WESLEY (SAM) v POLICE

Supreme Court Apia
17 June; 7 July 1971
Spring CJ

CRIMINAL LAW (Appeal) - Hearing and determination - Function of appellate court where sole question is the proper inference to be drawn from the facts - Court may conclude on evaluation of the whole of the evidence that the inference drawn by the Magistrate was not warranted - Onus on appellant to satisfy Court that the Magistrate's decision was wrong: Benmax v Austin Motor Co Ltd [1955] 1 AER 326, Gillard v Cleaver Motors Limited [1953] NZLR 885, Teper v R [1952] AC 480, 489 considered and applied.

(Evidence) - Identification (Justice dependent on independent identification) - Prior description of person to be identified influencing witness: R v Dickman (1910) 26 TLR 640 referred to.

EVIDENCE (Witnesses) - Credibility - Trial judge should not assess credibility entirely on demeanour and manner of giving evidence: Uganda v Khimchand Kalidas Shah & Ors [1966] EA 30, 31.

APPEAL against conviction of theft.
Conviction quashed.

Loe for appellant.
Slade for respondent.

Cur adv vult

SPRING CJ. This is an appeal against the conviction of the appellant by the Magistrate on the 23rd April, 1971 on a charge of theft. The facts very briefly are as follows. The complainant Ta'uvalea Lui is a member of the Mothers' Committee of the Vaotupua Congregational Church at Falealupo, Savai'i, and further was a trustee of a Post Office Savings Bank Account No. 3852 in which funds belonging to the Committee were banked from time to time.

Evidence was given that the monies were normally banked at Tuasivi Post Office, but that on the 13th May, 1970 the sum of $73 was taken by the complainant, together with the Pass Book No. 3852, to the Fagamalo Post Office. The complainant alleged that she gave the $73 to the appellant, whom she called "Sam", and that he gave her a paper - deposit slip - to sign. She said that Sam kept the Pass Book saying that he had to send it to Apia for entering the interest therein, and that when the Pass Book was returned to Fagamalo he would deposit the $73.

The complainant said further that in June, 1970 she went to Fagamalo Post Office to get the Pass Book as the Committee desired to withdraw certain monies, but Sam was not there. So she came to the Chief Post Office at Apia where she spoke to Ronnie Mann and other postal officials. Mann said that the complainant said that it was Soa'ai Li'o to whom she gave the $73, and at no time did she mention any one else. Mann said that the Pass Book 3852 was received in Apia and sent back to Fagamalo, but the original letter enclosing the Pass Book was not produced. Mann

said at page 51 of the record:-

> I believe it is recorded in our records. If certain Pass Books are marked with a correct mark, a tick that is, then it means these books were received in Fagamalo, but if Pass Books are marked with the letter "X" it indicates they weren't received. Had these Pass Books been returned after the insertion of interest they may have been sent altogether under the same cover, but they might have been sent separately under different covers too. At such times when we are very busy we just enclose the Pass Books in an envelope and address it to the Postmaster.

In my view, it was desirable that the original letter be produced (and not a typed copy) as it was according to Mann's evidence and the Deputy Chief Postmaster.

The copy of the Bank Pass Book No. 3852 was apparently produced at the hearing (vide p. 51 of the record), but according to Mr Loe it was ruled inadmissible as the witness could not depose to the authenticity thereof, and the Magistrate's own notes would appear to support this, and accordingly, same is not before me on this appeal. In my view, the prosecutor should have called the Postal Officer in charge of the Bank Statements and furnished to the Court a duly authenticated copy of the Pass Book No. 3852 to show conclusively that the sum of $73 was not banked to the credit of Account No. 3852. No evidence was given of the $73 not being banked in the account other than from the complainant herself. Mr Loe urged upon this Court that the conviction should be set aside for a variety of reasons which I list as follows:-

(1) That the identification of the accused as being the person to whom the $73 was given was open to grave suspicion on the basis that the complainant mentioned to Mann and the Chief Postmaster Mr Williams, the name of Soa'ai Li'o only as being the person to whom she gave the money. When Soa'ai Li'o who worked in the Fagamalo Post Office was confronted by Mr Mann with taking $73 he denied all knowledge of receiving $73. Thereupon, it was submitted, that the complainant when faced with a denial from the said Soa'ai Li'o (through Mr Mann) said it was Sam Wesley to whom she gave the money.

The complainant at page 7 of the record says:-

> Q. What name did you tell the Police?
> A. I mentioned the name of Soa'ai to the Police, but in June as our agreement with Sam for me to come back in June, I went back to him and I saw the person in Fagamalo as the same person I gave the $73 to. I asked Sifua who was inside a car outside to describe to me this person Sam. He told me that Sam is tall, big and white. I told this name Soa'ai to the Police because that was the name usually mentioned by the people when they come to the Post Office.

This evidence, Mr Loe claims, is open to the objection that the suspected person should not be described to the witness.

