Olitulagi v Reginam [1966] SBFJCA 3; Crininal Appeal No. 26 of 1966 (30 November 1966)

IN THE FIJI COURT OF APPEAL OF THE SOLOMON ISLANDS
Criminal Jurisdiction

Criminal Appeal No. 26 of 1966

BETWEEN:

OLITULGAI
Appellant

v

REGINAM
Respondent

Bhai for Appellant
Palmer for Respondent

Marsack, J.A.

JUDGMENT

Judgment has already been given allowing this appeal and quashing the conviction from which the appeal was brought. We now proceed to give our reasons for that judgment.

The appellant was convicted before the High Court of the Western Pacific at Auki in the British Solomon Islands Protectorate on the 3rd October 1966 of Storebreaking and Larceny on the 5th August at Buma in the Protectorate, and sentenced to 18 months' imprisonment. The trial was held before a Judge alone, sitting without assessors. This appeal is brought against conviction only. The sole ground set out in the notice of appeal, which was prepared without legal advice, was that the evidence was given by the witness Aligi (sic) was prejudiced and untrue.

At the hearing of the appeal leave was granted to adduce several additional grounds; counsel for the respondent intimating that he had no objection. Of these additional grounds it is necessary to consider only four, which may be set out shortly thus:

(1) that in commenting on the appellant's failure to give evidence the learned trial Judge went beyond the scope of permitted comment and accepted that failure as corroborating the evidence for the prosecution;

(2) that the evidence of Supt. Morgan as to a statement made to him by the appellant through an interpreter was hearsay and should not have been admitted;

(3) that the learned trial Judge had misdirected himself on a matter of fact in that he found that the appellant had given the time of his departure for the island of Federu as 7 p.m. whereas the appellant's evidence had fixed the time as 7 a.m.;

(4) that the verdict was unreasonable and should not be supported having regard to the evidence.

The first ground of appeal concerns a passage in the judgment of the learned trial Judge set out at page 16 of the Record. The words complained of were perhaps not strictly comment, as they may have been if used in the course of summing-up to a jury or assessors, but rather a direction by the learned trial Judge to himself. The passage reads:

"If in this case I have had any doubts concerning the guilt of the accused, these doubts were raised by the evidence of the defence witness Fersella, whom I accept as a truthful witness, but they are dispelled by the fact that the accused has, in spite of careful explanation refused to give evidence on oath."

This passage appears to us to establish that the whole of the sworn evidence given before the Court had raised in the mind of the learned trial Judge such a doubt that in the absence of any other considerations he would have acquitted the appellant; and that the factor which impelled the trial Judge to enter a conviction was the inference which he drew from what he refers to as the "refusal" of the accused person to give evidence.

This case presents some similarities with that of *Mariano Sirai v. R.* (Criminal Appeal No. 19 of 1962) which was an appeal to this Court from the High Court of the Western Pacific. There the appeal was allowed on the ground that the trial Judge was not entitled to accept a failure on the part of the accused to give sworn evidence on corroborative of any evidence given for the prosecution. In the course of the judgment, after reference had been made to the extent of the trial Judge's

right to comment on the failure of an accused person to give evidence, this passage occurs:

"Accordingly we think that the trial Judge should have been extremely careful in making any comment on the failure of Appellant to give evidence. But what he has done goes considerably beyond making a comment. He states unequivocally that in coming to his conclusions he has taken into consideration the fact that Appellant did not submit himself to cross-examination; and that this is a matter of some importance. There is only one possible inference which this Court can draw from paragraph 26 of the judgment: that the Judge accepted the failure of the Appellant to submit himself to cross-examination as supporting the view he had formed of the credibility of the evidence of the accomplice Antonio Suurai. It goes a long way towards saying that he accepts Appellant's failure to give sworn evidence as corroboration of the testimony of the accomplice. In our view the learned trial Judge was not entitled to draw any such conclusion from the fact that Appellant merely accepted the Court's invitation to make a statement from the desk. In these circumstances we are unable to say that the Judge, without the support afforded by his consideration of what he calls the important matter of Appellant's failure to submit himself to cross-examination, would necessarily have entered a conviction against Appellant."

In our opinion this principle can be applied directly to the present appeal. It is clear that a doubt existed in the mind of the learned trial Judge as to the guilt of the appellant, and we think that the Judge was not entitled to accept the failure of the accused person to give evidence as dispelling the doubt which the whole of the evidence had raised in his mind. Consequently we are unable to say that, but for the inference drawn by the Judge from the appellant's failure to give evidence on oath, the appellant would have been convicted.

For these reasons we are of opinion that the appeal must be allowed and the conviction quashed.

Although this is sufficient to dispose of the appeal we consider it desirable to deal shortly with the other grounds raised.

We now turn to the second ground. The argument on this is based upon the admission of Supt. Morgan's evidence, to the effect that he had interviewed the accused and that the accused had given the answers detailed to his evidence. It appears from the Record, however, that this conversation was conducted in Pidgin through an interpreter, Sgt. Peter. The Supt. Accordingly deposed only to what he had said to Sgt. Peter and what the Sgt. Had said to him reply. The interpreter was not called to give evidence of what had been said to his, or of the fact that he had correctly translated into English everything that the accused person had said to him in Pidgin.

