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VISHNU DEO

v.

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REGINAM

[COURT OF APPEAL (Marsack J.A., Henry J.A., Spring J.A.,)]

Date of Hearing: 30 March 1981

Delivery of Judgement: 4 April 1981

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*Criminal Law—Circumstantial evidence to prove fraud—use of lies by accused—role of assessors in evaluating secondary evidence—secondary evidence, proof by*

S. M. Koya for Appellants

R. Lindsay with A. Seru for the Respondent

D

Appeal by 1st appellant against his conviction for fraudulent false accounting contrary to Penal Code s.340(1) and by 2nd Appellant for a conviction for counselling and procuring first appellant to commit the said offences. The case for the prosecution was that both appellants were parties to a scheme whereby entries were made in accounts of the Fiji Sugar Corporation Limited (F.S.C.) at its mill in Labasa. First appellant was employed as shift clerk at the weighbridge of the said mill. Second appellant owned a cane farm at Bocalevu; he supplied sugarcane under contract to F.S.C. at the Labasa Mill.

E

The method by which the process of false accounting was carried out was described by the Court in its Reasons for judgment and need not be repeated here.

F

The Court referred to passages from the Summing up wherein the learned trial Judge referred to the prosecution evidence as "circumstantial". It said, referring to such a method of proof—

G

"The question now is not whether this Court on appeal thinks that the only rational hypothesis open upon the evidence was that both appellants carried out the fraud alleged. It is whether this Court considers that upon the evidence it was open to the assessors to be satisfied beyond reasonable doubt that each of the said seven tickets was not in fact accompanied by a load of sugarcane in accordance with the particulars on it: vide *Plomp v. The Queen* 110 C.L.R. 234 per Menzies J. at p. 247. On this aspect of the case it was for the assessors to decide what evidence is to be accepted and what conclusion should be drawn from it."

H

Upon the question of how assessors might deal with untruthfulness of an accused, the Court quoted *Broadhurst v. The Queen* (1964) A.C. 441 at p. 457:

"But if upon the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt. What strength it adds depends, of course, on all the circumstances and especially on whether there are reasons other than guilt that might account for untruthfulness."

They said:

"If an accused denies an incriminating incident and the tribunal finds that such denial is false, it is a matter which may be weighed along with other testimony."

As to the conviction of the second appellant there was discussion of the words "counselling and procuring". The Court said:

"The second appellant on the evidence, which was clearly accepted by the assessors knew the essential matters constituting the offence faced by the first appellant. It has been held that the words "aid and abet, counsel and procure" may all be used together to charge a person who is alleged to have participated in the commission of an offence otherwise than as a principal *Re Smith* (1858) 3 H. & N. 227; *Ferguson v. Weaving* (1951) 1 K.B. 814."

The Court considered a criticism that second appellant (charged with counselling and procuring the offence alleged against the first appellant) should not have been joined with the first appellant in each of the seven counts laid against him, i.e. that the second appellant should have been separately charged.

As to joinder of more than one person in one charge, the Court referred to Criminal Procedure Code s. 122(d).

"In their Reasons the Court said:

"On the facts it is clear that both first and second appellant acted in concert; they both made entries on the weighbridge slips, admittedly at different times, but with the common purpose or intention of defrauding the F.S.C. The offences related to the defrauding of F.S.C. was an entire transaction; the offences alleged against each appellant in each of the seven counts arose out of one transaction. In *R. v. Benfield and Saunders* (1760) 2 Burr 980 in which the Court in dealing with the objections said that "several defendants may be joined in one and the same indictment or information if the offence wholly arises from such a joint act as is criminal in itself, without any regard to any particular personal default of the defendant which is peculiar to himself": See also *R. v. Fenwick & Taylor* (1953) 54 S.R. N.S.W. 147."

It is clear therefore from the evidence that in the case on appeal each appellant was assisting the other in the commission of the offence of defrauding the F.S.C. In *D.P.P. v. Merriman* (1972) 56 Cr. App. R. 766 per Lord Diplock 21 p 796

A "I conclude, therefore, that whenever two or more defendants are charged in the same count of an indictment with any offence which men can help one another to commit, it is sufficient to support a conviction against any and each of them to prove either that he himself did a physical act which is an essential ingredient of the offence charged or that he helped another defendant to do such an act, and, that in doing the act or in helping the other defendant to do it, he himself had the necessary criminal intent."

