A

ISIRELI SOWATA

v.

REGINAM

[COURT OF APPEAL, 1967 (Gould V.P., Marsack J.A., Bodilly J.A.), 4th, 18th July] B

Criminal Jurisdiction

Criminal law—trial—reference by witness to accused's having been in gaol—decision whether to discharge assessors—discretion of trial judge.
Criminal law—practice and procedure—inadmissible evidence given inadvertantly— discretion of trial judge whether to discharge assessors or continue trial. C
Criminal law—appeal—application to call fresh evidence—question whether available at trial or likely to have effect on verdict.
Criminal law—evidence and proof—fresh evidence on appeal—principles upon which admitted.

In an appeal against a conviction of shop breaking and larceny an application to call two witnesses to give fresh evidence before the Court of Appeal was refused where the Court was not satisfied D

(a) In the case of one witness that he was not available at the time of trial or that proper enquiry had been made.

(b) In the case of the other witness that his proposed evidence of an experiment with lighting could not have been given by another witness, or E

(c) That the proposed fresh evidence could reasonably have been expected to make any difference to the verdict.

During the course of the trial a witness referred to the fact that the appellant had been in gaol. At the suggestion of counsel for he accused the trial continued and the judge directed the assessors that the remark should be ignored as irrelevant. F

Held: The decision whether to discharge the assessors in the circumstances was one for the discretion of the trial judge and there was no reason to interfere with the way in which he had exercised it.

Cases referred to: *R. v. Parks* [1961] 3 All E.R.633; 46 Cr.App.R.29: *R. v. Weaver* [1968] 1 Q.B. 353; [1967] 1 All E.R. 277. G

Appeal against conviction and sentence for shop breaking and larceny.

N. Nawalowalo for the appellant.

T. U. Tuivaga for the respondent. H

The facts sufficiently appear from the judgment of the court.

Judgment of the Court (read by MARSACK J.A.): [18th July 1967]—

This is an appeal against conviction for the offence of shop breaking and larceny and also against sentence of five years' imprisonment imposed thereon by the Supreme Court at Suva on the 11th November, 1966.

On the morning of the hearing of the appeal the appellant filed a motion for leave to adduce fresh evidence before this Court. The application was refused, and we now proceed to give our reasons for this refusal.

Two affidavits were filed in support of the motion. One was by the appellant, who deposed that one of the witnesses whom he sought leave to call, Fred Whippy, could give evidence to the effect that the terms "Kadavu Kava Saloon" and "Paw Paw Saloon" were used interchangeably. At the trial the appellant made a statement from the dock that on the night of the burglary he was drinking kava in the Kadavu Kava Saloon until daylight. A witness, Apenisa Nawalu, was called by the appellant to substantiate this; and he deposed that the appellant had been with him in the Paw Paw Saloon from about midnight 6.30 or 7.00 a.m. It was common ground that the burglary was committed at about 5 a.m. Apenisa further stated that the Kadavu Kava Saloon "is just round the corner" from the Paw Paw Saloon. Whippy's evidence, according to appellant's affidavit, would be to the effect that there was only one Kava Saloon, called either Kadavu or Paw Paw.

The other affidavit was by the proposed witness Kavaia Naborisi. In the course of this he states that he was at the scene of the burglary some minutes after the offence had taken place on the 25th July, 1965, and had noted the state of the lighting in the vicinity. On the 3rd July, 1967, he carried out a visibility test when the lighting was approximately the same as it had been two years earlier; and he was unable to identify a person from across the street. The purpose of calling this evidence, in Counsel's submission, was to satisfy the Court that Adi Laite could not have made a positive identification of the appellant in the circumstances outlined in her evidence given in the Supreme Court.

Counsel also gave the name of one Akariva, of Lami, Suva, as the third witness he wished to call; but no statement of his evidence was put before the Court.

The principles upon which the Court will exercise its discretion to allow further evidence to be called have been authoritatively laid down by the Court of Criminal Appeal in *Parks* (1961) 46 Cr.App.R. 29 at p.32. Four essential requirements are there set out; but only two need be considered in the present case.

These are:

(i) the evidence that it is sought to call must be evidence which was not available at the trial;

(ii) the evidence is such that it might have caused a reasonable doubt in the minds of the jury as to the guilt of the appellant, if that evidence had been given together with the other evidence at the trial.

The first requirement quoted is later expressed by the Lord Chief Justice to mean evidence "which was not known and could not reasonably be known to the defence at the time of trial".

