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VICTOR JIWAN RAJU

v.

REGINAM

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[SUPREME COURT, 1977 (Grant C.J.), 21st January]

Appellate Jurisdiction

Criminal law—evidence and proof—unsworn statement from dock—weight to be attached thereto—Criminal Procedure Code (Cap. 14) ss. 201(1)(2), 220, 275(2).

C This case is reported for the observations made by the court relating to the making of an unsworn statement from the dock during a trial.

Per curiam: In so far as the decision of *R. v. Coughlan* appears to conflict with the decisions of *Lenaitasi Vakatora, V. r.*, *R. v. Gurmel Singh*, and *R. v. Emori Kilaka* it should not be followed.

Cases referred to:

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R. v. Coughlan (1976) 64 Cr. App. R. 11; [1976] Crim. L. R. 628

R. v. Emori Kilaka Suva Crim. App. 75 of 1976 (unreported)

R. v. Gurmel Singh Suva Crim. App. 123 of 1973 (unreported)

Lenaitasi Vakatora v. R. 20 F.L.R. 8.

R. v. Frost & Hale 48 Cr. App. R. 284; *The Times* 9th April 1964.

R. v. Shimmin 15 Cox C. C. 122.

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Shankley v. Hodgson [1962] Crim. L. R. 248.

Appeal against conviction in the Magistrate's Court for larceny.

GRANT C. J. : [21st January 1977]—

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On the 18th August 1976 at Suva Magistrate's Court the appellant was convicted after trial of larceny contrary to section 294(1) of the Penal Code. The appellant appealed against conviction and on the 30th September 1976 the conviction was quashed for the following reasons.

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In the light of what transpired during the trial, the only admissible evidence against the appellant on which the trial magistrate relied was that upon the discovery of a stolen motor vehicle battery, which was found hidden in a shed in the presence of the owner, a police officer and the appellant, the appellant said that he had put the battery there. At his trial the appellant made an unsworn statement denying any knowledge of the theft of the battery. The trial magistrate found that the admission by the appellant of having put the battery in the shed shewed he was exercising some form of control over it and held that he was a party to its theft. Upon the hearing of the appeal the Crown conceded that such evidence was insufficient to ground a conviction for larceny and the appeal was allowed.

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However the present case does raise another matter of some importance that requires clarifying. In his judgment, after referring to the fact that the appellant chose to make an unsworn statement from the dock rather than giving sworn evidence subject to cross-examination, the trial magistrate continued: A

"This avenue open to the accused is what might be termed 'a hand over' from the pre-1898 position when the accused could not give evidence on oath and had only this means of stating his position. At this stage it would be well to make reference to the recent English case of *R. v. Coughlan* (*The Times* 16/7/76). There it was said that whatever status might be assigned to unsworn statements, they could hardly vie with sworn evidence in cogency and weight. In that case it was also said that an unsworn statement could not prove facts not otherwise proved by evidence before the jury, but it might make them see the proved facts and the inferences to be drawn from them in a different light." B

In *R. v. Emori Kilaka* (Suva Crim. App. No. 75/76) this court, subsequent to the trial magistrate's judgment above quoted, referred briefly to the decision of the English Court of Criminal Appeal in *R. v. Coughlan* in the following terms: C

"The appellant made an unsworn statement denying any knowledge of the commission of the offences; and this may be a convenient time to reiterate that, notwithstanding the vague suggestions to the contrary in *R. v. Coughlan* (1976) *The Times* July 15, a statement from the dock is evidence, in the sense that the court can give to it such weight as it thinks fit and should take it into consideration in deciding whether the prosecution has established the guilt of the accused beyond reasonable doubt (*R. v. Gurmel Singh* Suva Crim. App. No. 123/73; *R. v. Lenaitasi Vakatora* 20 F.L.R. 8, *R. v. Frost & Hale* (1964) *The Times* April 9)." D

In view of the trial magistrate's reference to *R. v. Goughlan*, I think it desirable now to consider that decision more fully and place it in historical perspective. E

