IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

CRIMINAL APPEAL NO. 42 OF 1982

Between:

VIJAY PRAKASH
s/o Thakur Prasad — APPELLANT

- and -

R E G I N A M — RESPONDENT

S.D. Sahu Khan for the appellant
D. Fatiaki for the respondent.

JUDGMENT OF THE COURT

Spring, J.A.

The appellant was convicted by the Magistrate's Court sitting at Ba of the following offences:

(a) Larceny, contrary to section 262 of the Penal Code (Cap. 17) concerning the theft of a goat;

(b) Three counts of cattle theft, contrary to section 275 of the P nal Code and

(c) A count of escaping from lawful custody contrary to section 138 of the Penal Code.

He was sentenced to a total of 2 years 3 months imprisonment.

Appeals against these convictions were heard by the Supreme Court of Fiji at Lautoka on 16th July, 1982, and dismissed.

Appellant appeals to this Court and by virtue of section 22(1) of the Court of Appeal Act (Cap.12) such appeals are confined to questions of law. The appeal in respect of the conviction of escaping from lawful custody was abandoned. It is necessary to set out the facts in some detail.

Evidence was given by Mani Ram that on the night of 24th December, 1980, he had 8 goats tethered beside his house at Vatulaulau. Next morning he noticed that a white goat with a black under belly was missing; he searched unsuccessfully for the animal and reported the theft to the police. Shiri Dharan of Vatulaulau stated thot on 13th August, 1981, he tethered his black cow away from his house; later that day he found the cow missing; his search proved fruitless.

Sahil Khan (also known as Dado) of Vatulaulau gave evidence that he owned 2 bullocks, one black and white, and the other black, both had horns; he had owned them since calving. On 14th September, 1981, he left them in a sugarcane field of a neighbour unattended and approximately 14 chains from appellant's house; next morning he found the bullocks were missing and after an extensive search he reported the loss to the police. Two days loter he found the bullocks tethered by a very short rope and located opproximotely 4 chains from appellant's house in a hollow surrounded by bush and hidden from sight; he reported these details to the police and on their instructions he took them away.

Motilal (also known as Sadhu) cultivated his land at Mavuvu with 2 bullocks one black and one white and both branded "BGY". On 16th September, 1981, appellant borrowed these bullocks for ploughing upon the understanding that he would return them that evening; no permission was given to appellant to sell the beasts; the animals were not returned; Motilal searched for 3 days and reported their loss to the police; some time later the police returned the animals to Motilal. Ram Raj a farmer of Balevuto gave evidence that in August/September 1981 he bought a black cow from appellant for the sum of $100 which he represented was his own property.

About one month after the sale of the cow, appellant offered to sell to Ram Raj for $500 a pair of bullocks one black and one white; both were branded; he claimed that the bullocks were his; upon rejecting the offer appellant reduced the price to $300 whereupon Ram Raj became suspicious and offered $150; agreement was reached whereby Ram Raj paid $50 on account of the purchase price and kept the bullocks on his farm until the balance of the purchase price was paid next day. At 8 a.m. on the following morning the police arrived with appellant who admitted to the police he had sold the bullocks to Ram Raj; he further admitted that earlier he had sold a black cow to Ram Raj.

A police officer, Ramendra Kumar Singh, gave evidence that he accomponied Sahil Khan when he identified his bullocks tethered in the bush hidden from view and in close proximity to appellant's house; upon Sohil Khan identifying his bullocks a police officer handed them to him.

On 17th September, 1981, as a result of another complaint, Constable Ramendra Singh interviewed appellant at

Balevuto when he admitted purchasing bullocks from Motilal and selling them to Ram Raj. Upon being requested to accompany the police to Motilal's property, appellant refused to go and thereupon was arrested. The police party and appellant proceeded to Motilal's property where the bullocks were tethered. Appellant escaped from the police party by running away into a canefield three chains away. Help was sought from the villagers to look for the appellant; he was subsequently apprehended and the questioning continued; he was asked about the sale of a cow to Motilal; he admitted stealing the cow and selling it to Motilal for $100; upon being shown a receipt for $100 for the cow he admitted that he had made it out for $100 and given it to Motilal. After further questioning, he admitted that he had stolen a goat from Mani Ram's property, killed it by a creek and consumed the meat. Shortly thereafter he was taken to the Police Station and duly cautioned; he made a statement admitting the theft of the goat, the cow and the two pairs of bullocks.