B Secondary evidence was admitted being a photocopy of entries in a notebook. Counsel for first appellant criticised the reception as having—

"breached the rules of evidence in that it was secondary evidence hearsay and should be classed as self-serving."

C The Court in rejecting this argument said:

"We are satisfied that the learned trial Judge was entitled to receive the photocopy as secondary evidence for the following reasons:

- D (a) It was clearly established on oath that the original notebook itself formerly existed in fact and would if available have been legally admissible;
- (b) That it was proved that the original notebook had been lost or destroyed and there was abundant evidence before the learned Judge that the original notebook could not by any reasonable amount of effort be found;
- (c) The original entries made in the notebook were made contemporaneously when the cane was cut;
- E (d) That the due and diligent search for the original notebook proved fruitless;
- (e) That there was sworn testimony that the photocopy was a true and faithful reproduction of the original document apart from the ticks and other markings which had been satisfactorily explained on oath;
- (f) That sworn testimony was given as to the circumstances—
- F (i) leading up to the loss of the original notebook;
- (ii) how and why the copy was made; and
- (iii) how it came to be in the hands of the police who wished to tender it as secondary evidence.

G While we have gone through the evidence in some detail there is no question of our laying down by the foregoing an exhaustive set of rules by which the admissibility of such evidence should be judged.

In our view a proper foundation was laid by the prosecution for the reception in evidence of the photocopy."

H *Held:* Appeals dismissed.

## Cases Referred to:

*Plomp v. The Queen* 110 C.L.R. 234.

*McGreevy v. D.P.P.* (1973) 1 All E.R. 503.

*Broadhurst v. The Queen* (1964) A.C. 441.

*Jones v. D.P.P.* (1962) 1 All E.R. 569.

*R. v. Hayes & King* (1964) Crim L.R. 542.

*Narend Prasad & Anor. v. R.* 17 F.L.R. 208.

*Re Smith* (1858) 3 H. & N. 227

*Ferguson v. Weaving* (1951) 1 K.B. 814.

*R. v. Benfield & Saunders* (1760) 2 Burr 980.

*R. v. Fenwick & Taylor* (1953) 54 S.R. (NSW) 147.

*D.P.P. v. Merriman* (1972) 56 Cr. App. R.

HENRY. Judge of Appeal:

## Judgment

First appellant was convicted on seven counts of fraudulent false accounting contrary to Section 340(1) of the Penal Code. Second appellant was convicted of counselling and procuring first appellant to commit the said offence. Each was sentenced to imprisonment for 2 years. The trial was before a Judge and 3 assessors who returned a unanimous opinion of guilt.

Second appellant owned a cane-farm at Bocalevu. He supplied sugarcane under contract to the Fiji Sugar Corporation Limited (called F.S.C.) at its mill in Labasa. First appellant was employed as shift clerk at the weighbridge of the said mill. The case for the prosecution was that both appellants were parties to a scheme whereby entries were made in the accounts of F.S.C. giving credit to second appellant for seven lorry loads of sugarcane falsely purporting to have been supplied from the farm of second appellant.

The system for checking in cane for crushing at the said mill was through the issue of books of tickets. The tickets are numbered in triplicate and filled in for each load delivered to the mill. When a lorry arrives at the weighbridge (which had an accompanying office) a ticket book carried by the driver has in it an entry in triplicate partly filled in and signed by the sirdar of the gang which had cut the cane. The book is handed to the clerk at the weighbridge who checks the quota from a quota allocation book supplied by a field officer. If the entry is authorised by the quota allocation the clerk records the gross weight of the vehicle and the date and time when it was weighed. There was a conflict of evidence whether or not, at the material time, the driver was issued with a white ticket called a lorry quota statistic which contained the lorry number, quota, date, shift, time and grower's number, such entries

- having been made by the clerk. This will be referred to later. However the driver proceeds to the unloading area where the load is received by the mill, where, if a white slip had been issued, it was handed to the head man. The driver then returns to the weighbridge where the lorry is weighed for the purpose of ascertaining the weight of the load of cane. The clerk after recording the weight, tears out the original and first carbon copy in the book which is then returned to the driver with the third copy still in it. In the accounting system of F.S.C. entries are duly made whereby the producer is credited with and paid for the value of the cane so recorded as having been supplied.