In England during the 18th Century (partly as a reaction against earlier Star Chamber practices, interrogation under torture and the compulsory administration of an oath to an accused person) judicial questioning of an accused person ceased, he could not be sworn as a witness and, in the event, was prevented from personally giving his version of events at his trial. This was not a satisfactory state of affairs (as it led not only to doubtful convictions but also to unmerited acquittals as defence counsel was able to sway the jury by emphasizing that had the law not sealed the lips of the accused he would be able to clear himself) so it was partially remedied by some judges who, as a matter of practice, permitted accused persons to make unsworn statements. In January 1804, in *R. v. Francis Smith* (referred to in *Kenny, Outlines of Criminal Law*, 15th Edition 117 as the case of the "Hammersmith Ghost" and more fully considered by Professor Glanville Williams in 65 L.Q.R. 491 at 500 et seq.) the accused was permitted by Chief Baron Macdonald to make an unsworn statement at his trial; and writing in 1883 Sir James Stephen notes that it has been his practice, and that of Cave J., to allow an accused person to make an unsworn statement (*History of the Criminal Law of England*) Vol. 1 at 440. Indeed, in 1882 in *R. v. Shimmin* (15 Cox C. C. 122) Cave J. stated as a rule of practice, approved of by all the judges of the High Court, that an accused person may make an unsworn statement at his trial F

A whether he be defended by counsel or not. As to the value to be attributed to an unsworn statement, Cave J. took the view that, while it was not made on oath and was not subject to cross-examination and was therefore not entitled to the same weight as sworn testimony, nevertheless it was entitled to such consideration as the jury might think it deserved.

B This was the position in 1898 when by Act of Parliament criminal procedures were changed. By virtue of section 1 of the Criminal Evidence Act 1898 an accused person became a competent witness in his own defence; but nevertheless subsection h of section 1 specifically preserved at his option what had become the common law right of an accused person to make an unsworn statement.

C Writing in 1953, Sir Carleton Allen states that there can be no doubt that by 1898 an unsworn statement was treated as evidence; and he cites the case of *R. v. Florence Maybrick* in 1889 (Famous Trials series, (Vol. 3) in which the unsworn statement of the accused at her trial was treated as evidence of the greatest relevance. And Sir Carleton Allen observes "It has never been questioned, so far as I am aware, that (the accused's) unsworn and untested statement is "evidence" which the court is bound to consider" (69 L.Q.R. 22 et seq.)

D I might add that this observation related to the position in England. The position varied in other jurisdictions. For example in the Irish Republic and in South Africa an accused's unsworn statement was clearly treated as evidence, whereas in some Australian States it was not. Commenting on subsection h of section 1 of the Criminal Evidence Act 1898, and on an Australian decision in 1951 that an accused's unsworn statement was not evidence of the facts but merely his explanation of them and that unsworn statements are "something less than evidence but something more than mere argument", Professor Cowan submits that "this is an unsatisfactory conclusion. No doubt it stems from a view of evidence as

E *sworn* evidence. Statements of the character under review are neither sworn nor subject to cross-examination. However, there are special statutory provisions for the admission of unsworn evidence which may not be subject to cross-examination. Cases may arise, for example, under the Evidence Act 1938. It would seem that the purpose of the subsection would be better achieved by allowing the statement to go to the jury for what it is worth. To direct a jury that such a statement is not evidence

F serves only to confuse and really tends to defeat the object of allowing prisoners to make unsworn statements *of fact*. How is a jury to understand that it is to take the statement for what it is worth, if it is told that it cannot regard it as evidence (i.e. proof) of the facts alleged?" (68 L.Q.R. 463). With respect, I agree entirely with that comment. To describe an unsworn statement as something less than evidence but more than argument is to enter the realm of metaphysics, where the rarefied air may sustain those of an academic turn of mind but is hardly suitable for juries or

G assessors.

H In England then, the position seemed clear, but in 1962 in *Shankley v. Hodgson* (Crim. L. R. 248) the Divisional Court held that an unsworn statement was not evidence. Commenting on this decision Professor Glanville Williams says, with every justification, that it was "apparently arrived at without an adequate consideration of the authorities... This seems to nullify the provision in the Act of Parliament permitting the unsworn statement to be made; and it turns the legal procedure into a trap for unwary defendants, who thus have their testimony rendered worthless." (The Proof of Guilt, 3rd Edition 72).

Fortunately the position was rectified in 1964 in *R. v. Frost & Hale* (48 Cr. App. R. 284); *The Times*, April 9; Crim. L. R. 461) where the English Court of Criminal Appeal, the Lord Chief Justice presiding, delivered a decision which adopted the historical approach and which should have settled the matter once for all. It held that it was a misdirection to instruct the jury that an accused's unsworn statement was not evidence but merely comment; and laid down that an unsworn statement "is clearly not evidence in the sense of sworn evidence that can be cross-examined to; on the other hand, it is evidence in the sense that the jury can give to it such weight as they think fit." And that "it is quite clear today that it has become the practice and the proper practice for a judge not necessarily to read out to the jury the statement made by the prisoner from the dock, but to remind them of it, to tell them that it is not sworn evidence which can be cross-examined to, but that nevertheless they can attach to it such weight as they think fit, and should take it into consideration in deciding whether the prosecution have made out their case so that they feel sure that the prisoner is guilty".

