

IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 25 of 1979



1. SHARDHA NAND (s/o Mani Ram)
 2. FLOUR MILLS OF FIJI LIMITED
- Appellants

v.

R E G I N A M

Respondent

S.M. Koya for the First Appellant
M.S. Bahu Khan for the Second Appellant
R. Lindsay with W.D.D. Morgan for the Respondent

Dates of Hearing: 3-12 March 1980
Delivery of Judgment: 31st March 1980.

JUDGMENT OF THE COURT

On 23rd May 1979, in the Supreme Court of Fiji sitting at Suva, after a trial lasting thirty days both appellants were convicted of various offences: the three assessors were unanimous in returning their opinion of guilt in respect of both appellants. Shardha and the first appellant was convicted of, concurring in falsification of entries in the company's balance sheet for the year ending 1976 (count 1); concurring in circulating the said balance sheet which contained false particulars (count 2); and conspiring to defraud the Minister of Commerce, Industry and Co-operatives by fraudulently reducing the operating profit of the company for the year 1976 (count 3); on counts 1 and 2 he was sentenced to three years' imprisonment;

on count 3 he was sentenced to one year's imprisonment; the sentences were to be served concurrently. The second appellant, a limited company, was convicted of conspiring to defraud the said Minister by fraudulently reducing the profit of the company for the year 1976 (count 4); and of conspiring to defraud the shareholders by fraudulently reducing the operating profit of the company for year 1976 (count 5); on counts 4 and 5 the company was fined the sum of \$75,000 on each count and in addition was ordered to pay the sum of \$6,503.11 towards the cost of the prosecution.

During the trial a considerable volume of documents was tendered and although the facts were involved they may be summarised in this way. On 14th October 1971, the Minister of Commerce, Industry and Co-operatives on behalf of the Government of Fiji entered into a ten year agreement with Wallace Flour Mills Company Limited, India, whereby it was agreed that Wallace Flour Mills Company Limited would incorporate a flour milling company in Fiji to which all rights and obligations under the said agreement would accrue. Suva Flour Mills Company Limited was incorporated as a public company on 14th October 1971; the name of this company was changed to Flour Mills of Fiji Limited on 18th January 1972 (hereinafter referred to as the company). The agreement provided (inter alia) that for the initial period of ten years thereof the company would enjoy a monopoly in flour milling in Fiji; the company was required to supply sufficient products to meet local requirements; the company would sell its milled wheat products on the basis of sound and prudent business management thereby assuring fair and reasonable return on the flour mill investment; the price of the company's products and in particular the price for flour and sharps (subject to any variation in the price of wheat) was to be fixed at

at least 35 per long ton lower than those generally available in arms length transactions; the Government undertook to ensure that the company enjoyed fair and reasonable protection against unfair practices; the company was granted concessions in respect of taxation, customs dues and port dues.

The company commenced production in September 1973 and at this time the Prices and Incomes Board established under the Counter-Inflation Act 1973 controlled the prices of flour and sharps. The company made representations to Government that the Prices and Incomes Board did not allow a fair and economic return on the investment and as a result it was decided that the pricing of the products of the company should pass from the control of the Prices and Incomes Board to the Minister of Commerce, Industry and Co-operatives. The Minister agreed in November 1974 that for the year 1975 the price fixing formula be based on the Australian Wheat Board formula (hereinafter called A.W.B. formula). Towards the end of 1975 the company made representations for the extension of the A.W.B. formula: lengthy negotiations were held and the company's financial accounts were sought by Government as profitability was a consideration. The former Minister M.T. Khan stated in evidence "The whole operation of the formula was based on receiving regular accounts."

On the 23rd February 1976, a supplementary agreement was concluded between Government and the company whereby the A.W.B. formula was adopted for a further period of one year from the date thereof which provided (inter alia) that any time after the expiry of twelve months from the date thereof either party might give notice to the other requiring a review of the agreement within five months from the date of such notice and any variations thereto should unless otherwise agreed become effective not earlier than five months from the date of the notice.

First appellant joined the company as its Managing Director on 8th October 1976. Pran Gopal Chanda commenced as Secretary in July 1974; David Michael Gutteridge joined as production manager in June 1975.

The prosecution case against first appellant (in respect of count 1) is that with intent to defraud he concurred with the chairman of the company Pratap Singh Vissanji in making a false entry in the company's balance sheet for the year ending 31st December 1976, by undervaluing the stocks of the company.

Count 2 charges first appellant with concurring with Vissanji in circulating a balance sheet for year ending 31st December 1976 which he knew to be false in that wheat stocks as at 31st December 1976 had been understated by 576 metric tons (valued at approximately \$102,448) thereby reducing the profit of the company for the year 31st December 1976 with intent to deceive the shareholders.

Count 3 alleged that between 8th October 1976, and 30th April 1977, first appellant conspired with Vissanji, Fane (a Director of the company resident in England), Chanda (Secretary), Gutteridge (Production Manager) and Foster (Financial Adviser and a member of the company's firm of Auditors and resident in Australia) to defraud the Minister of Commerce, Industry and Co-operatives by fraudulently reducing the profit of the company for year ending 31st December 1976 by understating wheat stocks by approximately \$102,448 and by other devices, viz. charging capital items to revenue and writing off usable stores for the purpose of obtaining from the Minister a price fixing formula more favourable to the company than if the true operating profit had been disclosed.