- Both appellants agreed that in each of the seven relevant tickets second appellant had written in the date of the ticket, the date and time when the cane was cut, the number of the lorry, the type of cane and the name of the gang and that he signed the ticket as sirdar. Further that first appellant filled in the gross weight, the tare weight and the nett weight as recorded from the weighbridge and the date and time when the load was weighed. Thus each ticket was completely filled in triplicate either by first or second appellant. The whole of the accounting system of F.S.C. depended upon the details set out in each ticket, namely, that sugarcane had been delivered to the mill by the particular grower in the quantities and on the dates set out in each ticket. Payments were made to the grower in accordance with such quantities.

- The only signature required is that of the sirdar in charge of the gang which actually cut the cane. He was required to state the date and time of the "cut". Second appellant signed each of the said seven tickets as sirdar. Second appellant had a business as a cafe-shop proprietor in Labasa. The duties of sirdar were carried out by one Mahabir who said that second appellant did not carry out his duties as sirdar but that he, Mahabir, carried out such duties in the absence of second appellant who, he said carried on business in town. Mahabir said he did not maintain a record of the gang. Second appellant said he saw each load he signed for, either at his house, or at his cafe in Labasa before he signed any ticket as sirdar.

- The case for the prosecution was that a fraud was perpetrated by both appellants acting in concert. It was that, although second appellant did not act as sirdar, he signed tickets as such for non-existent loads on seven separate occasions and first appellant completed each ticket as if each load had in fact passed over the weighbridge and had been unloaded at the delivery point in the mill. The tickets were not signed by the sirdar who was in charge of the actual cutting. Such a scheme thus did not require the collaboration of any other person.

- The sole issue of fact was whether or not the said seven loads were fictitious loads which were by the acts of both appellants intended to become and did become part of the records of F.S.C. as if they were genuine deliveries. The assessors and the Judge were satisfied that this was so. Proof depended upon the inferences which could properly be drawn from the evidence. No complaint was made concerning the directions of law given by the trial Judge on the burden of proof. Indeed, the trial Judge on a number of occasions stressed the burden which lay on the prosecution. It is sufficient to cite one passage. It reads:

- "Now what is the evidence on this issue. As defence counsel has pointed out there is no direct evidence, nobody saw the accused filling in any weigh slip and noted that there was no cane delivered. That is not surprising. If there was

no cane, there was nothing for any one to see, and anyone preparing a fictitious slip is unlikely to let any one else see him doing it. With so many lorries trailers and trucks passing through the weighbridge each shift was anyone likely to notice that there was one less than there ought to be?

The prosecution evidence is circumstantial evidence, as defence counsel said, just as most evidence in criminal cases is invariably circumstantial evidence. Criminals usually prefer to commit their crimes secretly and without witnesses. There is usually some evidence pointing the finger of suspicion against some one. You cannot of course convict on suspicion, but there may be a body of evidence which points conclusively to some person, which when taken together leads to an inescapable inference as to the guilt of that person, and does not lend itself to any other innocent interpretation. That is the sort of circumstantial evidence which a prosecutor must produce to the court in order to succeed. That is what the prosecution in this case has to do."

The question now is not whether this Court on appeal thinks that the only rational hypothesis open upon the evidence was that both appellants carried out the fraud alleged. It is whether this Court considers that upon the evidence it was open to the assessors to be satisfied beyond reasonable doubt that each of the said seven tickets was not in fact accompanied by a load of sugarcane in accordance with the particulars on it: vide *Plomp v. The Queen* 110 C.L.R. 234 per Menzies J. at p. 247. On this aspect of the case it was for the assessors to decide what evidence is to be accepted and what conclusion should be drawn from it.

In *McGreevy v. D.P.P.* [1973] 1 All E.R. 503 Lord Morris of Borth-Y-Gest in a speech concurred in by the other four Law Lords said at p. 507.