As the learned authors of the Criminal Law Review state in a favourable commentary on this decision "it is misleading to tell a jury that the statement is not evidence, for this suggests that they are not entitled to regard a fact as established merely because the prisoner, in his unsworn statement, states it to be so. In fact, if the jury think only that the statement might reasonably be true, they should act on it. In deciding whether it might reasonably be true, they must, of course, take account of the fact that the prisoner has declined to go into the witness box, take the oath and submit to cross-examination." ((1964) Crim. L. R. 462).

Unfortunately, so far as England is concerned, that does not categorically dispose of the matter, in view of the decision in 1976 of a differently constituted Court of Criminal Appeal in *R. v. Coughlan*. As briefly reported in the Criminal Law Review (at 629) this decision appears to be authority for the proposition that the potential effect of an unsworn statement is persuasive rather than evidential (whatever that may be intended to mean) and that it cannot prove facts not otherwise proved by the evidence. However a fuller report in *The Times* (July 15 1976) throws some doubt on whether it is an authority for such a proposition. In the first place, the Court does not appear to have directed its mind to the previous decision in *R. v. Frost & Hale* (supra); and in the second place, if I may be permitted to use a colloquialism, it hedges its bets by stating that the controversial question is reduced to a mere logomachy (that is to say a mere quibble about words) and by falling back on the fact that, in the summing up appealed from, there occurred a passage which by implication reinstated the unsworn statement as having a possible evidential value. Whatever interpretation may be placed on this decision in England, I do not consider it of any relevance to Fiji.

In Fiji, an accused person not only has a statutory right to address the court on his own behalf, but has a separate and specific statutory right to make an unsworn statement conferred by either section 201(1) or section 275(2) of the Criminal Procedure Code as the case may be. Further, quite apart from the common law position which I have outlined, statutory authority for treating the unsworn statement of an accused as evidenced may be found in section 220 of the Criminal Procedure Code which provides that at a preliminary inquiry.

A "If, after examination of the witnesses called on behalf of the
prosecution, the court considers that on the evidence as it stands there are
sufficient grounds for committing the accused for trial, the magistrate shall
satisfy himself that the accused understands the charge and shall ask the
accused whether he wishes to make a statement in his defence or not and, if
he wishes to make a statement, whether he wishes to make it on oath, or
not. The magistrate shall also explain to the accused that he is not bound to
make a statement and that his statement, if he makes one, will be part of the
evidence at the trial."

B *A fortiori* an unsworn statement made by the accused at his trial.

C There is, I think, good reason for these specific statutory provisions. The laws of
Fiji do not follow automatically those of England, nor do the Courts of Fiji follow
blindly English decisions although afforded the greatest respect. In order to do
justice it is necessary for the law to be interpreted and applied in the context of the
country concerned, after taking into account the traditions, mores and degree of
sophistication of its inhabitants; and this is the approach of the Privy Council, the
Fiji Court of Appeal and the Supreme Court of Fiji. Whatever the position may be
in other countries, in Fiji there are many accused persons who prefer to make an
unsworn statement for reasons which have nothing whatever to do with the truth or
falsity of the defence which they are putting forward; and this is a factor to be taken
into consideration by the Legislature and by the Courts.

D It is the usual practice in Fiji, and in my view the proper practice, for a judge
when summing up to assessors to direct them on the following lines:

E "The accused did not give sworn evidence from the witness box which
could be tested by cross-examination. Instead he made an unsworn
statement from the dock, as he was entitled to do, and you may attach such
weight to it as you think fit and should take it into consideration in deciding
whether the prosecution have proved his guilt."

F This has also been the approach of the magistrates, and rightly so. There is no
magic in the word evidence, which simply means something that furnishes or tends
to furnish proof; the distinction between sworn evidence subject to cross-
examination and unsworn evidence not subject to cross-examination is one of
weight; and the weight to be attached to any admissible evidence varies according
to all circumstances of the case.

G This Court for the reasons given stands by its decisions in *R. v. Lenaitasi
Vakatora* (supra), *R. v. Gurmel Singh* (supra), and *R. v. Emori Kilaka* (supra);
and reiterates that in so far as the decision in *R. v. Coughlan* (supra) appear to
conflict it should not be followed.

H I would only add that, when an accused is placed on his defence and his
statutory rights explained to him, I think it undesirable to go beyond the wording of
section 201(1) or section 275(2) of the Criminal Procedure Code as the case may be.
Apparently in some courts it is the practice to also inform him that, though he is
entirely free in the matter, more weight may be attached to his sworn than to his
unsworn evidence; but this is best omitted it appear to influence his choice.

Appeal allowed.