IN THE SUPREME COURT OF FIJI

000152

Appellate Jurisdiction

Criminal Appeal No. 25 of 1980

Between:

INDAR NARAYAN s/o SHIU SAHAI

and

REGINAM

Mr. V. Parmanandam for Appellant

Mr. M. Raza for Respondent

JUDGMENT

The appellant was convicted after trial at the Nausori Magistrate's Court of receiving stolen property under section 347(1) of the Penal Code.

It was alleged that the appellant received between 1st July and 20th July 1979 at Kasavu, Nausori 252 wrist watches valued at $72,350 knowing them to have been stolen. He was sentenced to five years' imprisonment.

The appellant appeals against his conviction and sentence. A number of grounds of appeal have been argued to which reference will be made later.

The facts as found by the learned Magistrate may be summarised as follows.

On Sunday morning of the 1st July 1979 the shop of M. Razak & Co. Ltd. was broken into and a number of watches amongst other duty free items were stolen. On 20th July 1979 acting on information received, Sergeant Abdul Hassan (P.W.4) accompanied by Mohammed Janif s/o Sarajan Mohammed (P.W.1) one of the owners of the shop travelled to Suva in a private car in pursuit of the appellant who had earlier on travelled in a

van AH319 to Suva with one Abid Ali from Nausori. P.W.4 was stopped along the way by a police highway patrol who was told of the purpose of the pursuit and was instructed to go after the appellant's van. In the meantime the van had gone to Greene Street in Suva and it was there that P.W.4 and his party caught up to it. When appellant saw P.W.4 he got out of the van and started running away. P.W.4 ran and got hold of him. Following a search of the vehicle a number of watches which were wrapped up in a piece of cloth inside a bag and covered over with a sack was found under the spare wheel of the van. The watches were identified to be part of those missing from P.W.1's shop on the morning of the break-in. Appellant was interviewed under caution by P.W.4 at Nausori Police Station the same day at which appellant said he bought the watches from Saiki for $600 that same morning. When he was asked "Do you know that it was all stolen watches" appellant replied "Yes Saiki told me that they broke the store of Razak". Appellant also said at the interview that he was taking the watches to Suva to sell. He was then arrested and charged with receiving stolen property during which he admitted he bought the watches from Saiki who told him all the watches were stolen. Appellant admitted he had made a mistake.

On 21st July at about 2 a.m. appellant's house at Kasavu was searched by the police and in the bathroom hidden between the ceiling and the roof was a rubber hand glove in which were found four watches and these were later identified to be part of the stolen goods from P.W.1's shop.

In the first ground of appeal argued counsel for appellant complained that Abid Ali who was at the material time an employee of P.W.1's shop in Suva and a neighbour of appellant at Kasavu and with whom Abid Ali had travelled to Suva when P.W.4 and his party came upon them at Greene Street was not called as a witness by the prosecution nor by the Court even though Abid Ali in these circumstances would appear to be an important potential witness in the prosecution case. It is said

that Abid Ali should have been required to give evidence as part of the proper unfolding of events in the prosecution case. It is said that in fairness to the appellant Abid Ali ought to have been called as witness, if not by the prosecution certainly by the Court which was also fully cognizant of Abid Ali's rather close connection with the events on that day. It is said that much suspicion surrounds Abid Ali's activity on that day that the decision not to use him as a witness has caused a miscarriage of justice and there ought therefore to be a new trial. Counsel for the appellant cited Richardson v. The Queen (1974) 131 C.L.R. 116 where the duties of a Crown prosecutor in regard to the calling of witnesses are well and fully discussed. I think it only necessary for me to refer to the passage at pages 121/122 which is noteworthy:

> "It follows that a failure on the part of the Crown prosecutor to call in the Crown case an eye-witness of the incidents giving rise to the offence charged does not of itself constitute a ground for setting aside a conviction and ordering a new trial. Counsel for the applicant was unable to point to any authority for the proposition for which he contended and, in the light of what we have said, it finds no support in principle or in the nature and character of the decision which the prosecutor is called upon to make. Once it is acknowledged that the prosecutor has a discretion and that there is no rule of law requiring him to call particular witnesses, it becomes apparent that the decision of the prosecutor not to call a particular witness can only constitute a ground for setting aside a conviction and granting a new trial if if constitutes misconduct which, when viewed against the conduct of the trial taken as a whole, gives rise to a miscarriage of justice."

For my part I am afraid I do not find the case quoted to be of much help to the appellant. On the contrary the case in my view makes it clear that the calling of prosecution witnesses is a matter for the Crown prosecutor and as long as he exercises his decision on the matter in good faith there is no ground upon which his decision not to call any particular witness could be properly impugned. Surely if appellant had wanted to call Abid Ali as a witness at the trial he would have been perfectly entitled to do so and he could not have been

prevented from doing so. The Court of course has a right to call a witness not called either by the prosecution or the defence if in its opinion this course is necessary in the interests of justice. However, the power should be used sparingly and rarely exercised (see Archbold (40th Edition) paragraph 592). As I pointed out above Abid Ali could have been called either by the prosecution or defence but neither did so and in the circumstances I do not think it would have been proper for the Court to call a witness which neither contending party wished to call. For the Court there may well be problems of a technical nature which would make it imprudent for it to call a witness neither side wanted. Besides the court had no adequate brief on Abid Ali as to what role he might have played in the events of that day and in particular as to the discovery of the stolen watches in appellant's van.