As regards the second appellant - the company - the prosecution brought two charges - count 4 alleged that between 8th October 1976, and 30th April 1977, the company conspired with Chanda, Gutteridge and Foster to defraud the Minister by fraudulently reducing the operating profit of the company for year ending 31st December 1976, by understating wheat stocks by approximately \$102,448 and by other devices for the purpose of obtaining from the Minister a price fixing formula more favourable to the company; in count 5 the company was charged with conspiring with the same persons as in count 4 to defraud the shareholders by reducing the profit of the company by the amount stated and in the manner set forth in count 4. The company was desirous of retaining the benefit of A.V.B. formula for the balance of the term of the ten year agreement and representations to this effect were made late in 1976 to Government. Various letters were produced during the trial as far back as December 1973 indicating that the company did not wish to reveal to Government in its accounts "embarrassing" profits.

The Crown claimed that the conspiracy alleged in counts 3, 4 and 5 was formulated early in October 1976. Chanda in evidence said:

" The first meeting in October there were present Vissanji, Woodbridge, Foster, A1 and myself. Vissanji said 'The estimated profit of \$1.2m would be too embarrassing and this profit must be reduced to between \$800 - \$900,000'. He also said that 'Mr. Gutteridge should play about with tape and reduce the wheat stock at the year end. Also capital items should be charged as revenue as much as possible and some of the stores items also should be written off.' A.1 said 'I agree with the Chairman's view and we will try to reduce the profit.' Mr. Foster said something. I can't remember exactly what he said. I remember he said 'We will work with Chanda closely and reduce the profit.'"

First appellant was present at a meeting of Directors of the company on 9th November 1976 when a resolution approving payment of an interim dividend of fifteen per cent on the capital of the company was passed. The Crown alleged that first appellant would at this stage have been aware of the projected profit of the company for the 1976 year.

The company accounts showing the stocks at \$3,315,747 (which was understated according to the Crown by \$102,448) and the operating profit of \$893,511 before tax were approved by the Board of Directors held on 9th March 1977, at Suva; the accounts were signed by Vissanji and first appellant on 11th March 1977. Chanda in his evidence said:

"As accountant I can say that if correct stocks were shown and there were no write off of capital items and stores the profit would have been between \$1.1 - 1.2m.

If the correct figures for wheat stocks were used there would have been a reduction of about \$175,000 on the figure shown in accounts.

Last item, packing materials and consumable stocks were reduced by about \$35,000. Fixed assets was reduced by about \$70,000 by charging capital items to revenue."

Chanda went on leave on 10th or 11th November 1976 and had discussions with Vissanji in Bombay, India. Chanda said:

"We discussed the accounts for 1976. He said he had received the 1976 accounts from Mr. Nand whilst I was on leave and the profit up to that time was over \$900,000. He told me to discuss with Mr. Nand on my return and to implement the profit reduction scheme agreed in October. He also said that he has already written a letter to Mr. Nand confirming the scheme of profit reduction. He also told me that I

should not insist on the \$1000 C.O.I. adjustment which was due to me at that time. He told me that profit should be reduced to \$800,000 - 900,000 by reducing the stock through Gutteridge, and that more capital items should be written off to revenue. Stores items should be written off as much as possible bearing in mind that the overall yearly profit should be between \$800,000 - \$900,000."

The prosecution tendered a signed copy of a letter from Vissanji to Fane dated 19th November 1976 copied to first appellant which was found at the company's premises during investigations in May 1977; the letter reads:

" FLOUR MILLS OF FIJI LTD.

Post Box No. 977,
Near Suva Fire Station,
Valu Bay, Suva-Fiji

SUVA-FIJI
Cable: 'Filter' Suva
Phone: 23866

MONTHLY REPORT

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9 Wallace Street,
Fort, Bombay 400 001.
19th November, 1976.

My dear Vere:

Many thanks for your letter of 16th November and your observation of the profit figure dropping is quite correct.

At the rate of the monthly figures, we would be ending up the year with a profit of 1.2 million. After the Board Meeting I had a general discussion with Geoff Foster and others and we came to the conclusion that it would be too embarrassing to show this profit and therefore, we should start watering down of the profit to the maximum extent possible which would be allowed under the scrutiny of audit. Therefore, the process had been started and we have written off stores worth about \$35,000 during the month of September. On a gradual basis we would be also writing off whatever are the erection charges towards maintenance and labour expenses to the maximum extent that is possible.

Even certain items of machinery in consultation with Geoff Foster they will decide which of such items can be taken against stores and written off. Is an overall policy I have suggested to them that they should try and water down the profit to the maximum extent and if possible to bring down the year-end results to nearabout between 700,000 to 900,000%. This will be achieved by various methods by way of stock adjustment, writing off stores and write off revenue expenses against capital expenditure etc. Thus a sort of a secret reserve would be built up which would remain for rainy day.