(2) Mr Loe urged that the Magistrate decided the case on the demeanour of the witnesses, particularly Sufia and Ta'uvalea Lui, alone, and did not properly evaluate the facts.

(3) That there was no conclusive proof that $73 was not banked in the Account No. 3852 as the production of the copy of the Pass Book had been ruled inadmissible.

(4) That the disappearance of the $73 was equally consistent with one of several hypotheses, and these had not been excluded by the prosecution.

(5) That the guilt of the accused had not been established by the

prosecution beyond reasonable doubt.

I remind myself of the law where an appellate Court is hearing an appeal from a lower court as this appeal is by way of rehearing on the Magistrate's notes of evidence, and this Court has not had the advantage of seeing the witnesses and watching their demeanour. This places, it seems to me, an onus on the appellant to satisfy me in all the circumstances that the Magistrate was not warranted in entering a conviction, or at least that his mind should have been left in a state of reasonable doubt. I accept the passage adopted by Mr Justice Stanton in the civil case Gillard v. Cleaver Motors Limited [1953] N.Z.L.R. 885, where Mr Justice Stanton quoted the words of Lord Atkin in Powell v. Streatham Manor Nursing Home [1935] A.C. 243 at page 255:-

> The Court has to rehear, in other words has the same right to come to decisions on the issues of fact as well as law as the trial judge. But the Court is still a Court of Appeal, and in exercising its functions is subject to the inevitable qualifications of that position. It must recognize the onus upon the appellant to satisfy it that the decision below is wrong: it must recognize the essential advantage of the trial judge in seeing the witnesses and watching their demeanour. In cases which turn on the conflicting testimony of witnesses and the belief to be reposed in them an appellate Court can never recapture the initial advantage of the judge who saw and believed.

The learned Magistrate had the opportunity of seeing the witnesses on two occasions as there was a rehearing in the Magistrates' Court on this matter. However, in the headnote to Benmax v. Austin Motor Co. Ltd. [1955] 1 A.E.R. 326 it is stated:-

> An appellate Court, on an appeal from a case tried before a judge alone, should not lightly differ from a finding of the trial judge on a question of fact, but a distinction in this respect must be drawn between the perception of facts and the evaluation of facts. Where there is no question of the credibility of witnesses, but the sole question is the proper inference to be drawn from specific facts, an appellate Court is in as good a position to evaluate the evidence as the trial judge, and should form its own independent opinion, though it will give weight to the opinion of the trial judge.

I approach this matter, therefore, on the basis that at the very least the onus of proving that the Magistrate's mind should have been left in a state of reasonable doubt rests upon the appellant.

On the evidence it is clear that the complainant when she made her first complaint to the Postal officials and the Police in Apia accused Soa'ai Li'o as being the person to whom she gave the $73. It was not until she was confronted with Soa'ai Li'o's denial communicated to her by Ronnie Mann that she said it was Sam Wesley to whom she gave the $73.

In her evidence at page 22 of the record the complainant said:-

> I had these doubts when Ronnie returned and said that Soa'ai denied ever accepting such sums of money and then Ronnie asked me about this man to whom I gave the money to look like, then Ronnie said that it was not Soa'ai that Soa'ai is big, tall and black.

In Halsbury's Laws of England, 3rd Ed., Vol. 10 at pp. 439, 440 the learned authors say:-

> The prosecution must then prove that the defendant is the person who committed the offence charged; there must be no prompting or suggestion, however, unintentional, on the part of the police when they are dealing with potential witnesses of identification . . . . The witness should not, however, be asked to identify a person for the first time when he is in the dock, the accused should previously be placed with other persons and the witness

> asked to pick him out; nor should the witness be asked to identify a prisoner when the prisoner is alone in a room, nor should the witness be asked, "Is that the man?", nor allowed to see the prisoner before an identification parade; nor should the suspected person be described to the witness.

Further, in R. v. Dickman (1910) 26 T.L.R. 640 Alverstone L.C.J. said:-

> We need hardly say that we deprecate in the strongest manner any attempt to point out beforehand to a person coming for the purpose of seeing if he could identify another, the person to be identified, and we hope that instances of this being done are extremely rare. I desire to say that if we thought in any case that justice depended upon the independent identification of the person charged, and that the identification appeared to have been induced by some suggestion or other means, we should not hesitate to quash any conviction which followed. The police ought not, either directly or indirectly, to do anything which might prevent the identification from being absolutely independent, and they should be most scrupulous in seeing that it is so.

In my view, it was desirable for the copy of the Pass Book 3852 and the original letter from Wesley to the Chief Postmaster dated 15th May, 1970 enclosing the Pass Books to have been produced to the Court and admitted in evidence for reasons already given.

Further, once the complaint was made to the Police, action should have been taken to investigate the matter thoroughly. The complainant says at page 22 of the record:-

> It is the same story but when Ronnie informed me about that I then came to the Police asking for one of the officers to come with me so that I can point out the man that I gave the money to.
>
> Q. And did a Police Officer go with you?
>
> A. I waited for about one week for a constable to come, but then I came to Apia, and on returning we came with Sufia on the same bus and then I stopped at Fagamalo and I went and looked inside the Post Office and saw the same person that I described before.