Appellant was duly charged with the stated offences and the trial was held before a magistrate sitting alone; the appellant was unrepresented by counsel. The prosecution called evidence from Mani Ram, Shiri Dharan, Sohil Khan, Motilal, Ram Raj and Constable Ramendra Kumar Singh. The appellant did not cross-examine Mani Ram, Shiri Dharan, Sahil Khan or Motilal. In the case of Ram Raj, appellant suggested in cross-examination that Ram Raj had asked appellant to obtain the bullocks; the witness denied this allegation.

Constable Ramendra Singh gave evidence as to the discussions he had with appellant which subsequently led to his arrest; he also deposed as to the admissions made by

appellant and proceeded to read the statement made by appellant. When it came the appellant's turn to cross-examine the police officer he stated he had been threate ed and had his hoir pulled; whereupon the learned magistrate stated immediately that he would need evidence as to the voluntariness of the statement taken from the appellant by Constable Ramendra Singh; a trial within a trial was held to determine this issue, and also the admissibility of a charge statement taken by Constable Balwant Singh. At the trial within a trial evidence was given by the two Police Constables as to the circumstances surrounding the taking of the statements; they denied that force, threats or offers of inducement were made to appellant by any of the police officers. Special Constable Manoa Tora stated that he assisted in the search for the appellant when he escaped into the canefield and that in company with a villager he found the appellant sitting in high cane and noticed his tongue was bleeding; appellant was taken to the hospital for examination and a medical certificate was produced. Detective Inspector Subramani gave evidence that he was present when appellant gave his statement and that no assaults, threats or offers of inducement were made.

Appellant gave evidence on oath at the voir dire, this evidence was confined entirely to the alleged threats and assaults upon him and it reads as follows:

> "I was assaulted by police at Balevuto and again at station. P.C. Balwant (PW7) had hit me twice on the ear. He also hit me on the left eye.
>
> Cross-examination by Police.
>
> I did escape from police - I had injuries on my stomach, assaulted by police. P.C. Balwant had hit me in cell before my statement. I did not fall and sustain injury to lips/tongue."

Appellant called no witnesses nor did he direct his evidence or questions in cross-examination to any of the other matters dealing with the substantive charges and referred to in the evidence of the prosecution witnesses. The learned magistrate in giving his ruling that he would admit the statements in evidence said :

> "Have considered the evidence of trial within a trial and hold that no impropriety was resorted to when MFI 2 and MFI 3 taken."

The trial proper then proceeded and the two police officers were recalled and in the course of their evidence tendered the interview and charge statements; appellant when he was given the opportunity to cross-examine Constable Balwant Singh refrained from doing so; he merely questioned Constable Ramendra Singh whether the answers as recorded were given by appellant. The learned magistrate held that there was a primo facie case. There is a note on the record which reads :

> "Court: Hold a prima facie case. Section 210 C.P.C. accused elects unsworn statement."

An unsworn stotement was made by appellant, the full text of which is as follows :

> "I did not steal these animals. This is all."

Appellant informed the Court that he did not have ony witnesses; nor did he wish to address the Court.

The trial concluded on 7th April, 1982. On 26th May, 1982, the learned magistrate delivered his written judgment.

We turn now to the grounds of appeal. Ground 1 reads:

> "THAT the learned appellate judge erred in law in holding that the learned trial magistrate was correct and could refer to the proceedings and evidence of the voir dire in his final judgment."

Mr. Sahu Khan for appellant submitted that the learned appeal judge was in error in stating in his judgment that the learned trial magistrate in the course of his decision was entitled to refer to the evidence given on the voir dire. Mr. Sahu Khan when asked by this Court to point out this criticism levelled at the judgment of the learned judge was unable to do so and stated that it was an inference he was drawing from the judgment. No where in the judgment did the learned appeal judge hold that the learned magistrate could refer to the proceedings and evidence on the voir dire. This first ground of appeal is not correctly worded.