"The particular form and style of a summing-up, provided it contains what must on any view be certain essential elements, must depend not only on the particular features of a particular case but also on the view formed by a judge as to the form and style that will be fair and reasonable and helpful. The solemn function of those concerned in a criminal trial is to clear the innocent and to convict the guilty. It is, however, not for the judge but for the jury to decide what evidence is to be accepted and what conclusion should be drawn from it. It is not to be assumed that members of a jury will abandon their reasoning powers and, having decided that they accept as true some particular piece of evidence, will not proceed further to consider whether the effect of that piece of evidence is to point to guilt or is neutral or is to point to innocence. Nor it is to be assumed that in the process of weighing up a great many separate pieces of evidence they will forget the fundamental direction, if carefully given to them, that they must not convict unless they are satisfied that guilt had been proved and has been proved beyond all reasonable doubt."

A careful consideration of the summing up shows that the trial Judge succinctly told the assessors what was the issue which they had to determine. The evidence for the prosecution was reviewed. Each of the grounds of defence put forward was examined and discussed. However, it was argued that there were non-directions which amounted to a serious misdirection. The particulars given are lengthy and it is not necessary to set them out in full. In respect of the appeal of first appellant ground 1 commenced with paras (a) and (b) which are no more than a statement of the burden of proof, whilst paras (c) and (d) dealt with matters which were plainly put



A to the assessors. There was a complaint that some evidence of first appellant was not contradicted but it was for the assessors to say whether or not they accepted any evidence and whether directly contradicted or not. Sufficient directions were given on each of these matters. We will deal with ground (e) after dealing with ground 2. Ground 2 is also a complaint about details of evidence but such evidence in our view was properly put to the assessors.

B Ground 1(e) reads:

"That fifthly it was incumbent upon them to accept as a proposition of law that the rejection of the Appellant's evidence by them did not amount in law to the alleged falsification of the entry referred to in each Count;"

C This ground is similar to ground 3 in the additional grounds of appeal and will be dealt with together with that ground.

D In ground 3 counsel attempted, by analogy, to apply the law concerning false documents in a charge of forgery and claimed that the document must "tell a lie about itself". No such law applies to the present charges which simply claim that the said tickets are false in that, although they purport to show that a delivery was made, no such delivery was in fact made. This ground had no validity in law and the cases cited are not applicable to the present charges.

E Turning now to the case of second appellant complaints were also made of non-directions. These matters were all put to the assessors and were before them for their consideration. Ground 3 refers to a defence that the sugarcane may have been cut by some person other than Noa Masi Masi and his brothers upon whom the prosecution relied for establishing how much cane was cut over the relevant period. Reference was made to "circumstantial evidence" and "inescapable inference" and "uncontroverted evidence" but all these matters were reviewed by the trial Judge and were before the assessors who, as stated by Lord Morris (*supra*) had the duty of expressing their opinions on guilt. It was for the assessors to determine these questions upon a proper direction as to the burden of proof and such a direction was given. These grounds are extravagantly worded. All matters were properly before the assessors and they were entitled to reject the claim by the defence that the seven loads in dispute and come from elsewhere and to hold that the evidence of Noa Masi Masi ought to be accepted.

G Counsel for appellants produced to this Court a compilation of information contained in the tickets comprising Exhibits 2 and 3 which were the relevant tickets issued in respect of deliveries from the farm of second appellant. From this information it was argued from evidence in the case that there was a gap in proof that sugarcane had not been supplied in respect of the loads represented by the seven tickets relevant to the charges. This document was not placed before the assessors. Nor was it placed before the trial Judge. Nor was any request made that such an analysis should be put to the assessors by the trial Judge. Nor was the trial Judge requested to enlarge on the matters he had discussed in his summing up. The document was placed at the last moment before counsel for the Crown who did not appear at the trial. He made no comment other than that it was evidence in the case dealt with by the assessors. All relevant documents Exhibits 2 and 3 from which this document was compiled were before the trial Judge and the assessors together with all relevant

evidence and the examination and cross-examination of the relevant witnesses. We do not know what argument proceeded on these documents before the tribunal. Nor do we know what replies might have been made or could be made if the compilation had been produced at the trial. This compilation was an attack on the evidence of Noa Masi Masi but his evidence and the information now set out were all matters for decision by the assessors and the trial Judge on the totality of the evidence accepted by them. A

Before passing from this topic we desire to make reference to counsel's argument that certain inferences ought to be put to the assessors in respect of individual pieces of evidence and that there should be a direction that they should be proved as "inescapable inferences". There is no rule of law which requires a Judge to give that type of direction of various pieces of evidence. Lord Morris of Borth-Y-Gest said in *McGreevy's* case (*supra*) at p. 511: B