Yours sincerely,

Vissanji

Mr. V.J.L. Fano,
Wallace Brothers Trading & Industrial Ltd.,
4 Crosby Square,
London EC3A 6AJ.

PMV/r.

cc: Mr. Shardha Nand,
Suva Fiji.

"

Chanda returned to Fiji late in December 1976 and informed first appellant of Vissanji's instructions: he also informed Gutteridge shortly before the annual stock take on 3rd January 1977 that Vissanji and first appellant required the wheat stock to be reduced "as much as possible". Gutteridge confirmed he had received such instructions from Chanda.

Gutteridge stated that on the annual stock take on 3rd January 1977, he used a tape measure weighted at one end to measure the quantity of wheat in the company's silos and bins: he called out an incorrect figure to the company's officers (including Foster) which resulted in the suppression of 698 tons of wheat. Both Chanda and Gutteridge stated that they informed first appellant of the suppression of wheat stocks and received congratulatory comments from him.

On 25th January 1977, first appellant signed a letter to Vissanji which contained a statement "The closing stock of wheat revealed an operational loss of 451 M.T. of wheat during the year!" First appellant claims that although he signed the letter he did not draft it, nor read its contents. Chanda in evidence said:

"The exclamation mark there was suggested by A.I. He told me 'put a sign of exclamation at the end of the sentence to indicate to the Chairman about the suppression of the wheat stock'. He also said 'I will write a separate letter to the Chairman explaining how and to what extent the profit in the draft account had been suppressed.'"

In January 1977 Chanda informed first appellant of his misgivings over the profit scheme and repeated these misgivings to Vissanji in March 1977 prior to the Board meeting. However, Vissanji is alleged to have reassured Chanda, and advised that first appellant would take care of matters should Chanda become involved.

A letter was received by the company from the Ministry of Commerce, Industry and Co-operatives dated 1st March 1977, seeking a review of the terms of the agreements with the company and asking for information and the annual accounts for 1976.

First appellant acknowledged receipt of the letter. On 10th March 1977 a reply was sent to the Permanent Secretary signed by Chanda (although the letter bore the reference SN:psp) stating that the operating profit was \$893,511. A letter of representation was received from the company's auditors Messrs Coopers & Lybrand on 14th March 1977 requesting that the information in the 1976 accounts be confirmed as correct. The letter required signature by the Managing

Director and Secretary. First appellant declined to sign the letter and never did. In early April 1977 the printed accounts for the year ending 31st December 1976 were sent to shareholders by Chanda on instructions from first appellant.

In April 1977 Chanda was advised by first appellant that the company would withdraw its previous offer to employ him for a further two years from July 1977. On 21st April 1977 first appellant sent copies of the company's annual accounts for 1976 to the Minister of Commerce, Industries and Co-operatives.

On 24th April, 1977 Chanda advised J. Kamikamien, a Director of the company that the profit of the company had been deliberately suppressed. Shortly thereafter Chanda informed the auditors Cooper & Lybrand of the deliberate reduction in profit in the company's balance sheet for year ending 31st December 1976. On 26th April 1977, a surprise stock take of the wheat in silos and bins was undertaken by Coopers & Lybrand which disclosed that the stocks of wheat had been understated by 700 tons approximately. On 27th April 1977 Chanda and Gutteridge were placed on temporary leave of absence: their employment by the company ceased on or about 31st May 1977. On 29th April 1977, first appellant wrote to the Ministry of Commerce, Industry and Co-operatives that the 1976 accounts are withdrawn "for further scrutiny by the auditors".

On 11th May 1977, the Directors of the company approved the accounts for year ending 31st December 1976 despite the fact that Coopers & Lybrand had withdrawn their Certificate of Audit.

On 13th May 1977, Mumtaz Ali, a Chartered Accountant, was appointed by the Minister of Commerce, Industry and Co-operatives to carry out a special audit

of the company's accounts in terms of the agreement dated 14th October 1971; Mumtaz Ali enlisted the assistance of Price Waterhouse & Co. another firm of accountants in this investigation.

After 12th May 1977 many discussions were held between the company and its auditors. Amended accounts were finally agreed and signed by Gibbons and Qionibaravi - two directors of the company - on 11th January 1978.

The case for the defence was a denial of the evidence of Gutteridge and Chanda; first appellant gave evidence and several witnesses for the defence were called.

The defence further claimed that incorrect accounting procedures had been adopted by the company.

Chanda and Gutteridge both acknowledged their involvement in the suppression of the wheat stocks; it was apparent, therefore, that they were accomplices and that virtually the whole case for the Crown depended on their evidence. Therefore a clear direction from the judge was required on the issue of corroboration, and, as to the evidence which constituted corroboration in the case of Chanda and Gutteridge.

Both appellants appealed to this Court and over fifty six grounds of appeal were argued - many of which were diffuse, repetitious and overlapping and some were without merit. We do not propose setting them out in detail as they comprise some thirty four pages and consist partly of voluminous particulars picked out from a long summing up and a number of small points some of which were immaterial.