In giving his decision the learned magistrate referred to appellant's evidence given on oath in the voir dire, which was confined entirely to the alleged assaults upon him - and did not in any way contradict, or in any way dispute the correctness of, the testimony given on the substantive charges by the various witnesses.

We are satisfied that the learned magistrate when giving a summary of the proceedings on the voir dire in his decision was merely amplifying the reasons given for admitting the statements in evidence as having been voluntarily made; the learned magistrate said:

> "The accused gave evidence on his own behalf on this question alleging assault against P.C.Balwant Singh whilst accused was in cell and before interview commenced. He denied his injuries as the result of any fall in the cane.

> This concluded the case for a trial within a trial and having considered the evidence and noticing the demeanour of the witnesses for both sides I was satisfied beyond all reasonable doubt that the statement Exhibit 2 and the Statement MFI 3 were both voluntarily made and no impropriety resorted to in the taking of these. These were exhibited as exhibits 3 and 4 and read."

Earlier in the trial and before the voir dire, evidence had been given by lay witnesses called by the prosecution, which if believed, was entirely consistent with appellant's guilt; in no way did appellant challenge the truthfulness of this evidence either by way of cross-examination or otherwise. When the trial proper was resumed appellant did not give evidence, but elected to make an unsworn statement which consisted of a complete denial of the offences.

The passage in the judgment of the learned magistrate to which objection is taken by the defence reads :

> "Having considered the evidence and noticing the demeanour of the witnesses and giving due consideration to the accused's unsworn denial I am satisfied beyond the shadow of doubt that the accused did steal the goat in count 1 as he had admitted in his statement and also the animals charged - counts 2, 3 and 4 that he had fraudulently converted the animals lent to him as bailee by PW4 with the requisite intent to deprive the PW4 permanently."

In our opinion in making these observations, the learned magistrate was not relying on, or helping himself to, the evidence given on the voir dire by Constable Ramendra Singh and Constable Balwant Singh. He was merely summarising his reasons for convicting appellant of the several charges and in so doing, it is to be noted that he was careful to refer to the appellant's unsworn denial given in the trial

proper; the learned magisgrate did not refer to the evidence given by the appellant at the voir dire which, in any event, was unconnected with, and irrelevant to, the issues on the substantive charges.

We are satisfied that the learned magistrate did not use any of the evidence given by the appellant on the voir dire as part of the prosecution case and for th reas .is given this ground of appeal fails.

Grounds 2, 3 and 4 were taken together and may be conveniently summarised as follows :

That the learned appellate judge erred in law in not holding that the learned trial magistrate (a) should have carefully considered and evoluated the evidence given on the voir dire and given detailed reasons for admitting the statement and (b) should have applied his mind to the totality of the issues involved and the fact that appellant was in custody. The learned magistrate in his ruling at the conclusion of the voir dire said :

> "Court - Have considered the evidence of trial within a trial and hold that no impropriety was resorted to when MF2 and MF3 taken."

Mr. Sahu Khan submitted the ruling was too brief; that reasons should have been given for the conclusion reached by the learned magistrate which would assure an appellate court that the correct principles had been applied in reaching the conclusion to admit the statements.

Mr. Fatiaki for the Crown submitted that the voir dire was held to investigate the allegation that appellant

had been assaulted by the Police Officers and to decide the voluntariness of the statements; the inquiry was limited to this issue. Further, the ruling given was supplemented by the leorned mogistrate when in the course of his decision he traversed in some detail the evidence on the voir dire omplifying his reasons for having admitted the statements. The learned magistrate said :