"To introduce a rule (distinguishing between direct and circumstantial evidence) would, in my view, not only be unnecessary but would be undesirable. In very many criminal cases it becomes necessary to draw conclusions from some accepted evidence. The mental element in a crime can rarely be proved by direct evidence. I see no advantage in seeking for the purposes of a summing up to classify evidence into direct or circumstantial with the result that if the case for the prosecution depends (as to the commission of the act) entirely on circumstantial evidence (a term which would need to be defined) the judge becomes under obligation to comply when summing-up with a special requirement." C D

The trial Judge drew attention to all relevant evidence. The inferences to be drawn were a matter for the assessors. The ultimate burden of proof of guilt was clearly and forcefully put in the passage from the summing up already cited. It was repeated on a number of further occasions. There is no merit in counsel's criticism. E

Argument was addressed to this Court based on the white ticket issued to lorry drivers which ticket was referred to in the summary of facts at the beginning of this judgment. A witness for the prosecution stated categorically that such a procedure did not come into existence until after the time relevant to these proceedings. First appellant gave evidence to the contrary. There was other evidence. We do not know how the assessors decided this conflict. It is not for us to speculate on this. So any argument based on the use of white tickets must be rejected. F

There is only one further matter raised in ground 3 and that is (e) which reads:

"(e) That the sum total effect of the Appellant's evidence on this point was that he honestly believed that cane cutters other than P.W. Noa Masi Masi and his brothers were also cutting sugar cane on the area under Ghana alias Ghana Nand's control at the relevant time:" G

The same question was raised in ground No. 7. The case for the prosecution was that second appellant signed the seven tickets for loads which he knew did not exist. No question of honest belief could possibly arise—it was a cause of deliberate fraud. Further comment is superfluous.

We have not mentioned ground 2(a), (b) and (c) for the reason that it is more appropriate to deal with it after the citation of authority under ground 3. The assessors who were correctly directed therein. There was no error of law, indeed ground 2 raises no question of law. H



- A At the hearing additional grounds of appeal were filed and argued. They related to the evidence of two witnesses who gave evidence of conversations with appellants. The first witness was Muthusami Reddy who was employed as weighbridge clerk in 1978. He said:

"I know A2, he owns a cafe besides Majestic Theatre, Labasa. I went to his cafe in 1978, I don't remember which day. The mill was working then, crushing cane.

- B I did not speak to A2. He spoke to me. He said, "Can you increase the tons." He meant was that when the sugar cane was brought in I was to increase the tonnage. I said it would be better if you came to my house and had something to eat. He did not agree. Then he asked me about the quota and I said 'No'. He asked me if I could accept cane in excess of the quota and I said I could not."

- C The other witness was Shiri Niwasan who was also a weighbridge clerk in 1978. He said:

- D "In 1978 I was weighbridge clerk from about May to December. A1 was my immediate superior. I know A2, He owns a cafe. I went to his cafe to buy the Fiji Times. I met A2. He spoke to me. He took me into a corner and asked me if I could make tons for his cane. I didn't understand what he meant. He said 'how can the tons be made'. He was telling me how the tons could be made. He said he would give the book for his farm to me, the cane could not be brought to the mill, and I would make the tons. That although the cane would not be brought the weights would be given. I am familiar with documents used at the weighbridge. I recognise Exhibit 2 and 3, weight slips. We weigh the cane and put the number of tons. We fill in the weights.

- E I did not agree with what A2 told me. I did not want to make tons when there was no cane coming in. Why would I do that.

- F He spoke to me again outside my office where I work—where drivers usually talk to us. It was after he spoke to me at the cafe about 1 week later. He asked me if I could remember our discussion. I didn't know what he meant. Then he gave me his farm ticket book, they have tickets like Exhibits 2 and 3. The book has the farm number and sirdar's signature. I can't remember if they were filled in.

- G I asked him where the cane was. A2 said he didn't have cane. I said that if there was no cane what would I weigh. When the lorry drivers started to come in he started to ask me about his quota. He did not have a quota. Then he went away, with the ticket book."