We deprecate this prolix way of framing grounds of appeal and call attention to the words used in the judgment of the Court of Appeal (Criminal Division) in R. v. Morson (1976) 62 Cr. App. R. 236, 239:

"I will not leave this case without expressing the hope that the Bar will act responsibly before making in the grounds of appeal or in argument attacks of this general sweeping character upon a summing-up. If they be justified, it is the duty of the Bar to make them; if they are obviously unjustified, it is the duty of the Bar to refrain from making them."

We repeat, also, the disapproval expressed in Ali Hassan & Ors. v. Reginam Fiji Court of Appeal 57/1977 of the practice of subjecting a summing up to a microscopic analysis in the hope of finding some slight oversight or some inference to be drawn from a chance phrase or possible inconsequential misconstruction of evidence.

We turn now to a consideration of Ground 1(a) of the consolidated grounds of appeal which reads:

"1. THAT the trial was irregular and unfair:-

(a) because it was commenced by His Lordship the Chief Justice of Fiji and it was continued by His Lordship Mr. Justice Dyke. Once the plea was taken before His Lordship the Chief Justice and he dealt with a number of applications substantive and relevant to the trial and selected the Gentlemen Assessors he alone thereafter was in charge of the proceedings which were partly heard. The taking over of a part heard proceedings by His Lordship Mr. Justice Dyke was irregular and has caused a substantial miscarriage of justice and/or has rendered the trial a nullity."

The learned Chief Justice took the plea of both appellants, selected the assessors and thereafter dealt with a number of applications, some by the defence and one by the prosecution. An examination of the record shows that on the 8th January 1979, the informations as originally laid were read and both appellants, who were represented by counsel, pleaded not guilty; the first appellant to counts 1, 2 and 3; the second appellant to counts 1,2,3,4 and 5 - the latter two counts being referable to the second appellant alone. The Director of Public Prosecutions sought an adjournment and, by consent the trials were adjourned to 2nd April 1979, when the appellants appeared before the Chief Justice who stated:

"I shall proceed as follows: I shall first choose the assessors so that all those persons who have been summoned as prospective assessors will not be kept waiting. I shall then hear the prosecution application to amend the information. I shall next hear the defence application for further and better particulars. I shall then hear the defence application for the trial to be adjourned - during which the Court will be cleared, as material supplied with the notice is prejudicial to the trial. Finally, the decision as to the date of hearing will be delivered in open court."

Messrs. Herbert Francis Sale, Mesulame Nainoca and Ahmed Saheed Daud were chosen as assessors; the latter, applied to be discharged on the grounds that he had discussed the case, know the parties and had some preconceived ideas concerning same. he was discharged; Chate Charles Brooks was selected to replace him. The assessors, who had not been sworn, were released by the Court until the hearing of which they would be informed. The defence sought orders granting:

- (a) immunity from prosecution for a proposed defence witness - Geoffrey William Foster,
- (b) an adjournment of the trial sine die until the Criminal Sessions next after the Director of Public Prosecutions had granted immunity to Foster and
- (c) the furnishing of further particulars of count 1 and the overt acts alleged on the part of the conspirators.

The prosecution sought leave to amend counts 1, 2 and 3.

Items (a) and (b) above are dealt with in our consideration of the next ground of appeal.

The learned Chief Justice delivered his ruling on the various motions and directed that the hearing commence on Friday 6th April 1979. Defence counsel requested that the hearing commence as soon as possible and, on 5th April 1979, the hearing began before Dyke J. and the three assessors who were duly sworn: the amended informations were read; the first appellant entered pleas of "not guilty" to counts 1, 2 and 3; the company pleaded "not guilty" to counts 4 and 5. The duties of the assessors were explained by Dyke J., and the prosecution embarked upon the calling of its evidence.

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Counsel for appellants submitted -

- (a) that the trial commenced when the pleas were taken on the 8th January, 1979;
- (b) that Pratap Singh Vissanji was charged as a Co-accused with the first appellant in counts 1 and 2; and he had not been served with any summons nor appeared in court to answer the charges laid;
- (c) that the learned Chief Justice in hearing applications by the defence for immunity and adjournment, and the application by the prosecution to amend the informations, had continued the hearing of the trial which in his submission had commenced on the 8th January 1979;
- (d) Defence counsel submitted that if the learned Chief Justice had continued to preside (he having heard the motion seeking indemnity for Foster to enable him to appear as a defence witness) would have exercised the powers in section 136 of the Criminal Procedure Code (Cap.14) and required Foster to give evidence to ensure a "just decision of the Court". Accordingly an injustice occurred in Dyke J. presiding over the trial when he was unaware of the evidence Foster was likely to give as a defence witness.

We were informed from the Bar table that for some years it has been the practice in Fiji for the learned Chief Justice to open the Criminal Sessions, take

the pleas of accused persons, and if the plea is one of "not guilty" then assign the trial or trials to such other judges as are available. Counsel submitted that notwithstanding this was the accepted practice of the Supreme Court, the learned Chief Justice having heard the various motions and applications should have continued to preside over the trial.

