A

MUNSAMY CHETTY

v.

REGINAM

B

[COURT OF APPEAL, 1974 (Gould V.P., Marsack J.A., Henry J.A.), 30th October, 4th November]

Criminal Jurisdiction

Criminal law—evidence and proof—submission of no case to answer wrongfully rejected by court—whether conviction will be quashed where subsequent evidence given by defence supplies that which was lacking on part of prosecution—Criminal Procedure Code (Cap. 14) s.275(1).

C

Criminal law—evidence and proof—submission of no case to answer—whether court must be satisfied beyond reasonable doubt that defendant guilty before finding case to answer—Criminal Procedure Code (Cap. 14) s.275(1).

Criminal law—evidence and proof—witness refreshing memory—value and weight to be placed on evidence.

D

At the hearing before the Supreme Court, a submission of no case to answer was made, which submission was rejected by the trial judge. On appeal it was contended that the judge erred in rejecting the submission and also that, on appeal the court was confined to the evidence of the prosecution in determining whether the judge was in error in ruling as he did. It was further argued that the judge must be satisfied beyond a reasonable doubt at the end of the prosecution's case that the defendant was guilty before he could find a case to answer.

E

Held: 1. Where, after a submission of no case has been wrongly overuled, but evidence called for the defendant or co-defendant provided evidence justifying conviction, the appeal court might take the whole of the evidence into account but it need not do so.

F

(Editorial note. The authorities—reviewed in *Payne v. Harrison* [1961] 2 All E.R. 873 ; [1961] 3 W.L.R. 309.—do differ as to whether the appeal court will quash a conviction in such circumstances. It does seem that if the defendant supplied the necessary evidence himself, the conviction will probably be upheld : aliter if it came from a co-defendant.)

2. Proof beyond a reasonable doubt was not the test of whether or not there was a case to answer. There must be no evidence that the accused had committed the offence.

G

Per curiam : When a witness refreshed his memory from his statement prior to the hearing, his evidence would still be admissable and of probative value, but it was upto the court to determine what value and weight to place on that evidence. Although there was no duty on counsel for the prosecution to inform his opponent of anything that had come to his knowledge concerning a witness resorting to a record which the witness had made, he should act with propriety and fairness and make disclosures where justice so required.

H

Other cases referred to :

A *R. v. George* C & Mar 111.
R. v. Pearson 4 Cr. App. R. 40 ; 74 J.P. 451.
R. v. Jackson 74 J.P. 352 ; 5 Cr. App. R. 22.
R. v. Abbott [1955] 2 Q.B. 497 ; [1955] 2 All E.R. 899.
R. v. Power [1919] 1 K.B. 572 ; 14 Cr. App. R. 17.
Issa v. R. [1962] E.A. 186.
R. v. Christie [1914] A.C. 545 ; 10 Cr. App. R. 141.
B *Davies v. D.P.P.* [1954] A.C. 378 ; [1954] 1 All E.R. 507.
R. v. Mohammed Hanif 19 F.L.R. 16.
R. v. Roberts [1942] 1 All E.R. 187 ; 28 Cr. App. R. 102.
Gillie v. Posho [1939] 2 All E.R. 196.
Nominal Defendant v. Clements 104 C.L.R. 476 ; 34 A.L.J. 95.
R. v. Leonard Harris 20 Cr. App. R. 144.
Gyan Singh v. R. 9 F.L.R. 105.
C *Ravi Nand & Anor v. R.* 11 F.L.R. 37.

Appeal against a conviction for theft in the Supreme Court.