- H It was claimed that this evidence was "irrelevant and prejudicial and unfair". This evidence is admissible because it tends to prove the system which was alleged. It also tends to rebut the defence that the loads which were in excess of those from the farm of second appellant were from area cultivated by relatives of second appellant. There was no reason why the trial Judge should refuse to receive the evidence on the ground of prejudice or unfairness. This ground fails.

A submission was also made that denials by both appellants of this evidence ought not to have been taken into account when the trial Judge ruled at the end of the

prosecution case that there was a case to answer. This submission must fail for the reasons given above, but in any event there was ample other evidence to support the ruling. A

As to the first ground in the amended grounds of appeal the extract complained of is from a passage dealing solely with second appellant and has no relation to first appellant. So it must fail.

The second extract from ground 2 is:

"P.W.8 said that after Accused 2 spoke to him at the Weighbridge he saw Accused 2 speaking to Accused 1. That could be entirely innocent and no inference could be drawn from it even if you believed P.W.8 but Accused 1 denied the incident, he said that after careful consideration he was sure he never spoke to Accused 2 at the Weighbridge. Which witness do you believe? And if you believe P.W.8 and not Accused 1 can any inescapable inference be drawn from Accused 1's denial?" B C

It was argued that this was an invitation to the assessors to treat the denial as evidence of guilt. The argument was based on cases relating to corroboration. The cases are not parallel. If an accused denies an incriminating incident and the tribunal finds that such denial is false it is a matter which may be weighed along with other testimony. We can see nothing wrong in this passage. The same reasoning applies to ground 3 which refers to a denial by second appellant. It was a proper matter to be weighed. D

In *Broadhurst v. The Queen* [1964] A.C. 441 at p. 457 the Privy Council said:

"But if upon the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt. What strength it adds depends, of course, on all the circumstances and especially on whether there are reasons other than guilt that might account for untruthfulness." E

To the same effect are *Jones v. D.P.P.* [1962] 1 All E.R. 569 at pp. 578-9 per Lord Denning; *R. v. Hayes & King* [1964] Crim. L.R. 542; *Narend Prasad & Anr. v. R.* 17 F.L.R. 208.

The third ground has no validity. The Judge said:

"But if you do believe these two witnesses and do not believe Accused 2 what is the significance of their evidence." F

The Judge was entitled to draw attention to the conflict and to its importance in ascertaining the truth. We have already adverted to the law on this question.

The fourth ground related to a submission of no case. We have already dealt with this. Even if the evidence referred to is omitted (and we see no reason why it should be) there was ample evidence to call upon the defence. G

The remaining ground relating to the evidence is that the verdicts are unreasonable and cannot be supported. An attempt was made to raise the issue of the white ticket referred to earlier. Argument was addressed to this Court based on the white ticket issued to lorry drivers which ticket was referred to in the summary of facts at the beginning of this judgment. A witness for the prosecution stated categorically that such a procedure did not come into existence until after the time relevant to these proceedings. First appellant gave evidence to the contrary. There was other H

- A evidence. We do not know how the assessors decided this conflict. It is not for us to speculate on this. In our view the matter had been raised in the trial and adequately dealt with. So any argument based on the use of white tickets must be rejected in this case. In our view there was ample evidence to support the verdicts.

We have completed the grounds of appeal so far as they relate to evidence and directions given on evidence, but there are still further grounds to be considered.

- B The first ground in the appeal of second appellant complained that a direction should have been given that the assessors should find a casual link between second appellant and the actual commission of the offence with which first appellant was charged and also that there was no evidence to establish procurement and that the word "procure" should be explained and defined. The evidence was that both appellants combined in a fraud so there was a clear casual link. Moreover, that evidence clearly amounted to procuring, namely that second appellant induced first
- C appellant to complete the tickets and have them presented to F.S.C. If these facts are proved then procuring is proved and no special direction was necessary.

- We turn now to the question of duplicity. Mr Koya submitted that the information against second appellant was bad for duplicity in that he was charged in seven separate counts with "counselling and procuring" the first appellant to commit the offence brought against him. It is clear from the evidence that the assessors and the
- D learned trial Judge accepted the evidence that the first appellant and second appellant completed particulars on the weighbridge slips in each of the seven counts all of which were separate counts. Each count was in respect of a separate weighbridge slip on a different date and related to the alleged delivery of cane on that particular day.

