THE STATE

v.

VIJAY KAPOOR &
KAYLESH CHANDRA

[HIGH COURT, 1996 (Fatiaki J) 30 April]

Criminal Jurisdiction

Crime- evidence and proof- submission of no case to answer- whether evidence of identification albeit unsatisfactory precludes acquittal. Criminal Procedure Code (Cap. 21) Section 293 (i).

The accused were standing trial for murder. At the close of the prosecution case the Defence submitted that there was no case to answer. The Court reviewed the identification evidence and found it to be unsatisfactory. Allowing the application and acquitting the accused the Court HELD: that the phrase "no evidence" as it occurs in Section 293 (1) of the CPC must be taken to mean "no reliable evidence" or "no credible evidence".

Cases cited:

Daley v. R. (1994) 98 Cr. App. R. 447
Galbraith [1981] 1 All E.R. 1060
Haw Tau Tau v. Public Prosecutor [1982] A.C. 136
R. v. Jai Chand (1972) 18 F.L.R. 101
Sisa Kalisoqo v. R. Cr. App. 52/84 (FCA Reps 84/563)
Turnbull (1976) 63 Cr. App. R.

Ruling on submission of no case to answer.

Ms. E. Rice for State
H. Nagin for 1st Defendant
M. Raza for 2nd Defendant

Fatiaki J:

This is an application under Section 293(1) of the CPC which provides (so far as relevant) :

> "When the evidence of the witnesses for the prosecution has been concluded, ..., the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence, shall ... record a finding of not guilty."

In R. v. Jai Chand (1972) 18 F.L.R. 101 Grant J. (as he then was) in upholding a submission that there was 'no case to answer' said at p.103 :

> "It seems clear that the decision as to whether or not there is a case

A to answer should depend not so much on whether the adjudicating tribunal would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal properly directing its mind to the law and the evidence could or might convict on the evidence so far laid before it. In other words, at the close of the prosecution's case the Court should adopt an objective test as distinct from the ultimate subjective test to be adopted at the close of the trial. But the question does not depend solely on whether there is B some evidence irrespective of its credibility or weight sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence."

C Prosecuting counsel submits however that this court is bound by the decision of the Fiji Court of Appeal in Sisa Kalisoqo v. R. Cr. App. 52 of 1984 (FCA Reps 84/563) where, after setting out an oft-cited passage in the judgment of the Court of Appeal (U.K.) in Galbraith [1981] 1 All E.R. 1060 at 1062 which sets out how a judge should approach a submission of no case, the Fiji Court of Appeal said at p.8 :

D "In our view, the simple and narrow prescription of Section 293 precludes the adoption in this country of para. 2(a). It is of application where there is some evidence ... and where there is some evidence a Judge cannot say there is no evidence."

Paragraph 2(a) of the Galbraith passage reads :

E "(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence (a) where the Judge comes to the conclusion that the Crown's evidence taken at its highest is such that a jury properly directed could not convict on it, it is his duty, on a submission being F made, to stop the case."

Prosecuting counsel in light of the above dictum of the Fiji Court of Appeal in Sisa Kalisoqo's case submitted that the decision in Jai Chand must be considered as impliedly over-ruled.

In my view however the two decisions are not necessarily in conflict and indeed G may be reconciled on the basis that Sisa Kalisoqo's case was directed at interpreting the meaning of Section 293 in the context of the recognised separation of the duties and functions of a judge and a jury in the case of a jury trial, whereas, Jai Chand's case is directed at the meaning of the term "evidence" as it occurs in Section 293 when viewed in the context of the mode of trial in this Court where the judge in giving the judgment of the Court is not bound to conform to the opinions of the assessors (see : Section 299(2) CPC).