Nothing in the affidavits filed in support of the application, or in the submissions made by Counsel, has satisfied us that the evidence it is sought now to introduce was not available at the time of the trial. Mr. Fred Whippy lives in Suva, and according to the appellant had been in the appellant's company on the night of the 25th July, 1965. In his affidavit the appellant says that this witness "was difficult to locate". But he has given no evidence of what caused this difficulty, or of any enquiries made by him as to the witness's whereabouts. No explanation was given as to why Akariva was not available earlier.

As far as Kavaia Naborisi is concerned it may well be that the appellant was not aware until recently of his presence in the vicinity of the burglary on the 25th July, 1965. But all that is sought to be established by his evidence is the result of an experiment with lighting made by him two years later. As it was well known to the defence that Adi Laite's evidence of identification would be crucial, it would have been easily possible to conduct a similar experiment before the trial in the Court below.

Moreover, this Court is not satisfied that the proposed fresh evidence, if admitted, can reasonably have been expected to make any difference to the verdict. We cannot think that it would or might well have raised in the minds of the Assessors or the learned trial Judge a reasonable doubt as to the identification of the appellant at the scene of the crime at the time when it was committed, and consequently of the appellant's guilt.

For these reasons we find that neither of the two essential qualifications for the admission of fresh evidence before this Court has been established. Accordingly we have ruled that the application must be refused.

We now proceed to give our reasons for the dismissal of the appeal against conviction.

Two grounds were put forward in support of the appeal:

(1) That the inadvertent reference by the witness Adi Laite to the fact that she had known the appellant since he came out of gaol, was so detrimental to the appellant that the whole of her evidence should be ruled inadmissible.

(2) That the verdict was unreasonable and could not be supported having regard to the evidence.

As to (1): it is clear that when this statement was made by Adi Laite the matter received the immediate and serious consideration of the learned trial Judge, who heard Counsel on the matter in the absence of the Assessors. He accepted a suggestion made by Counsel for the defence that the trial should proceed, but the Assessors should be directed to ignore the statement. When the Assessors returned the trial Judge gave the strongest possible direction to the Assessors that the witness's remark should be ignored as utterly irrelevant; they were to disregard it entirely when weighing up the evidence. He repeated this direction in his summing up, and in his own judgment stated that he had totally discounted any evidence of a nature prejudicial to the character of any of the accused persons.

The principle to be followed in such cases was authoritatively stated by the Court of Appeal (Criminal Division) in *R. v. Weaver* [1967] 1 All E.R. 277 at page 280:

"The decision whether or not to discharge the jury is one for the discretion of the trial judge on the particular facts, and the court will not lightly interfere with the exercise of that discretion. When that has been said, it follows, as is repeated time and again, that every case depends on its own facts. As also has been said time and time again, it thus depends on the nature of what has been admitted into evidence and the circumstances in which it has been admitted what, looking at the case as a whole, is the correct course. It is very far from being the rule that, in every case, where something of this nature gets into evidence through inadvertence, the jury must be discharged."

In the circumstances we are satisfied that, though this inadvertent remark of Adi Laite was unfortunate, the proper steps were taken by the learned trial Judge to eliminate any effect it might have had on the minds of the Assessors or on himself, and that in the final result there was no miscarriage of justice on this point. This Court accordingly sees no reason to interfere with the exercise of his discretion by the learned trial Judge.

As to the general ground that the verdict was unreasonable and could not be supported having regard to the evidence, we can find no basis for this submission. In our opinion there was ample evidence which, if accepted by the trial Judge and the Assessors, was sufficient to prove the guilt of the Appellant beyond reasonable doubt. The evidence was so accepted; and there is accordingly no ground for disturbing the judgment of the learned trial Judge, based as it was on the unanimous opinion of the Assessors, that the appellant was guilty as charged.

There remains the appeal against the sentence of five years' imprisonment. Counsel submits that the sentence is unduly harsh, and does not take into account the fact that of the appellant's long list of previous convictions only two, and those many years ago, are for larceny. All his other convictions have been for offences arising from excessive indulgence in drink.

It is true that the sentence of five years' imprisonment is a heavy one. But the offence itself was extremely serious: what has been referred to as a smash-and-grab raid, in which the value of the goods stolen exceed £700. Moreover, consideration must be given to the fact that the Legislature has fixed the maximum penalty for this offence at 14 years' imprisonment. Taking these factors into account we are unable to say that the sentence was manifestly excessive or that it had been imposed upon a wrong principle. Accordingly we can see no good reason for interfering with the sentence imposed by the learned trial Judge, and the appeal against sentence is also dismissed.

Appeal Dismissed.