S. M. Koya for the appellant.
D. Williams for the respondent.

Judgment of the Court (read by HENRY J.A.) : [4th November 1974]—

D

Appellant was convicted of larceny as a servant contrary to Section 306(a)(1) of the Penal Code and bound over for a period of twelve months. He was employed as a motor vehicle salesman by a company called Automotive Supplies Ltd. which carried on business at Lautoka. It was alleged that on October 27, 1973 appellant stole a new clutch-plate, the property of the said Company, valued at $20.00. Two of the assessors were of opinion that appellant was
E guilty and one was of opinion that he was not guilty. The learned trial Judge gave a judgment of guilty and entered a conviction accordingly. A part of the business of Automotive Supplies Ltd. was dealing in spare parts for motor vehicles and it was alleged that the said clutch-plate was taken from stock.

The case for the prosecution relied heavily on the evidence of Josateki Naiquma who was employed by the Company as a Security Officer so it is necessary to
F set out his evidence in some detail. Witness said he first saw appellant on that day when he (appellant) entered the building at 8 a.m. to commence work. At this time appellant, who was with a group of other employees was not carrying anything so far as witness was aware. Witness next saw appellant at 9 a.m. when appellant came back into the shop. At this time appellant was not carrying anything. Witness added that appellant went inside but he did not bother to notice if appellant was carrying anything because he was, as
G a member of the staff, allowed to go in and out.

It is now convenient to cite the actual evidence on the events which followed. He said :—

> " I saw the Accused go out again. It was about 9.05 a.m. He was then carrying a basket. I saw him going past me. I was standing among customers who were at the spare parts counter. The basket was over his shoulder and he was looking all round him backwards and sideways ; he
H was walking quickly. He went through the door of the building. Apart from a locked door at the rear this was the only entrance to the building.
>
> I saw something—a carton—was inside the basket.

His behaviour was suspicious in the way he looked around him and walked quickly. As he approached the door I called to accused asking him what was in the basket. He replied.

" Nothing ".

The accused spoke in English. I spoke to him in English. The accused did not pause. I followed him. I said I wanted to see what was inside the basket. He did not stop ; he kept on walking in the direction of B.P.'s garage.

He did not respond to my request. Then I ran after the accused and got hold of the basket. Accused still did not speak, he left the basket in my possession and continued towards the garage of Burns Philp Ltd.

I returned to Automotive Supplies building with the basket. I opened it and saw a carton containing a disc clutch-plate. There were some small documents in the carton, I examined them but they did not relate to the clutch-plate.

A short while later the accused returned. As he entered he called out that someone had played a dirty trick on him. He was alone ; he said he had left his basket under the cashier's table and he did not know who had placed the carton in his basket. He spoke in English. He described it as a disc clutch-plate.

I rang our supervisor Eroni and told him of what had occurred. Eroni arrived and Mr Willmott the manager was called. "

Four further witnesses were called for the prosecution. Jaswant Singh was a Supervisor employed by the Company. He said there was no recorded transaction with appellant on October 27th. Stock was not taken until October 29th when there was a shortage of one similar clutch-plate. Detective Corporal Napolione Waqe interviewed appellant about 11.00 a.m. on October 27th. Mr Willmott, Manager of the Company, said appellant told him that someone was trying to " plant " a clutch-plate in his bag, that he so found it and was bringing the clutch-plate to the Inspector's Office when the Security Officer stopped him.

Appellant said he brought the basket, which was then empty, when he came to work at 8 a.m. and placed it on the floor behind Mariappa's chair near the Cashier's table. He intended to shop on the way home about midday. His exact narrative is then as follows :—

" I went to pick up my basket. It had been closed when I left it but when I came in it was open and the Exhibit 2 was inside. I saw the word " genuine parts ". Then I raised the carton. I saw " disc clutch-plate on it ". I was upset—very angry. I lifted the bag and swore in English and Hindustani.

I said that some member of the staff must have a grudge against me and was trying to play a dirty trick upon me.

I picked it up and began to move towards Mr Willmott's office.

I passed from Sarita's chair along the passage way from the spare parts counter. The open door was ahead of me.

I had Exhibits 1 and 2 in my right hand. I passed the cashier's table which was on my left.