The pleas to the counts as originally laid were taken on the 8th January 1979: counts 3, 4 and 5 were substantially amended, and on 5th April 1979 the appellants were re-arraigned, the new informations were read and fresh pleas taken on all counts. Both appellants were represented by counsel neither of whom took objection to the procedure adopted. The practice of the Supreme Court of Fiji whereby the Chief Justice presides at the opening of each Criminal Session, appears to accord with the practice of the Crown Courts in England. In the Courts Act 1971 section 6 subsection 4(a) provides:

"(4) Subject to any provision contained in or having effect under this Act, and without prejudice to the generality of subsection (3) above, the transfer of jurisdiction to the Crown Court in accordance with the preceding provisions of this section shall not affect -

- (a) the practice by which, on any one indictment, the taking of pleas, the trial by jury and the pronouncement of judgment may respectively be by or before different judges."

The learned Chief Justice heard various motions and applications - which of necessity were heard in the absence of assessors - does not, in our opinion, vitiate the hearing before Dyke J. when the appellants were re-arraigned, and pleaded afresh to the counts some of which had been amended. No evidence in the trial had been taken before the learned Chief Justice. Full opportunity was available to counsel for both appellants to raise any

objection to the appointment of the assessors.

Pratap Singh Vissanji was not a co-accused of the first appellant nor had he been charged with any offence although we concede that counts 1 and 2 were somewhat loosely worded.

Section 136 of the Criminal Procedure Code reads:

"136. Any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case....."

Counsel for appellants in support of their argument that injustice was occasioned by Dyke J. presiding over the trial instead of the learned Chief Justice cited Kulukana Otim v. Reginam [1963] E.A.C.A. 253 where it was held in considering section 148 of the Uganda Criminal Procedure Code (a provision similar to section 136 of the Fiji Criminal Procedure Code) "that if it appears to a judge that the evidence of a person is essential to the just decision of the case the judge has a mandatory duty (if the witness has not been called) himself to call the person; the duty remains even if the evidence to be called supports the case for the prosecution and not that of the accused."

Mr. Lindsay for the Crown submitted that Foster was beyond the jurisdiction of the Fiji Courts - he was residing in Australia and that no judge sitting in Fiji could compel Foster's attendance here; further Foster was mentioned in the conspiracy counts as a co-conspirator, and had he been present in Fiji he would

not have had the status of a witness - he would have been an accused. We are satisfied that the appellants suffered no injustice by reason of Dyke J. presiding over the trial, and section 136 (supra) and the principles enunciated in the case cited above have on the facts of this case no application. Accordingly, this ground of appeal fails.

Ground 1(b) concerns the dismissal by the Chief Justice of a pre-trial motion to grant an adjournment sine die. The motion sought the following orders:

- "(a) For an Order that under Section 10(2)(c) of the Fiji Constitution Geoffrey William Foster the proposed witness for the applicants SHARDHA NAND and FLOUR MILLS OF FIJI LIMITED in the proceedings herein is entitled to the same immunity and/or indemnity from being prosecuted against for his alleged complicity in the alleged offences now pending before this Honourable Court in this matter upon the same conditions as applicable to the prosecution witnesses David Michael Gutteridge and Pran Gopal Chanda.
- (b) For an Order that this matter namely the hearing of the criminal proceedings now pending before this Honourable Court against the applicants herein do stand adjourned sine die until the Criminal Sessions of this Honourable Court to be held next after the Director of Public Prosecutions has granted the immunity and/or indemnity to the said Geoffrey William Foster as referred to in paragraph (a) herein."

The present complaints are that there was a breach of the Constitution and a miscarriage of justice. Mr. Koya relied only on the second complaint whilst Mr. Sahu Khan argued both grounds. It is clear that Foster was a person who was prepared to give material evidence for the defence.

When the charge were first laid Foster had left Fiji to become a resident of Australia. The first information charged both appellants as co-conspirators with Foster. The case was so dealt with at the preliminary inquiry. The information in the Supreme Court named as co-conspirators Vissanji (who resides in India), Fane (who resides in England) as well as P.W.1 Gutteridge and P.W.10 Chanda who reside in Fiji and who gave evidence for the prosecution under immunity at the preliminary inquiry. At the time when the motion was heard there was also an application to add Foster. Foster was originally named as a co-conspirator. Counsel for the Crown advised us that, during his absence on leave, Foster's name had been omitted when the other named conspirators were joined. Counsel on his return immediately advised the other side and the application was made accordingly. The Chief Justice made the order sought.

The Director of Public Prosecutions had no present intention of extraditing Foster. He refused the request of appellants to grant immunity to Foster if he returned to Fiji. Foster was prepared to attend and give evidence only if an immunity were forthcoming. The immunity was to extend only to his visit as a witness.

The first order was sought on two grounds, namely, first that Foster was a material witness, and, secondly, since the Director of Public Prosecutions had already granted immunity to the two Crown witnesses, appellants were entitled under the Constitution to require the Director of Public Prosecutions to grant similar immunity to Foster as a material defence witness.

The office of the Director of Public Prosecutions is created by section 85 of the Constitution. It is a public office. By subsection (4) the Director of Public Prosecutions has power in any case he considers it desirable so to do:

"(a) to institute and undertake criminal proceedings before any court of law (not being a court established by a disciplinary law);"

(b) (to take over and continue such proceedings and

"(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority."