> "Evidence was also adduced on this paint from PW7 re statement after charge taken by PW7 who told Court no impropriety by assault or otherwise resorted to, witness denied any assault on accused person ot Balevuto at Ram Raj's place.
>
> In the re-exomination, PW7 stated no injuries when accused had escaped into cane from custody of PW7 but he was brought back by Special Constable Manoa and this witness sow injuries to accused's lips then later accused was taken for examination by Doctor and a medical certificate produced as exhibit.
>
> PW3 Manoa with PW7 had gone after the accused into cane (tall) and found him sitting inside cane and had spoken to accused whose lips he found bleeding. He did not ask for the cause of the injury but when spoken to by witness accused had made no reply. It was PW7 who had recaptured the accused, one other person being with witness.
>
> PW9 was present throughout at accused's interview at station and denied any assoult by or threats to the accused by any person.
>
> The accused gave evidence on his own behalf on this question alleging assoult against PC Bolwant Singh whilst accused was in cell and before interview commenced. He denied his injuries as the result of any fall in the cane.
>
> This concluded the case for a trial within a trial and having considered the evidence and noticing the demeonour of the witnesses for both sides I was satisfied beyond all reasonable doubt that the statement Exhibit 2 and the statement MFI3 were both voluntorily made and no impropriety resorted to in the taking of these. These were exhibited as exhibits 3 and 4 and read."

In deciding whether the stotements were made voluntarily, the magistrate was required to reach a conclusion based upon the evidence he accepted, but his method of expressing his finding is not controlled. It is true as was pointed out in Sparks v. Reginam [1964] 1 All E.R. 727 that if the ruling is unduly brief it may be more difficult for an appellate court to be assured that the presiding judicial officer had adapted and followed the correct principles. In Sparks case there had been a sharp conflict of evidence in the trial within a trial and their Lordships said at p. 736 :

> "It become the responsibility of the learned judge to reach a conclusian what evidence he accepted and ta base his ruling on his conclusion and..... it was for him to reach such conclusions of foct as were needed as the basis of his decision as to the admissibility of the statements."

However, the circumstonces of each case and the conduct of each trial vary immensely and each case must necessarily depend on its own facts. In this case the evidence that was in conflict was within a small compass.

While the learned magistrate might with advantage have dealt more fully with the evidential issues at the time of his ruling, he was not bound to do so and the question is - Has his ruling clearly conveyed that essentiol finding? If so, then we have no reason to disagree.

It is in our opinion unwise to compare the findings of a Court in ther cases, all of which are based on differing sets of facts, and by analogy attempt to show that the conclusions reached in the case under consideration are wrong. See Regina v. Attfield [1961] 1 W.L.R. 1135.

In D.P.P. v. Ping Lin /1975/ 3 All E.R. 175 at p.188 Lord Salmon said :

> "The Court of Appeal should not disturb the judge's findings merely because of difficulties in reconciling them with different findings of fact, on apparently similar evidence, in other reported cases, but only if it is completely satisfied that the judge made a wrong assessment of the evidence before him or failed to apply the correct principle - always remembering that usually the trial judge has better opportunities of assessing the evidence than those enjoyed by an appellate tribunal."

The finding is a "finding of fact" as Lord Hailsham at p.183 said in Ping Lin's case (supra.) or "a decision on the facts" as Lord Salmon said in the same report at p. 187.

The ruling in Ping Lin's case was very brief. According to the report the trial within a trial in that case lasted five days. Lord Morris at p. 179 said :

> "At the end of the trial within the trial the learned judge having considered the evidence and the authorities gave a short ruling that the appellant's statements were made voluntarily and were admissible."

Lord Hailsham in Ping Lin's case at p. 184 said :

> "Consideration should be given to the difficulties of judges on circuit or in the Crown Court, and as much respect given to a judge's findings and reasoning as any finding of fact by a judge of first instance is entitled to."

In the present case the learned magistrate stated quite positively that he had considered the evidence of the trial within a trial and that there was no impropriety. The issue before him was manifestly one of credibility and the ruling given was a clear finding that he believed the

police officers that appellant was not assaulted and rejected appellant's allegations to the contrary. The learned appellate judge in the course of his judgment said :

> "In giving his final judgment the magistrate dealt with the history of the voir dire, the evidence given for the prosecution and the defence in the voir dire and the reasons why he had admitted the statements. Counsel's argument was that the magistrate should have considered the evidence and given his reasons for his ruling before admitting the statements. I cannot see any merit in this argument. The magistrate has indicated his decision after due consideration, and later he has given the reasons for his decision..... The judgment of the magistrate shows that he did fully consider and evaluate the evidence given in the voir dire before admitting the statements and shows how he reached his decision. This is not a case where the magistrate has remained silent on the point."