In these circumstances I find no merit in this first ground of appeal.

The next ground argued claims that the learned Magistrate erred in law in failing to give due or any consideration to the weight of the contents of the confession after admitting same in evidence. It was submitted under this ground of appeal that the learned Magistrate did not give reasons for attaching any weight to the confessional statements and this omission made the trial most unsatisfactory.

I find it difficult to follow this line of argument. It is true that the learned Magistrate may have laboured the point concerning the free and voluntary nature of appellant's confessions without sufficient examination of the probative value of these so-called confessions. However, the basic point which is clear from his judgment is that he accepted the appellant's confessions to the investigating officer as not only having been made freely and voluntarily but the

confessions were themselves true in their contents and these showed how the appellant came to be in possession of the stolen watches. On the evidence accepted by the learned Magistrate I think he was fully justified in asserting in his judgment that this was "a clear cut case of receiving stolen property". The circumstances in which appellant came to be caught with the watches were themselves extremely inculpatory and tend strongly to enhance the probative value of appellant's confessions.

This ground of appeal also fails.

A further ground of appeal argued claims that the learned Magistrate erred in law in failing to put the amended charge to the appellant and that his conviction was a nullity.

What happened was that after P.W.2 gave his evidence police prosecutor applied to amend the particulars of offence in relation to the number of watches allegedly received by the appellant by deleting the figure 247 and substituting therefor the figure 252. Mr. Arjun, solicitor who represented the appellant in the Court below told the court he had no objection to the amendment.

The appellant was not required to plead again when the amendment was allowed and consequently it is submitted on behalf of the appellant that the failure of the Court to do so rendered the trial of the appellant null and void. The main contention of the appellant in this regard is that section 204(1) of the Criminal Procedure Code makes it mandatory for a fresh plea to be taken following any amendment made under the provisions of the section. Counsel for the appellant relied heavily in support of his contention on the Lautoka Case of R. v. Vijay Singh and Anor. (Criminal Appeal No. 50 of 1977).

It is clear that the amendment allowed relates to the

description of the property stolen and as can be seen was of a rather minor and trivial nature. Indeed under section 204(2) of the Criminal Procedure Code the variance which gave rise to the amendment in question could not be regarded as material and therefore did not really necessitate a formal amendment to the charge. Section 204(2) reads

> "(2) Variance between the charge and the evidence produced in support of it with respect to the date or time at which the alleged offence was committed or with respect to the description, value or ownership of any property or thing the subject of the charge is not material and the charge need not be amended for such variation:"

It is clear from the above provisions that the amendment made by the Court to the charge was technically unnecessary. It follows therefore that a fresh plea to the amended charge would equally be unnecessary. Moreover, the appellant could not possibly have been prejudiced by an amendment which was immaterial to the case against him.

Accordingly this ground of appeal fails.

A further ground of appeal argued claims that the learned Magistrate having decided to hold a trial within a trial involving both the oral interview and the charge statement failed to consider the evidence on each matter separately and hence his decision that they were both made freely and voluntarily is wrong in law.

The only point made in argument on this ground of appeal was the contention of the appellant that he was charged in Hindustani when he could not speak or understand the language. The learned Magistrate did not accept this when evaluating the evidence of the police officer who charged him. The learned Magistrate did not accept the suggestion of a fabrication between the two police officers who gave evidence

of the oral interview and of the charge statement. Not only did he find that they were in fact given by the appellant on the two separate occasions referred to in the evidence but also that the contents of the appellant's statement to the police were voluntary and were not induced by violence or promises of advantage. The issue of credibility is essentially one for the trial Court because of its particular advantage of having seen and observed the demeanour of the witnesses in Court. Such advantage is not available to this Court.

I can find no substance in this ground of appeal.

A further ground of appeal argued claims that the learned Magistrate erred in law in prohibiting counsel for the appellant from asking questions as to the possible trapping of the appellant.

The incident complained of appears at page 24 of the record when Sergeant Abdul Hassan (P.W.4) Investigating Officer in the case was being cross-examined by Mr. Arjun, solicitor for the appellant at the trial within a trial during which the following exchanges occurred:

"Q. At no stage you cautioned him.
A. I did caution him. Another person was with Accused. He was Abid Ali. He is employee of M. Razak & Co. Don't know if he is still employed there. He is not in court this morning.
Q. You arrested Abid Ali?
A. No.
Q. Why not?
A. Because he was acting on my direction.
Q. Did you direct Abid to pay accused?

