

IN THE FIJI COURT OF APPEAL

At Suva

Criminal Jurisdiction

CRIMINAL APPEAL NO. 6 OF 1989.

Between:

- 1. ASHOK KUMAR
 - 2. DHIREN CHAND
 - 3. ABHIMANNU Appellants
- v.
- THE STATE Respondent

Mr G P Shankar for the Appellants
Ms N Shameem and Ms L Laveti for the Respondent

Dates of Hearing : 4th, 12th March, 1992

Date of Delivery of Judgement : 13th March, 1992

JUDGEMENT OF THE COURT

At the initial hearing of this appeal on the 4th March 1992, counsel for the appellants sought to argue paragraph 9 of the Notice of Appeal before arguing other grounds on the basis that if the Court accepts his submission on this ground, it would dispose of the whole appeal. Counsel for the respondent agreed to this course being adopted.

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Ground 9 is as follows :-

- "Erred in procedural matter to wit in discharging two duly sworn assessors without reference or submission from the defence or the prosecution and swearing in therefore two alternative assessors to continue with the trial.'

The facts which form the basis of this argument are these. On the 6th February 1989, the three appellants were arraigned on a charge of murder and they all pleaded not guilty. The case was adjourned for trial later in the list.

The case resumed on the 8th March 1989 and each of the accused again pleaded not guilty to the information and the three assessors were sworn in. At this hearing, the trial judge explained preliminary matters and legal points. The record shows that Mr Babu Singh, the prosecutor sought to make certain legal submissions in the absence of the assessors. The record does not show whether the assessors were released at this point. We will assume that they were released.

What subsequently took place was a trial within a trial as the defence had sought to object to the admissibility of statements of the appellants on the basis that they were not made voluntarily. This trial continued for 11 days between 9th March 1989 and 3rd April 1989.

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Written submissions were tendered during argument on the last mentioned date. The ruling was handed down on the 5th April 1989. The statements were admitted.

The case resumed on 10th April 1989 and before any evidence was led by the prosecution, only two assessors were in attendance. One of these two assessors was subsequently discharged by the trial judge at this hearing.

Counsel for the appellants submitted that the trial could not continue with one assessor and a new trial should be held with fresh assessors. The trial judge rejected this submission and proceeded with the trial with the aid of two new assessors.

Counsel for the appellants has submitted before us that the trial judge has breached the terms of the proviso to S 285 of the Criminal Procedure Code in proceeding with the trial in the manner he did.

Section 285 is in the following terms :-

"If, at any time before the finding, any assessor is from any sufficient cause prevented from attending throughout the trial, or absents himself, and it is not practicable immediately to enforce his attendance the trial shall proceed with the aid of the other assessors.

Provided that the proceedings shall be stayed and a new trial shall be held with the aid of fresh assessors unless at least two, and in capital cases at least four assessors remain in attendance after an assessor has absented himself or been prevented from attending or has for any reason been discharged by the court."

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Counsel for the appellants has submitted before us that the trial judge has breached the terms of the proviso to S 285 of the Criminal Procedure Code in proceeding with the trial in the manner he did.

Section 285 is in the following terms :-

"If, at any time before the finding, any assessor is from any sufficient cause prevented from attending throughout the trial, or absents himself, and it is not practicable immediately to enforce his attendance the trial shall proceed with the aid of the other assessors.

Provided that the proceedings shall be stayed and a new trial shall be held with the aid of fresh assessors unless at least two, and in capital cases at least four assessors remain in attendance after an assessor has absented himself or been prevented from attending or has for any reason been discharged by the court."

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Counsel for the respondent has conceded that the trial judge has breached S 285 of the Criminal Procedure Code. However, he further submitted that this has not resulted in any miscarriage of justice and relied on the terms of proviso to Section 23 of the Court of Appeal Act which is in the following terms :

"Provided that the Court may, notwithstanding that they are of the opinion that the point raised in the appeal against conviction or against acquittal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantive miscarriage of justice has occurred"

The result in this appeal is to be determined by considering the question of whether breach of Section 285 of the Criminal Procedure Code results in a nullity? Counsel for the appellants has relied upon the case of Rex v. Assa Singh 4 E.A.C.A 41. This was a case which considered a similar provision in the Kenya Criminal Procedure Code to Section 285 of our Criminal Procedure Code. The relevant facts were these; During the course of a trial, one of the assessors did not attend for one day but then resumed his place and was present during the remainder of the trial. The Court of Appeal for East Africa reached the conclusion that when the assessor missed a day, the court ceased to be a court of competent jurisdiction and therefore the trial was rendered null and void.

We are of the opinion that the proviso to Section 285 of the Criminal Procedure Code is an expressed statutory provision relating to a mode of trial that must be complied with. A breach of this provision in our view would render the trial a nullity.

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Without having reached any conclusions as to whether the proviso to S 23 of the Court of Appeal Act is applicable in this instance at all, we are of the opinion that the trial was a nullity. We consider that a substantial miscarriage of justice has occurred.

Counsel for the Appellants concedes that in the circumstances an order for a fresh trial would be appropriate. We are satisfied that the interests of justice demands such a course.

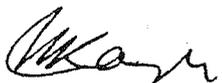
We therefore allow the appeal, quash the conviction and sentence herein and order the appellants to be tried afresh according to law.



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M. M. Helsham
PRESIDENT
FIJI COURT OF APPEAL



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(Sir Moti Tikaram)
JUSTICE OF APPEAL



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(Sir Mari Kapi)
JUSTICE OF APPEAL