- The second appellant on the evidence, which was clearly accepted by the
- E assessors knew the essential matters constituting the offence faced by the first appellant. It has been held that the words "aid and abet, counsel and procure" may all be used together to charge a person who is alleged to have participated in the commission of an offence otherwise than as a principal *Re Smith* (1858) 3 H. & N. 227 *Ferguson v. Weaving* (1951) 1 K.B. 814.

- Accordingly in our opinion the seven counts laid against the second appellant
- F were not bad for duplicity.

- Mr Koya submitted that the second appellant, who was charged with counselling and procuring the offence alleged against first appellant with which the first appellant was charged, should not have been joined with the first appellant in each of the seven counts laid against him. In developing his argument Mr Koya submitted that the offence laid against the second appellant was a separate and different
- G offence from that laid against the first appellant in each count and that the first and second appellant should have been separately charged.

- On the facts it is clear that both first and second appellant acted in concert; they both made entries on the weighbridge slips, admittedly at different times, but with the common purpose or intention of defrauding the F.S.C. The offences related to the defrauding of F.S.C. was an entire transaction; the offences alleged against each
- H appellant in each of the seven counts arose out of one transaction. In *R. v. Benfield and Saunders* (1760) 2 Burr 980 in which the Court in dealing with the objections said

that "several defendants may be joined in one and the same indictment or information if the offence wholly arises from such a joint act as is criminal in itself, without any regard to any particular personal default of the defendant which is peculiar to himself": See also *R. v. Fenwick & Taylor* (1953) 54 S.R. N.S.W. 147. A

It is clear therefore from the evidence that in the case on appeal each appellant was assisting the other in the commission of the offence of defrauding the F.S.C. In *D.P.P. v. Merriman* (1972) 56 Cr. App. R. Lord Diplock said:

"I conclude, therefore, that whenever two or more defendants are charged in the same count of an indictment with any offence which men can help one another to commit, it is sufficient to support a conviction against any and each of them to prove either that he himself did a physical act which is an essential ingredient of the offence charged or that he helped another defendant to do such an act, and, that in doing the act or in helping the other defendant to do it, he himself had the necessary criminal intent." B

Section 122(d) of the Criminal Procedure Code applies. It reads: C

"122. The following persons may be joined in one charge or information and may be tried together, namely—

(d) persons accused of different offences committed in the course of the same transaction;" D

We are of opinion that the joinder was correct and that this ground fails.

Mr Koya submitted that the learned trial Judge erred in admitting in evidence at the trial a photocopy of a page from Noa Masi Masi's notebook.

Briefly the facts were as follows: Noa Masi Masi and his brothers cut cane on a second appellant's farm in June and July 1978 at \$3 a ton; Noa entered in his notebook the date of cutting the cane; the initials of the cane cutters involved; the tonnage; and the amount due to them calculated at \$3 a ton. E

Early in 1978 Noa handed the notebook to Rajendra Naidu, Field Manager of the F.S.C., who in turn handed it to Detective Sgt. Shiu Dayal who photocopied the page where Noa had recorded the details relating to the cane cutting on second appellant's farm. Prior to the trial the notebook went missing from Labasa Police Station and despite a very thorough and vigorous search carried out under the direction of a Senior Police Officer the notebook along with other documentary evidence could not be found. The prosecution desired to tender the photocopy in evidence as it was a prominent part of the evidence for the prosecution. In the absence of the assessors, a trial within a trial was held to determine the admissibility of the photocopy. F

Evidence was given by police officers that the notebook was irretrievably lost. Assistant Superintendent Somer Singh gave evidence that as soon as the loss of the exhibits including the notebook was reported he searched all offices in the police complex at Labasa, waste paper baskets, police station compound, police residential compound and quarters, police incinerator and also went to police rubbish dump. The empty envelope in which exhibits had been placed was found crumpled up in waste paper basket in the general crime office. Noa gave evidence that he recognised the photocopy as a copy of what he had written in his notebook; he iden- H

tified his own handwriting; he stated he used the information he had written in the notebook to assist in working out what was due to him and his brothers for cane cutting when second appellant brought their pay. He also recognised a certificate he had written in Fijian although he could not remember when he wrote the certificate.