Witness: Claim privilege.
Raza: Object to this question. Source of information cannot be divulged.
I refer to Archbold (40th Edition) para. 1316 under caption "Informers".
Question regarded information. Constable cannot be asked.

"Arjun: Not asking what informer told him what I'm asking - did he direct Abid Ali to trap accused?

Court: Won't allow question as to trapping."

Two observations I need to make in regard to the foregoing. Firstly P.W.4 had no privilege upon which he could claim not to answer the question "Did you direct Abid to pay accused" if the case was that Abid was an agent provocateur as opposed to being a police informer. In the latter case of course a privilege would arise and this would have barred any discussion as to whether Abid Ali was a police informer. The objection of Mr. Raza could only have been properly upheld if Abid Ali was an informer and a declaration by counsel to that effect was made. No such declaration was made and because of that Mr. Raza's objection would appear to be misconceived. Secondly, the ruling of the learned Magistrate not to allow question relating to possible trapping (more commonly referred to as "entrapment") was clearly erroneous (see R. v. Sang (C.A. Unreported) but cited in Archbold (40th Edition) para. 1409). The evidence of alleged entrapment of appellant if such was the case was clearly admissible as being highly relevant and should therefore have been allowed by the trial Court. However in my judgment nothing of any consequence turned on learned Magistrate's refusal to admit alleged evidence of entrapment. This is because the case for the defence as it turned out was not one of entrapment i.e. being induced by an agent provocateur to commit the offence with which he was ultimately charged but that he was completely ignorant of the presence of the stolen watches in his van when he set out with Abid Ali from Nausori that day. In other words his case is that he was framed by the police and Abid Ali and that claim as I pointed out earlier in this judgment was rejected by the learned Magistrate who found the confessions made to the two police officers concerned and at two different occasions as representing the truth of how the stolen watches came to be in the possession of appellant.

This ground of appeal fails.

In the final ground of appeal against conviction it was claimed that the learned Magistrate on the facts before him could not have been satisfied beyond reasonable doubt that the appellant knowingly received the stolen property.

The main contention made under this ground was that the evidence between P.W.1 and P.W.4 was in direct contradiction. P.W.4 had said in evidence, and here I quote from page 20 of the record:

> " I recall going to Greene Street on 20.7.79. I stopped my car and noticed accused turning his carrier around and stopped in front of a house. I ran towards accused's carrier. Accused seeing me approaching got out of steering and started running away. I caught him and informed him that I am a police officer."

whereas in his cross-examination P.W.1 told the Court, and here I quote from page 10:

> " I saw accused when I arrived with the police. Abid was standing on passenger's side and accused standing on driver's side."

and at page 11 in his re-examination P.W.1 said:

> " I heard everything that was said to accused by Sergeant as I was with him - standing with Sergeant. Sergeant went and asked "Where are the things?" as he got there. I was this distance (about one yard) from Sergeant. I was there five to six minutes."

It is said that it was rather curious that only P.W.4 stated that appellant had run away from the van and no other witness claimed to have seen that alleged occurrence. P.W.1 who was there at Greene Street with P.W.4 made no mention of it. It is submitted that in these circumstances the learned

Magistrate could not possibly in the light of such contradictory and unsatisfactory evidence have satisfied himself beyond reasonable doubt of the guilt of the appellant.

It is true that P.W.1 made no reference to appellant running away from the van. However, it cannot in my view be inferred from that that P.W.4 was untruthful about that particular piece of evidence. It is clear from the record that at no time was P.W.1 interrogated directly on the point. So it is not possible to say one way or the other whether there was a material contradiction in the evidence given by P.W.4 and P.W.1 on the matter. Apart from that apparent lacuna their evidence where it really mattered, e.g. as to the evidence of discovery of the stolen watches in appellant's van and what was said by the appellant at the time of discovery was consistent with each other.

Accordingly this ground of appeal fails.

For the reasons I have given when dealing with each ground of appeal against conviction I am satisfied that the appeal must be dismissed.

I turn now to the appeal against sentence.

The appellant was sentenced to five years' imprisonment. It is said that the sentence was harsh and excessive having regard to the whole of the circumstances of the case. Appellant has no previous convictions and until this incident was a man of good character. It appears that the appellant succumbed to strong temptation when presented with an opportunity to make some quick illegal profit. There is nothing to suggest and indeed the evidence is to the contrary that he might have been what is popularly known as a "fence" for shopbreakers and thieves nor was he shown to be a professional receiver. Furthermore it appears that all the watches which the appellant had received have been recovered and have since been restored to the original owners. Appellant did not derive any personal gain from his criminal escapade.

In these circumstances I am satisfied that the sentence passed on appellant is too long. Accordingly I would allow the appeal and quash the sentence of five years' imprisonment and substitute therefor a sentence of two and a half years' imprisonment.

(T.U. Tuivaga)
Chief Justice

Suva,
3rd October 1980.