own guilt. Two of the three assessors were of opinion he was not guilty. One assessor considered him guilty and the trial Judge found him guilty.

The trial Judge directed the assessors on the crucial issue of the inference to be drawn from this behaviour in the following terms :-

> " The vital question is whether the Crown has established beyond all reasonable doubt that the accused, and no one else, must have stolen the money. That other persons had access to the safe between the relevant dates is indisputable although the accused, as Postmaster, was responsible for the safe and the keys, Exhibit 10. You have heard the evidence from the other post office employees in this regard. However, it is the Crown submission that any reasonable possibility that somebody other than the accused had taken the money is conclusively negatived by the behaviour of the accused when unexpectedly required to open the safe by Mr. Whiteside. It is for you to consider what reasonable inferences must be drawn from his behaviour. It is the Crown case that, taken in its totality, this behaviour of the accused was beyond all reasonable doubt the behaviour of a guilty man desperately playing for time, well knowing that once Mr. Whiteside counted the money in the safe, the deficiency, for which he knew he was criminally responsible, would be revealed. "

In his judgment, he has directed himself in similar terms and arrived at the conclusion that he is satisfied beyond all reasonable doubt that the Crown submission is correct.

Two grounds of appeal were pressed before this Court. One was in the following terms :-

> " The learned trial Judge misdirected the assessors in not directing them that even if they did not accept that the behaviour of the accused subsequent to 3 p.m. on the 7th February, 1966 was not consistent with the accused's innocence but were left in doubt about it the accused was still entitled to be acquitted. "

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Expressed thus, it is sufficient to say that, on several occasions in addition to the passage quoted above, the trial Judge both in his summing up and his judgment, makes it clear that the guilt of the appellant must be established beyond reasonable doubt, that he also pointed to the crucial issue as being the inference to be drawn from the appellant's behaviour and that the Crown case was that the inference of guilt was established beyond reasonable doubt.

In the state of the evidence, this was sufficient in the circumstances of this case. Where the state of the evidence is such that more than one inference may with equal reason be drawn from the acceptable evidence, no doubt a more complete direction on the question of inferences should be given. It is difficult to conclude that this is the state of the evidence in this case, notwithstanding that two of the assessors were of opinion that appellant was not guilty.

The appellant was sent off at 3 p.m. to go and get the keys. He did not return until 8.30 p.m., when a postal official and a police constable were sent to bring him. His explanation that he was looking for the keys can hardly be expected to be believed, or even to raise a reasonable doubt, when he fails to go one mile to the taxi garage where he thought he might trace them, goes to the Club twice where he feels he may have lost them and fails to make any enquiries, and fails to return and report to his superior officer until, after a lapse of five hours, he is sent for. In addition, he returned to the Club at 5 a.m. and gave the explanation that he was seeking transport to go to the office at a time when, according to Whiteside, he had been directed not to return to the office until the duplicate keys arrived. He still did not enquire for the keys, which, by that time, had been found at the Club. The very fact of his failure to produce the keys at a time when money was missing from the safe must weigh against him in these circumstances, as must his failure to contact Whiteside on the following day, when duplicate keys were expected to arrive from Suva. His conduct, far from suggesting the inference that he was endeavouring to find the keys or any other inference that might be favourable to him, obviously suggests the inference, unfavourable to him, that he had a guilty conscience

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and did not really want to produce the keys, if he had them, or find them, if he had lost them.

In the judgment of this Court, even had the Judge directed himself more fully on the question of the inferences that might be drawn, the conclusion would remain that, on the acceptable evidence, the appellant's behaviour was beyond reasonable doubt consistent only with the guilt of the appellant, in that it conclusively establishes that he knew there was a shortage in the cash and that he was not prepared to admit to a shortage or to offer an explanation, either at that time, or subsequently when the shortage was discovered.

The other ground argued was as follows :-

" THE learned trial Judge specially directed the gentlemen assessors not to confuse "reasonable doubt" with "a shadow of doubt". In directing himself that two of the gentlemen assessors, who had found your Petitioner not guilty, had perhaps elevated "reasonable doubt" to "a shadow of doubt" the learned trial Judge disabled himself in getting their aid and therefore a substantial miscarriage of justice has occurred. "

The trial Judge records in the judgment that he had given great weight to the opinion of these two assessors, and, in differing from them, expressed the view set out in the ground. In doing so, he was merely recording his view of what may have led the assessors to a different conclusion. He makes it clear that he is satisfied there was no reasonable doubt and that that is what he must consider. In expressing himself as he has, it is difficult to see in what manner he has disabled himself from having the aid of the assessors. On the contrary, he is obviously giving serious consideration to their view and stating the possible reason why they have arrived at their conclusion and why he must differ from them.

Some reference was made in the course of the argument to the judgment of this Court in Ram Lal v. R (Criminal Appeal No. 3/58) in which it is stated :-

" A trial Judge would require to find very good reasons indeed, reflected in the evidence, before being justified in differing from a unanimous opinion of the assessors on such a question of fact. "

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Reference was also made to the judgment of the Privy Council in Bharat v. R. (1959) A.C. 533 at p. 539 :-

> " If the majority of (the assessors) had given such an opinion the Judge might possibly have accepted it in preference to his own. At any rate he could hardly have rejected it without saying why he did so. "

It is to be noted that in the present case the learned trial Judge stated very clearly why he had differed from the majority of the assessors. He considered that they had confused "reasonable doubt" with "a shadow of a doubt". The judgment in Ram Lal (supra) was considered by this Court in Ram Bali v. R. and the judgment of this Court in the latter case was, on appeal to the Privy Council, referred to by Their Lordships (Privy Council Appeal No. 18 of 1961). In the course of the judgment Lord Morris says at page 4 :-

> " Though all three considered that the appellant was not guilty the learned Judge found him guilty. This was a strong course to take but there is no reason to think that the learned Judge did not pay full heed to the views of the assessors or to the striking circumstance that they were unanimous in favour of acquittal. Nor is there reason to think that he was unmindful of the value of their opinions or of their qualifications to assess the testimony of the various witnesses in a case of this nature. In his summing-up he had said that their opinions would carry great weight with him. The decision of the learned Judge was based upon his own emphatic conclusions in regard to the evidence. "

In that case Their Lordships upheld the verdict of the learned trial Judge and dismissed the appeal. In our opinion the same principles may properly be applied in the present case. The trial Judge, after giving full consideration to the opinion of the majority of the assessors, concluded that the only inference to be drawn from the evidence was an inference of guilt. He had, in our view, ample grounds for his finding and no good reason has been shown why that finding should be disturbed by this Court.

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The appeal is dismissed and the conviction and sentence confirmed.

Mills-Evans C.J.
PRESIDENT

Marsack J.A.
JUDGE OF APPEAL

Wylie J.A.
JUDGE OF APPEAL

SUVA,
16th September, 1966.