I am fortified in this view by the judgment of the Privy Council in an appeal from Singapore in Haw Tau Tau v. Public Prosecutor [1982] A.C. 136 where their lordships said at p.151 : A

> "It is well established that in a jury trial at the conclusion of the prosecution's case it is the judge's function to decide for himself whether the evidence adduced which, if it were to accepted by the jury as accurate, would establish each essential element in the alleged offence : for what are the essential elements in any criminal offence is a question of law. If there is no evidence (or only evidence that is so inherently incredible that no reasonable person could accept it as being true) to prove any one or more of those essential elements, it is the judge's duty to direct an acquittal, for it is only upon evidence that juries are entitled to convict ; but if there is some evidence, the judge must let the case go on." B C

In my view the phrase 'no evidence' as it occurs in Section 293 of the CPC must mean 'no reliable evidence' or 'no credible evidence' and not simply any evidence no matter how inherently vague or unreliable such evidence may be.

In my view sworn testimony does not become 'evidence' merely because it is given or uttered under oath from the witness box (irrespective of how irrelevant or inconsistent with other evidence, or inherently incredible it may be), in addition, sworn oral testimony must be relevant to the issues in the case and possess a probative quality. D

The fact that one of the principal grounds for defence counsel's 'no case' submission is that there is no evidence of the identity of the deceased's assailant(s) also brings into play the dictum of the English Court of Appeal in the leading case of Turnbull [1976] 63 Cr. App. R. 132 where the Court said at p.138 : E

> "When in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different, the judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word ; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification." F G

In this regard too prosecuting counsel was constrained by the wording of Section 293 of the CPC as interpreted in Sisa Kalisoqo's case to submit that even poor evidence of identity is some evidence, and therefore outside the narrow proscription of the section. Counsel also argued that there was some other forensic evidence which supported the visual identification and rendered it sufficiently substantial and proper to be left for the assessors to consider.

In my view however, the distinction, between the judge's function and that of the assessors, where the question at issue is the quality of the evidence of identification of the accused at the close of the prosecution's case, is over-ridden by the particular risk of injustice that can arise from an honest albeit mistaken identification.

In Daley v. R. (1994) 98 Cr. App. R. 447 a decision of the Privy Council on an appeal from Jamaica it was :

> "Held : allowing the appeal, that where the quality of the identifying evidence is poor, or so slender as to be unreliable and there is no other evidence in support of identification, then the judge should withdraw the case from the jury. ... In the instant case, considering the weaknesses of the identification evidence, the case should have been withdrawn from the jury."

Lord Mustill in delivering the judgment of the Privy Council dealt in some detail with the history of the law as it relates to the trial judge's power and duty to withdraw the issue of guilt from the jury. In particular the judgment considered the decisions in Galbraith and Turnbull and concluded that there was no incongruity between the principles enunciated in them.

Two possible explanations were advanced, firstly, that Turnbull was an exception superimposed on the general principles in Galbraith and secondly, that the perceived risk of a jury acting upon evidence which is not to be relied upon e.g. a confession obtained by oppression, is serious enough in certain types of identification cases as to outweigh the general principle that the functions of the judge and jury must be kept apart (See : p.454).

Their lordships stated however that a reading of Galbraith shows the Court of Appeal was primarily concerned with proscribing the practice whereby a judge who considered the prosecutor's evidence unworthy of credit would make sure that the jury was denied the opportunity of giving a different opinion from that of the judge, whereas and by way of contrast, the case is withdrawn in a Turnbull type identification case :

> "... not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction ... when assessing the quality of the evidence under the Turnbull doctrine the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice. Reading the two cases in this way, their Lordships see no conflict between them."

So much then for the law. I turn next to consider the prosecution's evidence.

It is common ground that the prosecution has established that the deceased Karam

Chand alias Tomasi on the early hours of the morning of the 23rd of April 1994 sustained multiple incised wounds to his upper left and right chest areas, one of which penetrated a major blood vessel, his pulmonary artery, and thereby caused his death. It has also been established that the wounds were consistent with having been caused by a sharp instrument such as a thin-bladed knife.

In addition, given the location, number and nature of the wounds on the deceased's body there can be little doubt as to the presence of 'some evidence' from which the assessors could properly infer the presence of malice aforethought in whoever inflicted those knife wounds on the deceased's body.