By subsection (7) it is enacted that:

"(7) In the exercise of the powers conferred upon him by this section the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority."

Section 136 is also relevant. It provides:

"136. No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court of law from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law or should not perform those functions."

Section 10(2)(c) of the Constitution provides:

"10. Every person who is charged with a criminal offence:-

(2)(e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance and carry out the examination

of witnesses to testify on his behalf before that court on the same conditions as those applying to witnesses called by the prosecution; "

The contention is that this provision, in view of the fact that the Director of Public Prosecutions had granted immunity to Crown witnesses, so qualifies the clear discretionary provisions of section 85 that a mandatory duty is cast upon the Director of Public Prosecutions, enforceable by direction of the Court, to grant a similar immunity to a witness for the defence. Section 85 does not give the Director of Public Prosecutions any powers over witnesses as such other than the usual powers of calling and examining them in pursuance of his powers to prosecute. This is by necessary implication.

Section 85 is concerned solely with the institution, taking over, continuation and discontinuation of criminal proceedings by the Director of Public Prosecutions. So long as he acts within his powers he is free from direction by the Court in respect of those powers. Section 10(2)(e) on the other hand deals exclusively with the calling and examination of witnesses. Both the prosecution and defence must have the same facilities and conditions for obtaining the attendance of and the carrying out of the examination of witnesses.

Second appellant seeks to construe the term "same conditions" in section 10(2)(e) to include the discretionary powers of the Director of Public Prosecutions under section 85 to institute or discontinue criminal proceedings. The contention goes further. It is that, if the discretionary power is exercised by the Director of Public Prosecutions in respect of a prosecution witness, the discretionary power changes its whole nature and then becomes, at the behest of the accused, a mandatory

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erty enforceable by a direction of the Court. No reason of construction permits such violence to the plain words of sections 85 and 136. The argument also creates the anomaly that no accused person has the right, however just it may be to call a person who may be vulnerable to prosecution, to invoke the power unless he also has the good fortune to have the power exercised in favour of a prosecution witness. In our view sections 10(2)(e) and section 85 deal with separate and distinct topics. Sections 85 and 136 cannot be read to be in any way controlled or modified by section 10(2)(e). The exercise of the discretion in respect of a witness is a matter which an accused may seek but not one which he can claim must, as a constitutional right, be exercised in a particular way. The Chief Justice was correct in refusing to give the direction in (a). Counsel for the Crown referred the Court to the history of the exercise of the prerogative to grant immunity from prosecution. It is to be found in the article on "The Kings Pardon" A History of English Law by Sir William Holdsworth Vol. 6 pp. 216-225. We have not referred to it since the position in Fiji has been enacted in the Constitution.

We turn next to the contention that the exercise by the Director of Public Prosecutions of his discretion in the circumstances resulted in a miscarriage of justice. Reference was made to an abuse of process, unfairness, irregularity, the right to call available witnesses and also that natural justice required the Director of Public Prosecutions to act as requested. It was not easy to follow the applicability of the various arguments to the facts of this application. A number of cases were cited for general principles but none was found exactly in point. We have held that there is no power in the Court to direct the Director of Public Prosecutions

to take the course of action sought. The Court was asked to place the Director of Public Prosecutions in a dilemma - either he exercises his discretion or the case will not proceed. This is an attempt to do indirectly that which the Court had no power to do directly. We think the Chief Justice was right to refuse to adopt this course. Then it was said that there was an abuse of the process of the Court to continue the trial. The leading case on the power of the Court to prevent abuse of its process is Connelly v. D.P.P. [1964] A.C. 1254, and in particular per Lord Devlin at pp. 1347-1354. Abuse of process is a well-known legal concept. It does not appear in ground 1(b). It was not argued before the Chief Justice. The claim again turns on an attempt to get the Court to place the Director of Public Prosecutions in a dilemma. To refuse to allow that position to develop and to allow the case to proceed in the ordinary way is not an abuse of process. Statutory provisions, rules of law or rules of practice may act to the prejudice of a party but that is no reason why a Court should adjourn a case until a condition, which it has no power to enforce, has been fulfilled, and, in particular, by converting the discretionary power of the Director of Public Prosecutions under section 85 of the Constitution in effect into a mandatory one if he wishes the prosecution to proceed.

A number of cases were cited on the duty of a prosecutor to call or make available material witnesses. These cases do not help because none involves the process of indirectly enforcing a Director of Public Prosecutions or other authority to grant an immunity. They deal with no more than the calling of, or making available or giving information concerning, a material witness or potentially material witness known to the prosecution and within the jurisdiction. Where the witness was not within the jurisdiction.

His existence, and the evidence he might give, were all known to the defence. It was not suggested that the prosecution should call him. All that stood in the way was the insistence of the potential witness that the Director of Public Prosecutions should grant him immunity - a matter which the Court could not effect except in the indirect manner already mentioned. He was liable to prosecution. Counsel for the Crown stated categorically that, if Foster came within the jurisdiction, he would be prosecuted and so could not properly be available as a witness even if in Fiji. Neither he nor the defence was entitled as a matter of law to the grant of immunity sought. It may work unfairly to an accused person but that is not the point - it is the operation of the law on a matter over which the Court has no control and the Court should not substitute its discretion in respect of section 85 for the discretion of the Director of Public Prosecutions. In any event the Court may well not be in possession of the whole of the information in the hands of the Director of Public Prosecutions or any policy or other reasons he may have for exercising or not exercising the discretion granted by the Constitution.

