IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

A T L A U T O K A

Appellate Jurisdiction

Criminal Appeal No. 49 of 1983

BETWEEN : RUSTAM ALI s/o Yusuf Ali — Appellant

A N D : R E G I N A — Respondent

Mr. A. K. Narayan — Counsel for the Appellant

Mr. M. Raza, Principal Legal Officer — Counsel for the Respondent

J U D G M E N T

Case referred to: Jagdishwar Singh and Anor v R. 8 F.L.R. 159.

The appellant was convicted of throwing an object contrary to section 105 of Penal Code in that he wilfully threw stones at a vehicle driven by the son of the complainant.

As the learned Counsel for the Prosecution, Mr. Raza, Principal Legal Officer has submitted, the issue was one of credibility. The learned trial magistrate had occasion to observe the demeanour of the witnesses. He accepted the evidence of the witnesses for the prosecution and rejected that of the defence witnesses.

The learned counsel for the appellant, Mr. Narayan, agrees that the issue is one of credibility but submits that he was not allowed by the Court to fully test the credibility of the witnesses. He submits that two of the witnesses made prior inconsistent statements to the police. He cross-examined the witnesses thereon and from the record it does appear that two witnesses disagreed with the contents of their previous statements. I say that this 'appears' to be the case because the cross-examination of the witnesses is recorded in narrative form. I am far from saying that to record a cross-examination in this manner in any way affects the validity of any criminal trial. Obviously it is desirable however to record a cross-examination by way of question and answer, simply because leading questions are invariably asked in cross-examination to which the answer may be merely 'yes' or 'no': the answer in itself is of little assistance to the court, or indeed an appellate court, unless the question itself is recorded. In the present case in particular, where the contents of previous statements were being put to the witnesses I consider that it was necessary to record

the questions asked by Counsel fully. As this was not done, then the particular contents of such statements put to the witnesses and the answers to the questions, particularly as to whether the particular contents of the statements were admitted or denied did not become evidence in the case.

In the appeal case of Jagdishwar Singh and Anor. v R. 8 F.L.R. 159 at p.161, the record of the court below indicated that a prior inconsistent statement was read over to a witness in court which he admitted to having made and confirmed that it was true. MacDuff C.J. observed that "the learned magistrate did not, as he should have done, make the statement an exhibit." With that observation I respectfully agree: in such case, the witness having admitted to a statement read out in Court, the contents of the statement became evidence for a particular purpose of the case, not of course evidence as to the proof thereof, but evidence as to the making of the statement.

In the present case as the two witnesses apparently did not accept their statements in court, counsel for the appellant made an application in the court below to have the statements put in evidence, as proof of the making thereof, when examining the witness for the prosecution, a police officer, who had recorded the statements from the witnesses. The learned trial magistrate refused the application. Subsequently he refused an application to recall the witness, presumably for the purpose of introducing the statements as evidence of the making thereof. Had the statements been introduced, the learned trial magistrate who, of course, had not read the statements, would have been in a better position to decide on the credibility of the witnesses. Unfortunately the statements were not admitted. I am not satisfied that had the learned trial magistrate admitted the statements and compared them with the evidence of the witnesses, he would inevitably have convicted the appellants.

Under the circumstances therefore it would be unsafe to allow the conviction to stand. The appeal is allowed. The conviction and sentence are set aside.

Delivered In Open Court At Lautoka This 2nd Day of March, 1984.

(B. P. Cullinan)

Judge