We respectfully agree with these remarks.

Counsel for appellant argued that the learned magistrate in his ruling paid scant regard to the appellant's injuries and the medical certificate. It is clear from the written record that in reaching his conclusion the learned magistrate did not overlook the injuries or the medical certificate. He referred to the evidence of Constable Manoa Tora who found appellant hiding in the tall cane with blood on his lips and tongue. Appellant did not aver that the police were in any way responsible therefor, although, he denied falling in the cane and causing hurt to himself. The learned magistrate had the advantage of being able to observe the demeanour of the witnesses and the manner in which they gave their evidence. In these circumstances the learned magistrate was not precluded from finding, as

he apparently did, based on the evidence and his assessment of the credibility of the witnesses, that "no impropriety was resorted to". The injuries mentioned in the medical certificate were consistent with appellant, who was running away from the police, falling and injuring himself. Unless the medical certificate excluded that as a proper finding it is not a case for interference by this Court on appeal.

The learned magistrate clearly demonstrated in his judgment that he was conscious of the fact that appellant had been arrested. There was nothing improper about the circumstances leading up to his arrest; the police were inquiring about the theft of certain stock and in the course of questioning the appellant claimed he had bought Motilal's bullocks; when requested to go with the police officers to see the beasts he refused and thereupon he was arrested. In the trial proper the appellant did not refer to the question of his arrest at all, but in giving evidence on the voir dire he admitted escaping from the police - his reason being that he had been assaulted. The arrest was in all the circumstances quite proper and nowhere does the appellant assert to the contrary.

Counsel for defence quoted an extract from the judgment given in Daulat Khan v. Reginam F.C.A. Crim App. 3/76 in which this Court said :

> "To find only that no improper conduct took place at the police station is not sufficient as a matter of law."

Mr. Sahu Khan attempted to argue by analogy that the ruling given by the learned magistrate did not sufficiently deal with the totality of the evidence given on the

voir dire and was restricted entirely to the conduct of the police at the police station. It is necessary to look at the whole of the statement in Daulat Khan's case of which the above extract forms a very small part.

It is clear that the question in Daulat Khan's case was whether the learned magistrate correctly approached and applied his mind to the totality of the issues raised when making findings in the circumstances of that case. The evidence led by the prosecution on the voir dire related solely to incidents at the police station and did not deal with the allegations of assaults made by the accused and his brother at times when the accused was first seen at his home and the incidents which they alleged occurred in getting the accused to the police station. It is evident from reading the judgment in Daulat Khan's case that the facts were vastly different from the facts in this instant appeal.

Nothing was said before this Court which would indicate that the learned magistrate did not correctly approach and apply his mind to the whole of the issues raised in the instant appeal when he made his findings of fact that "no impropriety was resorted" to by the police when the statements were taken. Obviously it was a matter of credibility as to where the truth lay. The learned magistrate clearly considered the question whether or not the accused was in custody as this is a matter which is relevant to the discretion to be exercised by a magistrate who is considering whether to admit or exclude statements having regard to the conduct of the police and all other circumstances. Although the allegations of an accused person as to ill treatment, inducement and other relevant factors are rejected, the presiding magistrate or judge may still consider that it is unfair to use such

statements against on accused person.

It is evident thot the learned magistrate gave his ruling after a mature consideration of the whole of the evidence and the circumstances of the case. It is always a question of degree in each cose and a matter for the presiding magistrate to determine, in the light of the circumstances, whether the statements or admissions of an accused have been extracted from him under conditions which render it unjust to allow those statements or confessions to be given in evidence. Th~ observonce, or non observance, of the Judge's Rules may, and at times do, lead to the exclusion of the alleged confession, but ultimately the question turns on the presiding magistrate's decision ~s to whether breach, or no breach, it has been shown by the prosecution to be voluntary. Principles to be applied where a stotement has been obtained in breach of the Judge's Rules are conveniently summorised in the headnote to R. v. Convery (1968) N.Z.L.R. 426 where it is stated:

> "The question whether an accused person is in custody and whether statements made by him are made voluntarily is very much a matter of fact in the surrounding circumstances of the particular case. The triol Judge, in exercise of his discretion to admit or exclude statements made by the accused in such circumstances, should ask himself whether, having regard to the conduct of the police and all circumstances under which the statements were mode, it would be unfair to use his own statement against the accused."

