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SHAMEEM MOHAMMED

v.

REGINAM

B [COURT OF APPEAL, 1983 (Gould V. P., Speight J. A., O'Regan J. A.) 7th, 18th July]

Criminal Jurisdiction

Criminal Law—Evidence and Proof—Handwriting—whether disputed evidence of handwriting should be left to assessors unaided by expert opinion.

C

During the course of the trial in the Supreme Court disputed evidence of handwriting was given to the assessors although no expert evidence of similarity was offered. On appeal:

Held: save in exceptional cases of striking similarity and where the evidence is tendered for necessary probative purposes assessors should not have placed before them disputed D evidence of handwriting for comparison, unless assisted by expert opinion, even when warned of the inherent dangers of such a course.

(*Note:* Only those parts of the Judgment covering the successful ground of appeal are reported.)

E Cases referred to:

R. v. Harvey (1867) 11 Cox C.C. 546
R. v. Rickard (1918) 13 Cr. App. R.140
R. v. Tilley (1961) 45 Cr. App. R.360
Day (1940) 27 Cr. App. R. 168
F *R. v. O'Sullivan* (1969) 53 Cr. App. R.274
Stirland v. D.P.P. (1944) A.C. 315
Dharmasena v. The King (1951) A.C. 1

Mrs A. Hoffman for the Appellant
K. R. Bulewa for the Respondent
G

GOULD V. P.:

Judgment of the Court

H This is an appeal against the conviction of the appellant by the Supreme Court of Fiji at Suva upon two charges of obtaining goods by false pretences.

In each case the company alleged to have been defrauded was Burns Philp (S.S.) Company Limited at Suva and each case involved the presentation of a cheque to that company by some person, the acceptance of the cheque and the giving in return of a quantity

of groceries and some cash as change. The first count concerned Bank of New Zealand cheque No. 374862 for $114.05 presented on the 29th January 1982, and the second Bank of New Zealand cheque No. 375459 for $106.62 presented on the 4th February 1982. The fact that the person who presented the cheques to the company (we will refer to it as Burns Philp) had no entitlement to them and was therefore acting with intent to defraud, was established at the trial in the Supreme Court beyond any doubt. What had to be decided was whether the appellant was proved to have been the person who presented the cheques and received the goods and money. One of the original three assessors had been discharged during the course of the trial, but each of the remaining two expressed the opinion that the appellant was guilty on each count. The learned Chief Justice agreed and convicted him accordingly.

The notice of appeal contained eight grounds. Mrs. Hoffman, who appeared for the appellant, sought to add three more, but objection was taken on the ground of lateness. No notice had been given of them to counsel or the Court and they were disallowed. Grounds 6 reads:

> 6. THAT the learned trial Judge wrongly exercised his discretion in admitting in evidence the purported specimen handwriting of the Appellant when the same ought to have been rejected on the grounds that the prejudicial value in admitting the same far outweighed the probative value.

The brief facts are that Corporal Imo Sagoa who interviewed the appellant invited him to test his own handwriting. He dictated a few words which had been written on the backs of the cheques and the appellant wrote them. When this evidence was tendered, objection was taken by the defence on the ground that comparison of handwriting should only be made by experts, but the learned Chief Justice ruled that in the circumstances of the case it was admissible. It was left in the summing up to the assessors as an additional piece of evidence relied upon by the prosecution. What the prosecution alleged by way of similarities was set out but had apparently only the support of having been pointed out by prosecution counsel. No witness, expert or otherwise, was called to compare the handwriting. In the circumstances, when the learned Chief Justice said:

> "According to the prosecution the similarities between those handwritings are so striking that there can be no doubt whatever that the accused was the author of them all."

there was danger that the assessors may not have realised sufficiently that it was only the prosecution's opinion that was being advanced.

In this part of the case, and in spite of a warning which he gave to the assessors later, we consider, with respect that the learned Chief Justice erred. The law and practice on the subject of handwriting has been laid down in a series of cases. An early one was *R. v. Harvey* (1867) 11 Cox C.C. 546 where Blackburn J. in a case where the evidence was "very slight" said that he did not think it would be right to let the jury compare the handwriting (in some copy books) without some assistance.

In *R. v. Rickard* (1918) 13 Cr. App. R. 140 the Court said that a letter in evidence should not have been handed to the jury (to compare with an allegedly forged receipt) to form an

A opinion by comparison. In that case a police witness had made a comparison but it was said he was not an expert. It was said, however, that if there were striking similarities a different conclusion might have been reached. A similar opinion is expressed in *Adams' Criminal Law and Practice in New Zealand* (2nd Edition) para. 3993, as follows:

> "There may, it is submitted, be extreme cases where the result of comparison is so
B obvious that no assistance is needed:"

In *R. v. Tilley* (1961) 45 Cr. App. R. 360 the accused gave evidence and were asked to give specimens of handwriting during cross examination. No expert was called and the Crown made no reference to any similarities. In the summing up the Judge invited the Jury to form their own view on the genuineness of the disputed receipt and expressed his own view
C on certain similarities. The Court, following *Rickard* (supra) and *Day* (1940) 27 Cr. App. R. 168 reaffirmed the statement of principle that:

> "A jury should not be left unassisted to decide questions of disputed handwriting on their own."

