SUPREME COURT

A

MAHENDRA PRASAD SHARMA

v.

REGINAM

B

[SUPREME COURT. 1979 (Dyke, J.), 7th February]

Appellate Jurisdiction

C *Criminal Law—Secondary evidence (including reference to due search) not to be admitted until lost originals accounted for*

G. P. Shankar for Appellant
D. Williams for Respondent

D The appellant was charged in connection with transactions involving two cheques.

There were four counts in respect of each cheque. Counts 3 and 8 were not the subject of any finding since they were in the alternative.

E The appellant was convicted of remaining charges in respect of the two cheques.

Over objection of Counsel, the prosecution was allowed to adduce secondary evidence of the two cheques.

F The learned appellate Judge referred to the principles of secondary evidence relevant to this situation viz that the best evidence should be produced and "it is only after proof of loss or destruction (i.e. of the originals) and after proof of proper and sufficient search (i.e. for the originals) in the most likely places that lesser evidence should be admitted, although it is a question of fact whether in the circumstances of the case there was sufficient and proper search." Defendant appealed.

G *Held:* The Magistrate should have ruled on the admissibility of the secondary evidence before proceeding with the trial and should not have admitted evidence of alleged copies of the cheque subject to objection or given himself power to reject it later. What he did was to hear evidence generally, before ruling as to admissibility of the alleged copies of cheques. If secondary evidence did not support the admissibility of copy cheques, the case would have taken a different turn.

H The nature and degree of search for the originals and as to whether it was due and proper, was open to criticism. The Magistrate did not refer to some matters.

The Court also referred to some confusion as to what exactly was as a 'copy' being put forward for at least one cheque, and the use by the Magistrate of parol evidence— A

> ". . . . a mistaken and very belated attempt to justify his wrongful admission of secondary evidence in the first place."

The Magistrate erred in the way he admitted secondary evidence of the cheque. It was impossible to be satisfied there had been a fair trial. The convictions and sentences on all counts were set aside. B

Cases referred to:

Queen v. Inhabitants of Kenitworth (1845) 7 Q.B.D. 642.
Queen v. Rastrick 2 Cox (1846) 39.
Pritam Singh and Ujagir Singh v. Neina Singh Cr. App. No. 47 of 1957. C

DYKE, J.:

Judgment

The appellant was charged with 8 counts. They were in connection with transactions involving two Government cheques drawn on the Bank of New Zealand, the D first being cheque No. 88437 and the second being cheque No. 92579. The first four charges were concerned with the first cheque in respect of which it was alleged that the amount payable on it was unlawfully and fraudulently altered from 76c to $100.76 and the appellant was charged firstly with forging the cheque (i.e. making the alterations himself) secondly with uttering it knowing it to have been forged, thirdly with obtaining money from the cheque (i.e. $100.00 increase) by false pretences, and fourthly with larceny of the same $100.00. E

The last four charges were similarly in respect of the second cheque, which was alleged to have been unlawfully and fraudently altered from $6.89 to $716.89, and were again for forgery, uttering, obtaining by false pretences and larceny.

He was convicted on counts 1–3 and counts 5–7 the magistrate making no order in respect of counts 4 and 8 because he said they were in the alternative. They were F not stated to be in the alternative, but in effect they must be treated as alternative. He was sentenced to 1 year imprisonment on counts 1 and 5 to run consecutively the sentences on the other counts being concurrent, so the total term of imprisonment amounted to 2 years. The appellant now appeals against his conviction and sentence.

One of the main grounds of appeal is that the magistrate erred in improperly G accepting secondary evidence of the cheques. In fact the record shows a quite extraordinary state of affairs. P.W.1, who is an accountant with the Ministry of Finance sought to produce photocopies of the two cheques concerned and this was immediately objected to by the defence since no proper foundation had been laid for the production of secondary evidence, and the non-production of primary evidence (i.e. the cheques themselves).

Because of course the best possible evidence must be produced and it is only after proof of loss or destruction, and after proof of proper and sufficient search in the most likely places that lesser evidence should be admitted, although in every case it is a question of fact whether in the circumstances of the case there was sufficient and proper search. See *Queen v. Inhabitants of Kenilworth* (1845) 7 QBD 642, *Queen v. Rastrick* 2 Cox (1845) 39. Almost inevitably the majority of cases on the subject are civil cases since in criminal cases usually more strict requirements are necessary. And cases of forgery where secondary evidence of the documents forged have been admitted must be very rare indeed, I was certainly not referred to any. When objection was made by the defence to the production of secondary evidence the magistrate should have adopted the course recommended in *Pritam Singh and Ujagir Singh v. Mewa Singh* Cr App No. 47 of 1957 that is he should have ruled on the admissibility of the secondary evidence before proceeding with the trial, and he should not admit evidence subject to objection or give himself power to reject it later. What he purported to do is shown in the record where he said "Before ruling I will hear evidence as to original and as to why it is not produced and as to preparation of copy. Counsel invited to submit further at close of case."

He permitted the witness to produce a photocopy of the first cheque No. 88437, and the witness then went on "I am shown a photocopy of what appears to be the reverse of cheque 88437."

He gave evidence that he had, before sending them to the police taken photocopies of both sides of each cheque, and had taken both cheques and photocopies to the Central Police Station. He said he gave cheque No. 92579 and the photocopies (i.e. obverse and reverse) of that cheque to Inspector Ramrakha, and then gave the other cheque No. 88437 and the other two photocopies (i.e. obverse and reverse) to Police Constable Ramesh. It was certainly unfortunate that the cheques were separated so early in the investigation, and they were not marked for identification in any way. He then was shown a photocopy of cheque 92579 but whether this was obverse and reverse is not indicated. He claimed that the photocopies shown to him were identical to those photocopies handed over by him to the police. He did not say that they were the same photocopies and the significance of this appears later.