P.W. 1 is inaccurate in describing how I carried the basket. I was then saying very loudly.

" I am going to see Mr Willmott about this ". The spare parts counter was then on my right.

A Then I saw P. W. 1 who was reading Fiji Times by the MKII car. The salesman's car is near. P.W. 2 was between the table and car. I was swearing and saying I was going to see Mr Willmott.

Then I called to P.W. 1. I was standing there. I told P.W. 1 that someone had been playing tricks on me and that I was taking it to Mr Willmott.

P.W. 1 said " Give it to me ". I was in front of the car when I handed it to him.

B P.W. 1 moved towards me and took it. From there I went to Mr Willmott's office. Then Mr Burbhard Singh appeared (my client).

He said he would like to see me. I told him to wait saying there was trouble and I was going to see Mr Willmott. Coming out of building and turning left one goes towards Burns Philp's garage i.e. Mr Willmott's in Naviti Street. "

C Appellant then said he told Hari Singh in the presence of the Security Officer what had happened.

Mrs Sarita Pande, who was a cashier working at the time, said that she heard appellant calling out that someone had put a parcel in his basket and he would challenge anyone who did it. Appellant was swearing and said he was going to his boss. He then had the basket in his hand (sic). Appellant was then in front of the counter which was indicated on a sketch plan of the D interior of the Office which plan she had prepared. The last witness called by appellant was Hari Singh who was a car sales supervisor employed by the Company. Witness said appellant came to his office at 9.00 a.m. in an upset state looking for Mr Willmott who was then out. Appellant said someone had " planted " a part in his basket and had played a dirty trick on him.

At the end of the case for the prosecution counsel for appellant submitted E that there was no case to answer. The Judge ruled against this submission and appellant elected to give evidence. He did so and called the two witnesses earlier referred to. It is now claimed that the Judge erred in law in rejecting this submission. It is further argued that before the Judge could rule that there was a case to answer he must, at the close of the case for the prosecution, then be satisfied beyond reasonable doubt that appellant was guilty. Counsel for appellant also contended that, on appeal, this court is confined to the evidence F for the prosecution in determining whether the trial judge was in error in ruling as he did.

In our respectful opinion we accept as correct the analyses of the relevant cases made by Holroyd Pearce, L.J. *Payne v. Harrison* [1961] 2 All E.R. 873, 876 where his lordship said :—

" From 1908 onwards the Court of Criminal Appeal took the view that G when the prosecution's evidence was insufficient but the defendant had given evidence, whether he had failed to make a submission that there was no case to answer or had made an unsuccessful submission to that effect, the court should or could look at the defendant's evidence as well that of the prosecution : see *R. v. George* (6) ; *R. v. Pearson* (No. 1) (7) ; *R. v. Jackson* (8) ; *R. v. Fraser* (9) ; but contra *R. v. Joiner* (10). In *R. v. Power* (11), where such a submission was rejected and a co-defendant H thereafter was called for the defence and gave evidence which incriminated the appellant, it was held that the Court of Criminal Appeal was entitled to take into consideration that adverse evidence, following the majority of the earlier decisions in preference to *R. v. Joiner* (10).

In *R. v. Abbott* (12), however, there was a somewhat different approach, and *R. v. Power* (11) was explained. Counsel for the defendants relies strongly on *R. v. Abbott* (12), but I do not find it helpful to the present problem. In that case the trial judge wrongly refused a submission made at the close of the prosecution's case that there was no evidence to go to the jury. LORD GODDARD, C.J., emphasised the fact that the defendant did not supply any direct evidence against himself and that it was his co-defendant who supplied the damaging evidence. He considered that the appellant had an absolute right to have his appeal allowed, if there had been a " wrong decision of any question of law ", unless it could be brought within the proviso that the court considered that there had been no substantial miscarriage of justice. With regard to *R. v. Power* (11), he said (13) :

" What the court said in that case was that if the case did go to the jury, then the evidence given by the prisoners respectively was part of the sum of the evidence in the case, and that this court when asked to quash a conviction might take the whole of the evidence into account. They did not say that the court must, but they said this court might, take the whole of the evidence into account. They certainly did not say that, if there was no evidence given against one of two or more prisoners, the learned judge could simply leave the case to the jury to see whether when the case for the defence was opened one or other of the prisoners would support the case set up by the prosecution. " "

To the same effect is para. 919 (pp. 535-6) in Archbold's Criminal Pleading Evidence and Practice (38th Edn.).