It is to be remembered thot each case must depend upon its own facts and we have no hesitation in agreeing with the learned appeal judge that the ruling given by the learned magistrate shows that he did fully consider and

evaluate the evidence given on the voir dire before admitting the statements and in so doing did not f ll in o ony error. In arriving at his finding he clearly considered the totality of the issues involved and accordingly there is no warrant for interference by this Court.

Grounds 2, 3 ond 4 fail.

We turn now to consider Ground 5 which reads:

> "THAT the learned appellate judge erred in law in not holding that the learned trial magistrate erred in law in not explaining the rights of the appellant after the prosecu+ion closed its case during the trial within trial and therefore in nat holding that there was no compliance with the provisians of the Criminal Procedure Code in particular section 211 and in holding that the learned trial magistro+e must have camplied when the record very clearly showed that there was no such compliance."

Section 211(1) of the Criminol Procedure Code reads :

> "At the close of the evidence in support of the charge, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused ond sholl inform him that he has o right to give evidence on oath from the witness box, and that, if he does sa, he will be liable to cross-examination, or t_ make a statement not on oath from the dock, and shall ask him whether he hos any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (_f any,."

Mr. Sahu Khan's main complaint was that there was nothing on the record to show that the learned

magistrate had at the close of the prosecution case, on the voir dire, explained to the appellant, who was unrepresented, his rights either to give evidence or to keep silent or to make an unsworn statement from the dock in accordance with the provisions of section 211(supra). Further, that if the appellant chose to give evidence he should be warned in respect of any question that might tend to incriminate him that he is not bound to answer. That in any event the record should reveal whether the learned magistrate had explained to the appellant his rights.

We agree with defence counsel that at least by analogy, it is necessary for a magistrate to comply with section 211(supra) in a voir dire as it is in the trial proper. However, on the facts of this case, the question is - Did the learned magistrate fail to explain to the appellant his rights at the close of the prosecution case on the voir dire? The record is silent on this point and counsel who appeared in this Court did not appear in the Magistrate's Court.

Turning to the transcript, no note was made by the learned magistrate that the appellant had his rights explained, but it is equally clear that appellant gave evidence on oath challenging the admissibility of the statement and in the trial proper elected to make an unsworn statement. The record shows that the learned magistrate made a note during the trial proper as follows :

> "Court: Hold a prima facie case. Section 210 C.P.C. accused elects unsworn statement."

It is probable that his words invoked section 211 (supra) by implication. The question we must ask ourselves is -

Whether there was any irregularity in the trial which has, in fact, prejudiced the appellant?

The appellant gave evidence on oath in the voir dire and the whole of his evidence and the cross-examination thereon was directed to the alleged assaults upon him in the trial proper when he could have been cross-examined on the general issues he elected to make an unsworn statement denying any complicity in the offences.

We are satisfied having read the record and having regard to the facts of this particular case that if the learned magistrate had failed at the voir dire to explain the provisions of section 211(supra) to the appellant (and we regard it as most unlikely that he did so fail) no prejudice was caused by reason of the course followed either at the trial within a trial or at the trial proper. In fact the appellant on the voir dire took the most advantageous option open to him when he gave evidence on oath; this was a manifestly sensible course for him to have taken if he was to have any real chance of excluding the statement.

Should the learned magistrate have failed to explain the provisions of section 211 (supra) to the appellant or, if as it appears more likely, that the slip of the learned trial magistrate lay in not making the appropriate entry in the record, then in either event we are firmly of the opinion that no question can possibly arise of any miscarriage of justice having occurred and no case arises for interference by this Court.

For these reasons this ground of appeal is dismissed.

All grounds of appeal having failed, the appeal is dismissed accordingly.

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Vice President

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Judge of Appeal

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Judge of Appeal

NEMBER, 1982