It is the question of the identification of the accused which causes me some concern. The learned Magistrate in his Judgment at page 2 says:-

> There is no doubt in my mind as to the sincerity the truthfulness and honesty of this witness. I am quite convinced that she paid over the money on the 13th May, 1970 at the Post Office at Fagamalo - but the question now remaining is to whom did she pay it. She said in evidence it was the accused Sam Wesley. In Apia she mentioned the name Soa'ai to Mr Mann; he, she said, was the person to whom she handed the money. Mr Mann said in evidence that she mentioned no other name. However Mr Mann goes further and said that when he returned from Fagamalo he asked her to describe the person she gave the money to; and she said the person she gave the money to was fair and tall. He said, "Sam's description it was - fair and tall". (p. 54). In XXD p. 22 Ronnie said, "It was not Soa'ai he big tall and black.

However, the complainant herself says that it was when she returned to Savai'i after spending a week in Apia she enquired of Sufia as to the accused's appearance, and at page 21 of the record says:-

> Q. Was it during this visit to Apia that you made this complaint to the Police?
>
> A. Yes.

Q. And you then returned to Savai'i?

A. On returning to Savai'i, I had some doubt about Soa'ai and so I asked Sufia because I wanted some information about Sam.

Also on page 23:-

A. It was on that same day while we were travelling towards my village that I stopped the bus and asked Sufia about Sam.

Q. And did you both get out of the bus?

A. After checking up on Sam, I hopped on the bus and then I proceeded on our journey.

Sufia does not support the complainant as to her evidence of the bus trip when she returned to Savai'i and the ensuing discussion as to the accused's appearance. I also mention again evidence of the complainant at page 7 of the record where she says:-

> I asked Sufia who was inside a car outside to describe to me this person Sam. He told me that Sam is tall, big and white. I told this name Soa'ai to the Police because that was the name usually mentioned by the people when they come to the Post Office.

The Magistrate's notes of evidence in the first hearing were put in as an exhibit in the rehearing in the lower Court, (from which this present appeal emanates), and it is interesting to compare the evidence of Ta'uvalea as to her acquaintance with Sufia in the first hearing and in the second hearing. In the first hearing she says, at page 3:-

> You had to wait for someone else to pay in money? Yes. Was this person known to you? He a stranger. How you know his name? Used to see him at Church meetings, found out his name. Called him stranger - saw him after. Doesn't live in our village - village Church meetings. Didn't discuss with him - found his name later.

In the second hearing she says at page 10:-

Q. Where did Sufia get on the bus?

A. We came across him between Letui and Sasina and we picked him up.

Q. This was the person known to you?

A. I knew him sometimes during church meetings. That was the only time that I knew him; when he have church meetings at Tufutafoe.

Q. Did you know the name of this person who got on the bus between Sasina and Letui?

A. Yes.

Q. Did you know anybody else?

A. No, only Sufia.

The withdrawal of $15 from the Pass Book of Pileo Sufia, which took place on the 13th May, 1970, was alleged by the prosecution to have been made by her husband Sufia Fiti, while the accused claimed that the only person who is entitled to withdraw any money from a Savings Account (in the absence of any proper written authority or power of attorney) is

the depositor in person, viz., Pileo Sufia.

Considerable argument was addressed to me on this matter as to the question of whose responsibility it was to call Pileo Sufia. I take the view that it is for the prosecution to prove its case beyond reasonable doubt, and it could quite easily, in my view, have called Pileo Sufia had it so desired. It is not for an accused person to prove his innocence or exculpate himself.

It is proper, in my view, when assessing the respective credibility of witnesses, that one should be careful not to assess credibility by their demeanour and the way they gave their evidence, and by that alone. The Court of Appeal of East Africa in Uganda v. Khimchand Kalidas Shah & Ors [1966] E.A. 30 at page 31 said:-

> Of course, . . . a court should never accept or reject the testimony of any witness or indeed any piece of evidence until it has heard and evaluated all the evidence in the case. At the conclusion of a case, the court weighs all the evidence and decides what to accept and what to reject.

It is true that in a criminal trial where circumstantial evidence plays a part it is permissible to infer from the facts proved other facts necessary to complete the elements of guilt or establish innocence. However, as Lord Normand said in Teper v. R. [1952] A.C. 480 at page 489:-

> It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

Considering the whole of the evidence in this case, evaluating the same and giving the best consideration thereto, and having regard to the lack of adequate police investigation when the complaint was first made, I am forced to the view that one is left in a state of reasonable doubt as to the guilt of the accused.

Admittedly, there is strong suspicion attaching to the accused, but suspicion, however grave, is never proof of an accused person's guilt. It is with reluctance that I differ from the decision given by the learned Magistrate, but I believe I had a clearer analysis of the evidence presented to me than was placed before him. Accordingly, I allow the appeal and quash the conviction.