The question of the admissibility of this type of evidence was carefully considered by this Court in *Ram Lagan v. R.* (Criminal Appeal No. 15 of 1966). In that case the evidence was held admissible on the basis that the interpreter had been called and had sworn that he had correctly interpreted into English all that the appellant had said in the course of his evidence in Hindi. A distinction was drawn, at page 6 of the judgment, between the facts of that case and those of *R. v. Attard* (1959) 43 C.A.R. 90;

"It is true that in *R. v. Attard* (1959) 43 C.A.R. 90 Gorman. J. held that evidence by a police officer of an interview which he had conducted with the prisoner through an interpreter was inadmissible. There, however, the interpreter was not called to testify that he had fully and accurately interpreted to the police officer that the prisoner had said in his own language. In the present case the interpreter has sworn that as accused gave his evidence he interpreted to the Court in English whatever accused was saying in Hindi. *R. v. Attard* is accordingly distinguishable."

In our opinion this Court should apply the principle laid down in Attard's case and held that in the circumstances given the evidence of Supt. Morgan as to his interview with the accused through an interpreter was inadmissible.

The admission of this evidence may well have had a considerable effect on the Judgment o the learned trial Judge. At page 15 of the Record, it is noted that he said:

"Mr. Morgan interviewed the accused on 13.8.66 and the accused told him a strange tale."

After referring in deltail to what the Supt. Had said the judgment proceeds:

"Now that tale is quite contrary to what Joachim says in his evidence, supported as he is by his wife Maria Joanna. I see no reason to disbelieve those two witnesses."

It cannot be too strongly emphasised that without the evidence of Joachim Aliki and his wife Maria there is no case at al against the appellant. The learned Judge, before referring to the evidence of Joachim Aliki and Maria, that had the matter rested there he would have had no hesitation in acquitting the accused. Their evidence is briefly to the effect that five days after the burglary the appellant called on Joachim Aliki and in the presence of the latter's wife gave him some money, saying (page 8):

"I am giving you this money because I have stolen from Buma mill before so this money I pay you not to tell anybody about it."

He also, according to these witnesses, at the same time and place produced to them a long bent screw-driver and said he had used that as the tool with which to open the safe. It seems clear that the learned trial Judge was influenced by the "strange tale", recounted by the Supt. In the evidence which we hold inadmissible, to accept

the evidence of Joachim and Maria as the truth and the unsworn statement made by the appellant as false.

In view of our decision on the first ground of appeal it is not necessary for us to decide whether the second ground in itself would have been sufficient to vitiate the conviction; but it is of some relevance to a consideration of the fourth ground.

The third ground is concerned with what the learned trial Judge refers to as a conflict between appellant's statement and the evidence of his witness Fersella as to the time of his going to Federu. The accussed said that on the 10th August he had gone back with his wife from Buma to his island of Federu and alleged an alibi in respect of that night. The judgment refers to his statement in these words:

"He said he had left Buma that night at 7 p.m. by canoe. He called a defence witness, Fersella, in support of this who impressed me as a witness of truth. That witness confirmed that he had taken the accused to Federu on the 10th August but that he had done so at 7 a.m. and not at 7 p.m."

And further:

"the accused states that the journey to Federu commenced at seven p.m. whereas his witness, whom I believe, says it was 7 a.m. And this point is vital to his defence."

But the Record at page 13 (top) sets out the accused's statement in Court on this point thus:

"About the Wednesday 10th Aug. at 7 a.m. I went to my island. I went with a man called Horsfella. We went to Federu. When I went toe Federu there was no time to return the same night to Buma. I slept with my wife. I could get back by an outboard motor canoe. It is difficult to get back when once I get to my island. I did not go back to Buma that night. I deny I went to Joachim's house that night."

If then the Record is correct – and in this absence of proof to the contrary this Court must accept it as correct – the statement made by the accused is confirmed by that of his witness Fersella whose evidence was accepted by the learned trial Judge as being the truth. As the Judge expressly stated that this point was vital to his defence, a misdirection on this matter of fact may well have had a detrimental effect on the defence put forward by the appellant, or at least on the Court's view of his credibility.

Our findings in respect of the 2nd and 3rd grounds of appeal, whether or not they would be sufficient in themselves to bring about the quashing of the conviction, are definitely relevant with regard to the 4th ground. The evidence taken as a whole is not strong against the accused. It presents a number of difficulties. There appears, for example, no reason why the appellant, if he had committed the robbery, should come five days later to a man who knew nothing of the appellant's complicity in it, should pay him the whole amount stolen, and should say to him "that is for keeping quiet about the robbery". It seems strange also that he should go to such great lengths to incriminate himself, by bringing with him the screw-driver he is alleged to have used five days before. There is also the discrepancy disclosed in the evidence of Maria to the effect that the appellant told them on the 10th August he had taken the money the night before.

In these circumstances we find that, after allowing for the rejection of the evidence of Supt. Morgan as to his interview with the appellant, and what appears on the face of the Record as a misdirection by the learned trial Judge on a matter of fact, the conviction cannot be supported having regard to the evidence.

It is for these reasons that we have already given judgment allowing the appeal and quashing the conviction.

APPEAL ALLOWED.

R.M. MILLS OWENS
PRESIDENT

C.C. MARSACK
JUDGE OF APPEAL

C.J. HAMMETH
JUDGE OF APPEAL

Suva,

30th November 1966