The photocopies of the two cheques were marked M.F.1 and M.F.2. Detective Inspector Ramrakha have evidence of receiving the cheque No. 92579 and photocopies. He said M.F.2 was the photocopy he received.

Police Constable Ramesh similarly gave evidence of receiving cheque No. 88437 and photocopies, putting both cheques and four photocopies in an envelope and sending them to Detective Corporal Raju (as he then was) at Lautoka.

Detective Sergeant Raju gave evidence as to the receipt of the cheques and photocopies. He did not say what he did with the cheques but said he put the photocopies in the police file. He said that M.F.1 is what he received, M.F.2 he had prepared later. In M.F.1 photocopies of the obverse and reverse of the cheque had been stuck together although there was no explanation for this. The record then says "Evidence of this witness concluded so far as receipt of M.F.(1) is concerned—M.F.1 (obverse) produced as Exhibit 'D'".

There was no ruling as to its admisibility and whether what the magistrate meant was that M.F.1 was not admitted in evidence is not clear, and since Exhibit 'D' as included in the list of Exhibits includes M.F.1 and M.F.2. It is extremely confusing.

This confusion persists since some later witnesses refer to Exhibit D, some to M.F.1, and some to M.F.2. Exhibit D sometimes seems to embrace M.F.1 and M.F.2 and it was never clear how the expression was used. There was certainly no other reference to M.F.2 being produced as Exhibit D or any other Exhibit. A

After Detective Sergeant Raju another witness, the Post master from Rakiraki was called and after he had given his evidence Detective Sergeant Raju was recalled to continue his evidence. Later still after other witnesses further police witnesses were called to try to show the history of the two cheques and the photocopies. They were presumably kept, or intended to be kept in an envelope in the exhibit store and there were several changes in personnel in charge of the exhibits till someone found that the two cheques were missing from the envelope. No one ever said what happened to the photocopies and no one seemed to be clear whether the envelope was sealed all or most of the time or whether it remained unsealed. Then Police Constable Ram Sami said he was ordered to check all the exhibits and he checked the contents of all the envelopes. That was the only direct evidence as to the disappearance of the cheques and of any search for them. Does that mean that only the envelopes in the exhibit store were checked? I would have thought that if important exhibits like these were found to be missing not only the exhibit store but the whole police station would have been turned upside down in an attempt to find them. B C

During his address Counsel for the appellant again raised objection to the production of secondary evidence of the cheques.

In his judgment the magistrate said "when the prosecution first attempted to adduce these (i.e. photocopies of the cheques) in evidence counsel for the defence objected on the ground that they were not admissible. I held that, in principle, the two photocopies could be admitted as secondary evidence and now set out my reasons for so finding." D

This was incorrect. In the first place the magistrate said that before ruling he would hear evidence as to the original and why it was not produced. Thereafter nowhere in the record is there anything to show that the magistrate did make a ruling or did formally (or informally) agree that the photocopies could be admitted as secondary evidence. Then, when in his judgment he was explaining why he admitted the photocopies, he says "Therefore before a copy of a written instrument or parole evidence of its contents, can be received as proof, the absence of the original instrument *must* be accounted for, by proving (in this case) that is lost or destroyed," and later he says "From their evidence I am satisfied beyond a reasonable doubt that the originals of the two cheques were lost and I accordingly hold that photocopies thereof could be admitted in evidence." But nowhere in his judgment does he refer to the other necessary requirement before secondary evidence may be admitted i.e. "due and proper search." E F

Then to make matters worse, having admitted the photocopy of cheque 92579 in evidence, it transpired that the photocopy was not even the photocopy prepared by P.W.1, but another prepared by Detective Sergeant Raju, and because there was confused evidence about this and clearly mistaken identification by the witnesses, the magistrate then said "the chain required for the production of cheque No. 92579 (sic) for $716.89 was broken and its admissibility in evidence was, albeit unwittingly nullified. Obviously, the truth of the matter is apparent but the rules as to production of documents are strict. Nevertheless, as I have said above parole evidence of the content of any original of a document is admissible provided the absence of the original is accounted for." G H

A So now we have the magistrate proceeding not even on the basis of a photocopy of the cheque alleged to have been forged, but deciding that he could proceed on parole evidence of the cheque, and the forgery.

Crown Counsel has, in my opinion quite properly, not sought to justify the procedure adopted by the magistrate, or the admittance of parole evidence of one of the cheques, but suggests that if the matter had been dealt with properly secondary B evidence would have been admissible and suggests that the appellant was not prejudiced. I am afraid I cannot accept that proposition. As the evidence came out, the confusion over the photocopy of cheque 92579 would have precluded the admittance of that piece of evidence. And it is impossible to say now that is the magistrate had properly directed his mind to the principles governing the admissibility of secondary evidence in such a case as this at the time when he should have done it, he C would necessarily have admitted the evidence. With the exclusion of secondary evidence, surely the case would have taken a quite different turn. I cannot really believe that the magistrate would at that stage have seriously considered allowing parole evidence of the cheques and the forgeries. I would like to think that his reliance on parole evidence in his judgment was only a mistaken and very belated attempt to justify his wrongful admission of secondary evidence in the first place. Surely once secondary evidence was excluded the prosecution would have fallen D flat, the appellant would have had no case to answer, and there would have been no element of self incrimination, the whole history of the trial would necessarily have been different.

Objection was taken by defence counsel to the admission of other documents, but it is unnecessary to deal with these points in detail. It is sufficient that I find for the appellant in the matter of secondary evidence of the cheques. This was so funda- E mental a matter that clearly it is impossible to be satisfied that there was a fair trial and I have no option but to set aside the convictions and sentences on all counts.

Appeal allowed. Convictions quashed.