There is nothing in any of the English cases to support the contention that a Judge on such a question must be satisfied beyond reasonable doubt at the close of the case for the prosecution. It will be noticed in all the cited cases " the evidence " is referred to which makes it clear that proof beyond reasonable doubt is not the test. In jurisdictions where guilt is decided by a jury the judge has no function to determine credibility. This is the prerogative of the jury. It is the function of the Judge merely to consider as a matter of law whether the evidence will, if accepted by the jury, be sufficient to establish guilt. But in Fiji, the position as at the close of the prosecution case is regulated by section 275 of the Criminal Procedure Code ; subsection (1) reads :

" 275(1) When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence (if any) of the accused person before the committing court has been given in evidence, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence, shall, after hearing, if necessary, any arguments which the barrister and solicitor for the prosecution or the defence may desire to submit, record a finding of not guilty. "

In East Africa it was held on a similar section of the Tanganyika Code that the words " if the court considers that there is no evidence that the accused committed the offence " made this decision essentially a matter for the trial court and that an appellate court would not set aside a conviction solely on the ground that there was no case to answer. *Issa v. R.* [1962] E.A. 186. We do not need to consider the matter from that point of view as in our opinion the use of the wide words " no evidence " in section 275 are fully in accord with the position we have stated, that proof beyond reasonable doubt is not the test of whether or not there is a case to answer. We find no reason to differ from the learned judge's ruling on this question and we reject this submission.

A It is convenient now to deal with the grounds of appeal which state that two essential ingredients of the offence cannot be supported by the evidence. Although one was argued on the basis that this Court was confined to the evidence for the prosecution this cannot be sustained because, as we have held, the whole of the evidence falls to be considered on appeal. The grounds are :—

(1) That there was no sufficient evidence to prove mens rea, and,

(2) That ownership of the clutch-plate had not been proved in terms of
B the particulars in the information.

The first has no substance if the Security Officer is believed and appellant is disbelieved. That is what happened at the trial. So the question will fall to be answered by the result of the argument that the Security Officer's evidence, as counsel put it, " had no probative value ". If it were proper to accept the evidence of the Security Officer and to reject the evidence of appellant as false,
C then the claim that there is no proof of mens rea is quite untenable. This needs no further elaboration.

There was, in our view, ample evidence to prove the ownership of the clutch-plate. We can put to one side any question of whether or not the dockets Exhibits Nos. 1 and 2 were properly proved. The Company stocked similar clutch-plates. If they did not, of course, the matter would have ended there as it makes no sense to pursue the article unless it was similar to stocks held.
D All those connected with the Company accepted it as part of their stock. Appellant never suggested it came from anywhere else, in fact, he said it was " planted " on him which, in the circumstances, bears only one meaning. Why " plant " something that is not the property of the Company ? It is idle, in the circumstances given in evidence, to suggest that any reasonable tribunal would entertain the possibility that it was an article that had nothing to do
E with the stocks of the Company but had been brought in from outside to trap appellant. This ground of appeal fails.