It is conceded that the Courts have wide powers of adjournment and on terms if thought fit: vide sections 242 and 265 of the Criminal Procedure Code. That does not entitle a Court to deprive, either directly or indirectly, the Director of Public Prosecutions of a power which the Constitution says is vested in him and is discretionary and not subject to direction of the Court. Counsel referred to section 136 of Criminal Procedure Code, which contains a mandatory provision under which the Court must call an available witness. Foster was only conditionally available. We have already dealt with that condition.

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Lastly, reference was made to the rules of natural justice. This appears to be an attempt to put this Court to enter upon a review of the exercise by the Director of Public Prosecutions of his discretionary powers under Section 85. If appellants desired to attack the exercise of the powers of the Director of Public Prosecutions and to force his hand on any ground it was open for them to do so by appropriate action either before or after the application for adjournment.

The motion for adjournment was heard on April 4. The hearing of evidence did not conclude until May 16 and, if necessary, further adjournments could be sought. The justice of granting such further adjournment could be determined at the time. The Director of Public Prosecutions would be the defendant. All questions of the propriety of his actions arising under the expression "natural justice in good faith and according to law" could be properly put before the Court and considered. The limitations imposed by section 136 of the Constitution could also be determined.

Mr. Koya conceded that, if this ground succeeded, any adjournment ought to be subject to an appropriate proceeding being brought by appellants to determine whether the refusal of the Director of Public Prosecutions should be set aside and immunity granted as sought. We are not prepared to adopt such a course at this late stage. There is insufficient material before us to make any determination on the ground of "natural justice" even if we thought it appropriate (and we do not) to argue the question on appeal.

In our opinion it has not been shown that the Chief Justice was wrong in refusing the adjournment either on the grounds then put forward or upon the matters urged in this Court. This ground fails.

In arguing ground 1(c) counsel for both appellants submitted that there was a substantial miscarriage of justice in that no member of the Indian race was chosen to act as an assessor upon his trial, he, being an Indian.

It is alleged in the ground of appeal that as a result this "constituted a breach of the well established practice and policy of the Supreme Court in Criminal Trials in Fiji".

An Indian - one Ahmed Saheed Daud - was selected by the Chief Justice on 8th January 1979, to act as an assessor but sought to be released upon the grounds that he had discussed the case and knew the charges: he was discharged and Chute Charles Brooks replaced him as an assessor. The assessors were released until the hearing on 5th April 1979. The same counsel appeared for the first appellant on 8th January 1979 and 5th April 1979, and no objection was made either, to the Chief Justice on the 8th January 1979 or, to Dyke J. on the 5th April 1979, regarding the appointment of any of the assessors; nor, was there any request that a member of the Indian race be included among the assessors. For approximately three months the names of the assessors were known to the defence, and, that no Indian was included. From the 8th January 1979, up to the time that the assessors were sworn on 5th April 1979, counsel could have objected to the selection of the assessors; further, they could have requested that a member of the Indian race be included as an assessor. The defence did none of these things.

In Iliesa Vula Waganituinayau v. Reginam 16 F.L.R. 84 it was argued that the three assessors appointed to sit with the trial judge would, because of their appointment, or of the positions previously held, be biased against the appellant. The trial

involved the misappropriation of funds and it was argued that the assessors because of their training would be likely to interpret the evidence unfavourably against the appellant which could result in an unfair trial. The Court said at page 85:

" In our view no such inference can be drawn from the facts surrounding the present and past occupations of the assessors. In any event it is perfectly clear that appellant had ample opportunity of raising at or before the trial any objection he might have had to all or any of the assessors. It was conceded by counsel that a list of proposed assessors is always handed to counsel for the accused before the trial, and no person to whom counsel has objected is appointed an assessor. Counsel for appellant had seen the list before the trial and took no exception to any names appearing on it. Appellant was present in Court when the assessors were called, and could even then, before they were sworn in, have submitted that one or more of them should not be appointed. He was, however, silent."

Defence counsel acknowledged that if counsel objected to any one or more of the assessors or had requested that a member of the Indian race be included prior to the assessors being sworn, appropriate steps would have been taken to meet the objection or request. In this case despite the fact that counsel had nearly three months to consider the position no objection was made, as to the suitability or otherwise of the names assessors. Mr. Koya in developing his argument submitted that the fact that a member of the Indian race was not sitting as an assessor went to the root of the matter and that the trial had not been properly constituted; further, that the practice of the Court in having at least one member of the same ethnic group as the accused as an assessor in a criminal trial was elevated to a custom which had the force of law; that any breach thereof would render a trial a nullity.