The sole element remaining upon which there is any serious dispute is the identity of the deceased's assailant(s). In this regard the prosecution's sole eye-witness is Valentine Rogers who testified that he saw both accused assaulting his friend Samisoni Cakacaka and then they left towards Phoenix Restaurant. Immediately prior to that Valentine had witnessed his friend Colin being pulled into some bushes beside Civic Centre by the 2nd accused who was dressed in a black vest.

This identification of Colin's assailant was contradicted by both Colin and Samisoni who stated it was the 1st accused dressed in black trousers and a shirt who had pulled Colin into the bushes. Quite plainly Valentine's identification in this regard was at best mistaken, at worst, false.

Valentine then testified that a Fijian ran past him and went up to the 2 accused and questioned them about the assault on Samisoni and shortly after a fight broke out between the 2 accused and the Fijian.

He saw punches being exchanged between both accused and the Fijian and then he noticed blood coming out from the front of the Fijian's stomach area and soon after the Fijian fell down and the 2 accused ran off across the road, where one of them fell outside Fintel and the other ran towards the Civic Centre building pursued by some Fijian boys.

Valentine said that whilst the fight between the 2 accused and the Fijian was in progress he saw another Fijian man run to the fight and pull or push the accused away from the Fijian man and that is when the accused ran off across the road towards Fintel.

Akapusi Kolitagane the second Fijian in question stated on oath however that as he neared the fight the Indians saw him and ran away towards Sukuna Park. He was unable to identify the Indians. On this aspect Valentine Rogers has plainly exaggerated his evidence.

Valentine Rogers although he did not know the accused by name had identified them by their build and their clothing. He had not identified them at an identification parade and was first asked to do so in Court by way of a dock identification. On this latter occasion his recognition of the accused was also based on their build and clothing and not on their facial features.

In similar vein Valentine Rogers was never asked to identify the deceased and his identification of him was that he was 'a Fijian man wearing something striped like black or blue and white T-shirt or vest.' He identified a court exhibit as being similar to what the Fijian man was wearing but he had left the scene shortly after the Fijian man had fallen down outside the Phoenix Restaurant and did not know what happened to the Fijian man.

In this latter regard the evidence is clear that the deceased was seen on the pavement by Riaz Ali outside the Fiji Times Office shortly before he was loaded into a police vehicle and taken to the C.W.M. Hospital. It is also common ground that no blood spot or stains were seen or noted outside the Phoenix Restaurant as one might have expected if the deceased had indeed collapsed onto the footpath outside the restaurant, and how was it that the deceased was uplifted from outside McConnell-Dowell by Constable Isimeli Tiva and his crew? Had he been moved after Valentine Rogers had seen him fall down and just prior to being lifted off the footpath ? or had Valentine Rogers made another innocent albeit honest mistake ?

Then there is the evidence of Riaz Ali which counsel have described as a 'dying declaration' by the deceased as to the identity of his assailants where he said that: "... he was drinking with friends in Lucky Eddies and when they came out the friends stabbed him."

Finally the other forensic evidence that prosecuting counsel suggests was supportive of the identity of the deceased's assailants is not wholly without doubt in that the doctor who examined the 1st accused's clothing on the morning of the 23.4.94, several hours after the alleged incident, found no blood stains on the 1st accused trousers albeit that he noticed it was torn. How then did blood from the deceased's blood grouping come to be on the 1st accused's trouser leg ?

Even Dr. Douglas' evidence at its highest was to the effect that 'the blood on the left leg of the (1st accused trousers) could have come from the deceased or someone else with the same blood group.' That particular blood sample taken from the 1st accused's trousers could only be tested under one of the 2 tests carried out by him.

In my considered opinion the quality of the Prosecution's identification evidence is so riddled with falsity, inconsistencies, discrepancies and exaggeration that I am left firmly of the view that the evidence of identification even if taken to be honest has a base which is so slender that no reasonable tribunal could convict the accused. Accordingly and as required in terms of Section 293(1) of the CPC I record a finding of not guilty against each accused and acquit them of the murder of Karam Chand.

(Accused acquitted.)