Proof of guilt in this case rests on two propositions which are not separate and exclusive but are part of the total concept of what is involved. To support a finding of guilt it must be proved beyond reasonable doubt, first, that the explanation given by appellant was false, and, secondly, that the Security Officer was a witness of the truth when he described the actions of appellant
F as set out in the extract from his evidence earlier cited in this Judgment. These questions must be determined on the whole of the evidence. The grounds relevant to this part of the appeal are :—

(1) That no probative value should have been given to the evidence of the Security Officer because he refreshed his memory outside Court from a statement he had previously given to the Police,

G (2) That the testimony of the Security Officer had no probative value because it :—

(a) conflicted with his testimony at the preliminary enquiry,

(b) showed a conflict on cross-examination,

(c) conflicted with his statement to the Police, and, further, in that :—

H (d) he admitted on oath that because he could not remember the events of the 27th October 1973, he refreshed his memory at about 9.25 a.m. outside the Court on the day he gave his evidence in chief from his written statement to the Police,

(e) he admitted on oath that he related the events of 27th October 1973 by reference to the said Statement and " after refreshing his memory therefrom,

(f) to the question " On what did you rely when giving evidence yesterday, " he stated on oath " on the 1st statement I have given to the Police because it was true, "

(g) the evidence of Jaswant Singh was ignored,

(h) the evidence of Hari Singh raised the irresistible inference (sic) that it was impossible for appellant (or anyone else) to enter from outside the counter to the spare parts Section, climb the ladder and return to the outer side of the counter without being observed by members of the staff, and,

(i) probative value was not given to the evidence of Hari Singh.

In addition to the above grounds counsel raised a number of matters concerning the summing up, the conduct of the trial and comment made in the course of the Judge's summing up. These grounds are :—

" 3. That the trial Judge erred in law in commenting to the assessors adversely to the defence on the following matters :

(a) on the question that Defendant's Counsel had characterized Josateki Naiquma as a self confessed liar to the assessors in his address,

(b) on the question that the Defence Counsel did not ask Josateki Naiquma why he had said something untrue at the Preliminary Inquiry and that the Defence Counsel did not pursue the matter but left it in the air. In addition whether by such comment the learned trial Judge had reversed the onus of proof and cast a new onus of proof on the defence.

4. That the trial Judge erred in law in directing the assessors and himself in the following terms :—

" if P.W. 1 Josateki is telling deliberate lies, he is knowingly making a thief of an innocent man ".

5. That the learned trial Judge misdirected himself in his summing up when dealing with Sarita Pande in making the comment that the defence knew that she would say that the police refused to take her statement and that the defence ought to have questioned Napolione Waqa :

" Did you interview Sarita Pande ? "

In addition whether by such comment the learned trial Judge had reversed the onus of proof and cast a new onus of proof on the defence.

6. That the learned trial Judge erred in law in failing to stop the Counsel for Prosecution from commenting to the Assessors that if the Defence Witness Sarita Pande's evidence was true that she did not say to the Police Officer on Monday the 29th day of October, 1973 that she would not give a written statement concerning this case, then the Prosecution Witness No. 3 (Cpl. Waqa) or whosoever interviewed her on that day was deliberately telling lies.

Ground 1 raises an important question on the position where a witness refreshes his memory from a record which has not been formally produced in Court for that purpose. Counsel for appellant, as we understand his argument, contended that a witness ought not to refresh his memory from any record before giving evidence unless the safeguards, which are inherent in the law of evidence and enforced by the Court at an actual hearing, are observed. Counsel went further and claimed that, if any witness used any means of refreshing his memory, other than pursuant to such safeguards, that fact, if known, ought to be disclosed to opposing Counsel, so that the witness might be cross-examined on the point. If it were shown that means, other than what is available to a witness in the witness-box had been resorted to, then, so Counsel claimed, the evidence ought to be treated as having no probative value. This means, in short, that no evidence ought to be accepted as having probative value unless the record could be produced in Court and its use would be permitted in accordance with the cases which govern the use of such material.