Noa said:

B “(Looking at MFI 1 entry for 4/7/78). The tonnage shown was correct. Same as in original notebook. There are 15 entries on the sheet. I got the dates from the docket brought from the mill. I got the same dates and tonnages from the dockets. I didn’t make any mistakes.

C I got the dockets from Accused 2. Sometimes the same day, and sometimes the day after the same was taken to the mill. I certified that we cut all that cane. I can’t remember where I wrote the certificate. It is my handwriting. All the entries above it were already written. Those entries were all made at A2’s.”

Noa disclaimed any knowledge of the tick, writing on the top of the page and the words “total 95.73” in the margin.

Rajendra Naidu—field officer with F.S.C. saw the notebook some time early in 1978 and he said:

D “I know Noa Masimasi. I spoke to him I saw his blue book containing information. Shown MFI-1. That is record I saw in Noa’s book is a copy of it. I saw original of that. When I saw book all the entries were there except red marks, the writing appendix 2, the blue ticks, the circles and at top right hand side, the total. The rest was there except the lines in Fijian which Noa added. I compared entries with weight slips belonging to farm 2012 in the lorry ticket books. E I checked slips for both June and July 1978. I compared original weight slips with original entries in notebook. I found 20 weight slips for farm 2012. Only 13 corresponded with entries in notebook, except for one where Noa had written 6.64 whereas the weight was 6.74 tonnes. Otherwise entries agreed . . . . . I asked Noa to put a certificate in Fijian in his notebook.”

Naidu handed the notebook to Detective Sgt. Shiu Dayal in July 1978 who stated in evidence:

F “M.F.I.-1 is a photostat copy made from the notebook. This shows one page of book. The photostat was prepared in my presence at the police station. I compared photostat with original notebook and found them to be exactly the same.”

G Detective Sgt. Dayal gave evidence that the ticks in blue ball point pen were his and explained how the other markings appeared in the photocopy.

The learned Judge after hearing the evidence and objections raised by Mr Koya on behalf of appellants ruled as follows:

H “So far as secondary evidence is concerned I am quite satisfied that there were original admissible documents, that they have become irretrievably lost in spite of the most vigorous search. The copies will therefore be admitted as exhibits. So far as MFI-1 is concerned, this was a contemporary or sufficiently contemporary record of cane cut, which Noa would be expected to compile. It would therefore be an admissible exhibit. I will admit MFI-1 as secondary



evidence of the original. The various writings put on it by others can be explained in evidence and cannot prejudice the accused or invalidate the document.”

Mr Koya submitted that the reception of the photocopy as evidence breached the rules of evidence in that it was secondary evidence, hearsay and should be classed as self serving. Secondary evidence may be given in the absence of better evidence which the law requires to be given first, when a proper explanation is given of the absence of the better evidence.

We are satisfied that the learned trial Judge was entitled to receive the photocopy as secondary evidence for the following reasons:

- (a) It was clearly established on oath that the original notebook itself formerly existed in fact and would if available have been legally admissible;
- (b) That it was proved that the original notebook had been lost or destroyed and there was abundant evidence before the learned Judge that the original notebook could not by any reasonable amount of effort be found;
- (c) The original entries made in the notebook were made contemporaneously when the cane was cut;
- (d) That a due and diligent search for the original notebook proved fruitless;
- (e) That there was sworn testimony that the photocopy was a true and faithful reproduction of the original document apart from the ticks and other markings which had been satisfactorily explained on oath;
- (f) That sworn testimony was given as to the circumstances—
  - (i) leading up to the loss of the original notebook;
  - (ii) how and why the copy was made; and
  - (iii) how it came to be in the hands of the police who wished to tender it as secondary evidence.

While we have gone through the evidence in some detail there is no question of our laying down by the foregoing an exhaustive set of rules by which the admissibility of such evidence should be judged.

In our view a proper foundation was laid by the prosecution for the reception in evidence of the photocopy.

Therefore in our view the learned trial Judge after hearing the evidence exercised his discretion correctly and we see no reason to interfere with his ruling that the photocopy of the page from Noa Masi Masi's notebook was admissible.

Accordingly this ground of appeal fails.

We can see no ground for holding that the sentences are excessive. The penalties imposed are appropriate for the perpetration of a deliberate falsification of transactions by falsely using documents upon which the commercial community must in the ordinary course of business rely.

The appeals are dismissed.

*Appeals dismissed.*