RAM KARAN

v.

REGINAM

[SUPREME COURT, 1976 (Williams J.), 27th February]

Appellate Jurisdiction

Criminal law—evidence and proof—unsworn statement by accused—weight to be attached thereto—self serving statement—not evidence of truth of its own contents.

In a judgment the magistrate observed that the accused had not given evidence on oath and what he said had not been tested by cross examination.

Held: 1. When an accused made an unsworn statement, it was proper for the court to comment that it had not been subject to cross examination, and that such weight could be attached to it as thought fit. (*Josefa Nasova v. R.* 9 F.L.R. 97 distinguished).

2. A self serving statement was not evidence of what happened, but only revealed what the accused had said to the police officer, and, therefore, could not be evidence of the truth of the matter.

Other cases referred to:
Frost and Hale v. R. 48 Cr. App. R. 284; (1964) 108 S.J. 321.
R. v. Storey [1968] Cr. App. R. 334; [1968 Crim L.R. 387.
R. v. Thompson [1975] Crim. L.R. 34.

Appeal against the conviction in the Magistrate's Court for careless driving.
C. Gordon for the appellant.
S. R. Shankar for the respondent.

WILLIAMS J.: [27th February]—

The accused who was convicted by the Rakiraki Magistrate for careless driving appeals against that conviction.

There are three grounds of appeal. The first that there are contradictions and inconsistencies in the prosecution evidence which the magistrate disregarded; and the third ground is virtually the same in that it alleges that the verdict is unreasonable and cannot be support having regard to the weight of evidence adduced at the trial.

The second ground is that the magistrate erred in fact and in law in not treating the accused's statement (made to the police) as evidence, in that he said the accused's evidence was not tested by cross-examination thereby demonstrating that he was ignoring it.

The brief facts are that P.W. 2, a taxi driver was proceeding from Ra towards Tavua. He was two chains behind the accused's motor lorry which stopped and then began to reverse. P.W. 2 said he was 10—15 yards behind the truck when he saw it reversing. He tried to stop and he swerved to the right but the truck reversed into him.

A P.W. 3 a passenger in the taxi said that it stopped when 4 or 5 yards from the truck which was reversing.

Mr Gordon for the appellant says that either the taxi driver stopped or tried to stop, and the evidence of P.W. 2 shows it had not stopped but only tried to, whereas P.W. 3 says it did stop.

B Whether or not the taxi had almost stopped at the moment of impact could be a difficult thing to note. The impact would in any event stop the taxi but if it were braking, it could be difficult to assess whether it had stopped at the moment of impact or was finally halted by the impact just as it was about to stop. I could not regard the different versions as the kind of inconsistency which should prompt the magistrate to say that P.W.'s 2 and 3 were quite unreliable witnesses.

C The magistrate in his judgment says that the truck began to reverse as the taxi was overtaking it. He did not express a finding as to whether the taxi had stopped before the impact or not, but he did find that the truck was reversing at the time of the impact and he said he believed the prosecution witnesses who had said so.

The accused elected not to give evidence. He simply said unsworn,

"Whatever I had to say, I have given it."

D That remark no doubt referred to a statement he made to the police in which he said he was driving his lorry at 30—35 m.p.h. when he saw prawns offered for sale on the roadside. He stopped intending to buy some and he was going to reverse to the spot, but before he began reversing the taxi ran into his rear.

E In his judgment the magistrate observed that the accused had not given evidence on oath and what he had said had not been tested by cross-examination. Mr Gordon submits that the magistrate's remarks show he had not considered the accused's evidence which was contained in the police statement. But the magistrate, in his judgment, said that he did not believe the accused's police statement that he did not reverse his motor lorry. Clearly the magistrate considered the accused's statement, but did not accept it, and he gave as one reason the fact that it had not been tested by any cross-examination.

F Mr Gordon referred to *Josefa Nasova v. R.* 9 Fiji L.R. at p.97 in which case the accused remained silent and called no witnesses at the close of the prosecution case. The magistrate said that since he had not denied or explained what the prosecution witnesses had said the magistrate was left only with that evidence and so he accepted it is the truth. The conviction was quashed on appeal. That case has absolutely no bearing on the instant case. In the case quoted the magistrate had put the onus upon the accused to show that the prosecution witnesses were untruthful; his approach was wrong; it was for the prosecution to satisfy him that its witnesses were truthful G and reliable.

In *Anthony David Frost & George Talbot Hale v. R.* 48 Cr. App. Rep. (1964) 284 the Court of Appeal held that where an accused makes an unsworn statement it is proper for the judge to remind the jury that it has not been subject to cross-examination, and they can attach such weight to it as they think fit and should take it into consideration in deciding whether the prosecution have proved their case. Clearly in H the instant case the magistrate did not err in commenting on the fact that the accused had not been cross-examined.

However, the accused made no unsworn statement in the instant case regarding the involvement of his lorry in the accident. There was simply a written statement

which the accused (appellant) had made to the police. In *R. v. Storey* (1968) 52 Cr. App. R. 334 an accused made a statement to the police, which if true, represented a complete answer to the charge. The accused at her trial, did not give evidence and was convicted. She appealed and Widgery L.J. said at p.337—p.384: A

> "We think it right to recognise that a statement made by the accused to the police, although it formed evidence in the case against him, is not itself evidence of the truth of the facts stated.....If of course the accused admits the offence then as a matter of short-hand one says that the admission is proof of guilt, and, indeed, in the end it is. But if the accused makes a statement which does not amount to an admission, the statement is not strictly evidence of the truth of what was said, but is evidence of the reaction of the accused which forms part of the general picture to be considered by the jury at the trial." B

What the lorry driver did in the instant case was to make an exculpatory statement to the police as in *R. v. Storey* (supra). Such statements are often described as self-serving; that is to say something which he has said which points to his own innocence. They are not evidence of the truth of their own contents. As is stated at para. 1538 of *Phipson on Evidence,* 11th ed., a person is not permitted to make evidence for himself. C

In *R. v. Thompson,* [1975] Crim. L.R. 34, Thompson who was convicted of wounding had made a written statement in which he foreshadowed the case of self-defence raised at the trial. He did not give evidence and the judge directed that the statement was not evidence of what happened, but only revealed what Thompson said to the officer, and it was not evidence in the case. It was held that the direction was correct. The Court of Appeal said that the law was clear; it was self-serving statement and could not be evidence of the truth of the matter. D

The principles enunciated in *R. v. Thompson* apply directly to the instant case. The lorry driver's statement was not evidence, it was simply a self-serving statement and could not be evidence of the truth of what the lorry driver did. E

With regard to the ground of appeal it is clear that the magistrate did not misdirect himself in any way.

The appeal is dismissed with costs which I fix at $40.00.

Appeal dismissed. F