Stated generally as above it is clear that there is no such general principle because it must apply to all evidence whether given in civil or in criminal trials. No case has ever laid down any such general principle and it has not been stated as a proposition of law in any text-book brought to our knowledge. All admissible and relevant evidence may be given, and, once given, has probative value according to the weight the judicial tribunal is prepared to give to it. No court is entitled to reject admissible evidence relevant to any matter in issue. The one exception is in criminal trials where, as a matter of practice, such evidence may be excluded in the interests of justice. Lord Reading in *Rex v. Christie* [1914] A.C. 545, 564 said :—

> " The principles of the laws of evidence are the same whether applied at civil or criminal trials, but they are not enforced with the same rigidity against a person accused of a criminal offence as against a party to a civil action. There are exceptions to the law regulating the admissibility of evidence which apply only to criminal trials, and which have acquired their force by the constant and invariable practice of judges when presiding at criminal trials. They are rules of prudence and discretion, and have become so integral a part of the administration of the criminal law as almost to have acquired the full force of law. "

His Lordship then went on to cite as an instance warnings given in the case of an uncorroborated accomplice but this reference has now to be read together with the speech of Lord Simonds, L.C. in *Davies v. D.P.P.* [1954] A.C. 378. The now familiar " Judges Rules " are a further example. His Lordship continued :

> " Nowadays, it is the constant practice for the judge who presides at the trial to indicate his opinion to counsel for the prosecution that evidence which, although admissible in law, has little value in its direct bearing upon the case, and might indirectly operate seriously to the prejudice of the accused, should not be given against him, and speaking generally counsel accepts the suggestion and does not press for the admission of the evidence unless he has good reason for it. "

Cases have been reported where it has come to the knowledge of the Court that witnesses have refreshed their memories in criminal trials by reference to depositions or police statements prior to giving evidence. Examples are seen in *R. v. Mohammed Hanif* (19 F.L.R. 16) where Grant, J. reviewed all the relevant cases at some length. It is clear that the discussion in all the cited

cases was on the probative value of evidence when it has been shown that a witness has refreshed his memory before giving evidence and then has given his evidence in chief in the witness-box without recourse to such means. In every case it was a matter of the value to be given to such evidence and whether or not rules ought to be laid down for the guidance of police on such topic. As stated before, we do not consider that we should embark on the task of laying down general rules on so wide a topic or suggesting what is and what is not in all cases proper police practice to be adopted. Each must be determined on its own facts and such weight given to admissible and relevant testimony as the tribunal is prepared to give to it.

A witness is not permitted to give evidence of previous consistent statements made earlier by him *R. v. Roberts* [1942] 1 All E.R. 187 ; *Gillie v. Posho* [1939] 2 All E.R. 196. In Australia the question of the exclusion of previous similar statements and the exceptions thereto were exhaustively considered in *Nominal Defendant v. Clements,* 104 C.L.R. 476 ; 34 A.L.J.R. 95. So the topic of what a witness has done to refresh his memory before coming into court cannot be embarked on in evidence-in-chief. We can see no duty on Counsel to inform his opponent of anything which has come to his knowledge concerning a witness resorting to a record which the witness has made or has been made as the result of information given by him. To do so would require counsel to inquire into such matter in respect of every witness he intended to call and to disclose the result to opposing Counsel. Counsel for the prosecution must always act with propriety and fairness and should make disclosure where justice so requires. Anything in the nature of " schooling " a witness by the police is to be deprecated strongly but reasonable recourse to statements made by or depositions of a witness is not improper. Beyond that we do not wish to make any comment.

We turn now to the question of the probative value of the evidence of the security officer. So far as concerns the first ground of appeal it was for the assessors and the Judge to give his evidence such weight as they thought proper but this does not end our inquiry because it was argued on a number of other grounds that this Court ought to hold that it was unreasonable or wrong for the assessors and the Judge to give credibility to the evidence of the security officer. First were the conflicts in his present testimony on cross-examination and conflicts with his police statement and evidence at the preliminary inquiry. It is not claimed that, on the vital evidence earlier cited in full, as to the conduct and demeanour of the appellant, that the security officer had varied his evidence. The conflict was on other matters. This was a matter for the tribunal to weigh. All matters were fully canvassed before the tribunal and this Court sees no reason to hold that the finding of credibility is not sustainable or ought to be set aside on appeal as unreasonable or wrong. So ground 2(a), (b) and (c) fail.