D The same principle was applied in *R. v. O'Sullivan* (1969) 53 Cr. App. R. 274, though in that case the disputed documents had already been put before the jury as part of the probative material of the case. There was no possibility of keeping it out of evidence. Winn L.J. said, at p. 281–2:

> "The document had to go before the jury in the instant case since it formed part of the
E probative material establishing the visit by the man who took away the wallet and the fact that he had entered somebody's name in the register of the bank. The jury was not in the instant case invited to make any comparisons, as the jury had been in *Tilley* (supra). The learned Deputy Chairman in the instant case did not himself purport to make any comments of any kind about similarities or dissimilarities, as had been done by the learned Deputy Chairman in *Tilley* (supra). The jury were warned very, carefully and
F stringently not to make these comparisons.
>
> In the circumstances, it does not seem to this Court that the jury in the instant case can be said to have been left to decide questions of disputed handwriting on their own. It is true they were not effectively prevented from doing it. What could possibly have been done effectively to prevent them from making the comparison passes the comprehension
G of the Court."

Later he said, at pp. 282–3:

> "It seems to the Court that in the instant case the matter was dealt with properly. The fact remains that there is a very real danger where the jury make such comparisons, but as
H a matter of practical reality all that can be done is to ask them not to make the comparisons themselves and to have vividly in mind the fact that they are not qualified to make comparisons. It is terribly risky for jurors to attempt comparisons of writing unless they have very special training in this particular science. All possible was done, this Court thinks, with great care and very fairly by the Court in the instant case. It may well be that,

despite it, the jury did try to make comparisons. That is really unavoidable and it should be accepted these days that *Tilley* (supra) cannot always be in its literal meaning exactly applied; nevertheless every possible step and regard should be had to what was said by the Court in that case, inasmuch as never should it be deliberately a matter of invitation or exhortation to a jury to look at disputed handwriting. There should be a warning of the dangers; further than that as a matter of practical reality it cannot be expected that the Court will go." A B

The report of this case contains also a description of the warning given by the Deputy Chairman to the jury. It will be sufficient to quote, from page 279 " . . . . . and for several pages of the manuscript he set himself strenuously to warn the jury against the dangers implicit in their making comparisons of writing without being expert, as of course they were not . . . . " C

In the present case we are satisfied that there has been a definite breach of the general principle. It was not a case like *O'Sullivan* where the evidence in question was already in for necessary probative purposes. It was put in deliberately by the prosecution for the purpose of comparison. This is where the error first arose. It should not have been tendered, as the prosecution well knew that it had no expert evidence to assist the assessors on the question. Without an assurance from the prosecution that they proposed to call expert evidence (we leave aside the question of what constitutes an expert on the subject) the learned Chief Justice ought to have exercised his discretion against admitting it. Once it was admitted it was clearly not a case where the similarities were so obvious that the rule could safely be disregarded, and the direction to the assessors should have been to disregard the specimen which the appellant had provided and also any comparison made by the prosecution. Instead, there was an invitation to the assessors, contrary to what was said in *O'Sullivan* to look at the disputed handwriting. D E

The learned Chief Justice did give a warning to the assessors. This is of course essential in such cases as *O'Sullivan* where the evidence is before the assessors in any event. But in our judgment a warning can seldom, if ever, be a satisfactory substitute for failure to observe the correct practice where the evidence should not have been before the assessors in the first place. F

In the present case the learned Chief Justice said:

"In considering the evidence relating to handwriting I must warn you that it is dangerous to act on such evidence without the assistance of an expert witness and here none was called. However, if you are satisfied that there are sufficient similarities between he accused's specimen handwriting and the handwritings on the two cheques (Exhibits 1 and 2) and on the void sales voucher, you may draw such conclusions as to the true author of the handwritings in question as you think proper in the circumstances." G H

Coupled, as it is there, with an invitation to make their own comparison, the warning was unlikely to have undone the damage the departure from rule could have caused.

There is merit in this ground of appeal. Our opinion, in brief, is that the specimen of

A handwriting should not have been admitted in the then state of the evidence. Once it was admitted the learned Chief Justice invited the assessors to make an unassisted comparison with the proved writing of the person who presented the cheques, instead of telling them that they should not do so. This wrong direction requires that the appeal should be allowed unless it is a case for the application of the proviso to section 23(1) of the Court of Appeal Act (Cap. 12—1978) on the ground that we consider that no substantial miscarriage of justice has B occurred. That involves the question whether the assessors would on the evidence properly admissible and properly directed without doubt have been of the same opinion: see *Stirland v. Director of Public Prosecutions* (1944) A.C. 315 and *Dharmasena v. The King* (1951) A.C. 1.

The evidence of identification, though counsel has sought to criticize it, was strong, particularly on Count 1. Sereana and Litiana were described by the learned Chief Justice as C of the greatest importance because of the high degree of certainty and self assurance in which they identified the appellant. They both picked him out at the identification parade, as the person who they had seen on the 29th January. They saw him together on that day and Litiana remembered him when he came again on the 4th February and told him that she had only cashed the cheque on the 29th January because he had come with Sereana. She confirmed that the cheque he had with him on the 4th was in the day's takings and came from Suchitra's check out, though Suchitra could make no identification at the parade. Sereana claimed to have seen D the appellant at Burns Philp on a number of occasions before this episode.

The assessors clearly believed these girls. The question is whether they must have done so irrespective of the effect on their minds of the evidence wrongly admitted. While we regard it as extremely likely that they would have arrived at the same conclusion we cannot say that all doubt has been eliminated.

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The result must be that the appeal is allowed and the convictions quashed and the sentences set aside. The prosecution must accept the responsibility for the way in which it presented its case and we do not therefore consider it a case where a new trial should be ordered.

F *Appeal allowed.*