Grounds 2(d), (e) and (f) claim that the trial Judge erred in law in giving probative value to the evidence of the security officer because he admitted refreshing his memory outside the Court and that he retold events by reference to such refreshing of his memory and relied on the 1st statement he gave to the Police. These were all matters which went to credibility and are not errors of law. They were, no doubt, fully in the minds of the tribunal who heard the evidence which contained all this matter.

Counsel for Appellant relied in particular on *R. v. Leonard Harris* 20 C.A.R. 144. In that case a daughter gave a statement implicating her father in the crime of incest. In the witness box she denied that incest had been committed. She was treated as hostile and examined on her previous statement. The finding of the Court of Appeal was that a proper direction to a jury is that such testimony is negligible. That is not the present case. The matter falls in this case to be determined on the principles laid down by this Court in *Gyan Singh v. R.* 9 F.L.R. 105 as explained in *Ravi Nand & Another v. R.* 11 F.L.R. 37. These cases make it clear that, if properly directed, the probative value of evidence is for the assessors and the judge. No complaint has been made in respect of the directions to the assessors or the directions which the judge himself applied, so the determination of the value of the evidence of the Security Officer was a matter for the assessors and the Judge to determine. This ground fails.

Ground 2(g) is that the evidence of Jaswant Singh was ignored. This evidence was not mentioned in the summing up. It referred to the stock records and went to prove that a clutch-plate was missing. We have already dealt with this point and held there was evidence to prove ownership. Ground 2(g) fails.

Ground 2(h) is that :—

> " 2(h) The evidence of Hari Singh raised the irresistible inference (sic) that it was impossible for appellant (or anyone else) to enter from outside the counter to the spare parts Section, climb the ladder and return to the outer side of the counter without being observed by members of the staff. "

This ground overstates the effect of Hari Singh's evidence. The Judge referred to the difficulty accused would have in getting behind a counter but we have no reason to believe that the evidence of this witness was not in the minds of the tribunal. The fact is, if it be accepted that the clutch-plate was the property of the Company, someone in all probability did just what counsel claims was an impossibility unless, of course, one of the persons who ought to have seen the culprit was the person who " planted " the part. That question was clearly before the tribunal. This ground also fails.

Ground 2(i) is that probative value was not given to the evidence of Hari Singh who was called for the defence. This witness was in the office of Burns Philp (of which Automotive Supplies Ltd. was a subsidiary). He dealt with statements made by appellant at about 9 a.m. when appellant claimed he was looking for Mr Willmott. We can see no reason to accept this submission. It was clear that appellant did act in the manner this witness deposed to and the tribunal was well aware of it. The Judge dealt with this evidence in his summing up. This ground fails.

Ground 3 refers to adverse comment made by the Judge concerning the final address of Counsel for appellant. The learned judge dealt at some length in his summing up with the information to which this complaint relates. We have carefully considered the summing up and can find no error of law, no unwarranted adverse comment and no casting of a wrong onus of proof on the defence.

This ground fails.

Ground 4 relates to a statement made by the Judge that, if the security officer was telling deliberate lies, then he was knowingly making a thief of an innocent man. We have considered the passage of the summing up in which this was said. It cannot be said that it was wrong for the Judge to put fairly before the assessors the stark fact that the evidence of the security officer was an accusation that appellant was a thief and if he (the security officer) was deliberately lying then he was deliberately doing so to convict an innocent man. Some criticism was made of the use of the word ' motive '. We are of opinion that this ground fails.

Ground 5 relates to the evidence of Sarita Pande who was called as a witness for the defence. She was questioned in evidence in chief by Mr Koya and the following passage is taken from the evidence namely :

" Q. Hear any allegations about theft ?

A. Not really.

No police came to see me that day. On the following Monday a Fijian detective came to see me. He asked if I knew anything about " the part ". I was telling him and then he stopped me. He did not take a written statement from me. He had a notebook and a pen but I cannot say if he wrote in it.

I said to him that he had handed the basket to the Security Officer (P.W.1) and that I had heard the accused shouting. "

This evidence was not admissible as evidence in chief. Whether or not she had given a statement to the police or spoken to anyone else at any time and particularly one hour after the event was not relevant as evidence in chief. *R. v. Roberts* (supra). From the wrongful tendering of this evidence by counsel for appellant and its acceptance by the Court, a series of matters arose. Witness was cross-examined on it and counsel for the prosecution asked leave to call rebutting evidence. Leave was refused. This evidence, which should not have been admitted as evidence in chief, although it might have been a topic for cross-examination, was dealt with by the Judge as follows :—

" D.W. 2 Sarita Pande, was in possession of very important evidence if you believe her. It was evidence she could have given to the police had they questioned her.

Mr Koya asked her if the police had come to see her and she said ' Yes ' but they did not like what she was saying and went away without taking her statement. You have to ask yourselves if this is likely. When the police find a witness who has vital evidence of this nature would they refuse to record it ? They might well expect that the witness would, as this one appears to have done, pass such evidence on.

One very significant thing is that the defence knew that D.W.1 would say that the police refused to take her statement. In that case, why did they not ask Napolione, (P.W.3), the investigating corporal, if he had tried to interview the staff, including Sarita Pande. P.W.3 said he was the investigating officer and that question—

" Did you interview Sarita Pande ? " should have been put to him. The defence may say that they were not aware who refused to take D.W.2's statement ; they were aware who the investigating officer was. If Napolione (P.W.3) was the officer to interview her, then her remarks were a slur upon his character, and the least the defence should have done was to put this to him. "

There was no misdirection in this passage and no reversal of the onus of proof as claimed. The Judge should not have criticised counsel for not questioning Napolione but equally Counsel should not have led the evidence, or, having essayed to lead it, the evidence should have been ruled inadmissible. Taking the passage as a whole we consider there is no real ground for complaint. The Judge felt that he should deal with an issue raised by Mr Koya and any criticism was that when a witness, who might speak on that issue, was in the box he was not examined on the topic. Although it is true witness said it was not Napolione who interviewed her it could be that Napolione might have said otherwise or he might have named the officer. The whole incident shows the danger of not adhering to the rules of evidence and the difficulties which follow. This ground fails.

Ground 6 relates to comments of Counsel for the prosecution on the failure of appellant to repeat his claim that the clutch-plate was planted on him when he was charged with the offence on October 29th which was two days later. Counsel attempted to cross-examine appellant on this topic. He was rightly stopped by the Court yet he was permitted to advert to it in his address. This was most improper and should have been stopped. Already a ruling had been made on the matter and it was Counsel's duty to obey the ruling. The Judge did not correct the matter in his summing up. This might have been a grave matter but, in the present case, it related to the evidence of appellant that there was a " plant ". It is clear from all the evidence that he made this claim to the security officer, to Mr Willmott, to Hari Singh and in the hearing of Sarita Pande. Appellant referred to it in the witness-box and it was plain that the case proceeded and was decided on the basis that he did make this claim. Any improper reference by Counsel for the prosecution could not affect the course of the trial. This ground, although well founded as an improper practice, must accordingly fail.

Counsel for appellant also submitted that the cumulative effect of the matters raised was such as to make it unreasonable and unsafe for the assessors and the Judge to act on the evidence of the security officer. We do not agree.

The appeal is dismissed.

Appeal dismissed.