A direction signed by the learned Chief Justice dated 9th March 1979, placed before this Court reads:

"

DIRECTIONSASSESSORS

(Section 251(1) of the Criminal Procedure Code)

The Chief Registrar or the Deputy Registrar shall ordinarily, at least seven days before the first day of any Criminal Sessions, summon from among the persons whose names appear on the List of Assessors for the place at which the trials are to be held a sufficient number of Fijians, Indians and Europeans as appear to be necessary to sit as assessors, having regard to the nature of trials and the race of the accused persons.

Such persons need not be summoned in rotation in the order in which their names appear in the said list.

The Judge presiding at the opening of the Criminal Sessions may assign to each trial such of the persons so summoned as he may see fit, subject to the provisions of section 246(2) of the Criminal Procedure Code.

Dated at Suva this 9th day of March 1979.

NB

As capital punishment has been abolished the number of assessors need not be increased in murder trials.

(Sgd) Clifford Grant
Chief Justice

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The direction does not, in our view, establish as a custom, or as a matter of principle, that it is essential in the interests of justice that the assessors selected for a trial include a person of the same ethnic group as the accused. On the contrary, the discretion is vested solely in the Judge presiding at the opening of the Criminal Session. It would be wrong, in our view, to fetter or restrict the right of an accused person to object on such grounds as he, or his counsel, thought fit. In many cases an accused for a variety of reasons may prefer that no member of the same ethnic group as himself be included as an assessor. Further, if the accused was of mixed blood, or belonged to an ethnic group other than Fijian, Indian or European, considerable problems could beset a judge in selecting assessors. It is preferable to have no mandatory rule: the existing practice whereby an assessor to whom counsel for the accused objects will not normally be appointed, coupled with the right of an accused or his counsel to make representations to the Court to ensure, should he so desire, that the assessors include among their number at least one member of the same ethnic group as himself, fully protects the rights of an accused. Full opportunity existed for the appellants or their counsel to make such submissions or request, but counsel chose to remain silent.

We would add that the question of suitability of the appointment of assessors should be dealt with at the commencement of the trial.

Accordingly, we are satisfied that no irregularity occurred nor was there any miscarriage of justice. This ground of appeal fails.

Corroboration was dealt with under a number of the grounds of appeal. There is no need to

specify each one. It is our intention to deal with general directions given in the summing up and then to turn to specific parts of the evidence which were treated as matters capable of amounting to corroboration.

The witnesses fell into two categories. First, Gutteridge and Chanda who were clearly on the prosecution case co-conspirators and thus accomplices, and, next, three other witnesses who, so appellants claimed, had an interest which required the judge to give a warning in respect of their evidence. They will be dealt with after we have considered Gutteridge and Chanda.

The judge told the assessors that although there is no rule of law forbidding them from convicting on the uncorroborated evidence of accomplices if fully satisfied of its truth, nevertheless they must always be warned of the dangers of doing so "and of the desirability, if not the necessity, of looking for corroboration". He then dealt appropriately with the degree of danger and said:

"But there is no doubt that it is most desirable that you look for corroboration."

The underlining is ours. Further comment on this is not necessary at this stage. The judge then correctly said that the assessors should first satisfy themselves that the accomplice is worthy of belief. If he was not then no question of corroboration arose, but that in judging his credibility not only his ^{evidence} but all the evidence in the case. He then added:

had to be taken into account

"..... and it has been said that anything that adds credence to the evidence of a witness also serves to corroborate that evidence."

It appears that the judge has, without explaining the difference, used the terms corroboration and corroborate in two different senses and illogically brought in all the evidence at this early stage. However, he then went on to define corroboration as follows:

"What you should look for is some independent testimony tending to confirm the commission of the crime and tending to confirm the accomplice's evidence in some material respect and the implication of the accused in the crime."

The judge then stated that there is no general rule that, depending on the circumstances, one accomplice cannot corroborate the evidence of another and added:

"Without going into the circumstances of this case, I suggest that it would be nevertheless safer for you to look for other corroborating."

There was no room in this case in respect of these two accomplices for self corroboration and the assessors should have been plainly told so and not that it was safer to look elsewhere. Then immediately followed this passage:

"Crown Counsel has indicated to you various pieces of evidence that could amount to corroboration and one other possible source of corroboration is in the evidence of A.1 himself. Lies told by an accused can also amount to corroboration."

What Crown counsel had indicated we do not know because no further reference was made from which the matters can be considered. It was the duty of the judge himself to point out the presence of evidence and not in any

way permit the assessors to have resort to their recollection of what Crown counsel might have said. He did himself refer to specific items but we do not know whether there was some additional matter in counsel's speech.

The extent to which lies might be considered as corroboration and the pieces of evidence which might be considered under this head were not further expounded and the assessors, with some exception later dealt with, were left with the bare direction. This was a serious defect. In Tumahole Bereng v. R. (1949) A.C. 253, 270 it was said by the Privy Council:

" Nor does an accused corroborate an accomplice merely by giving evidence which is not accepted and must therefore be regarded as false. Corroboration may well be found in the evidence of an accused person; but that is a different matter, for there confirmation comes, if at all, from what is said, and not from the falsity of what is said."

This general statement, which is undoubted law concerning the general rejection of the evidence of an accused person, has to be further considered in the light of subsequent decisions where specific lies told in Court may, in clearly defined circumstances, be considered on the question of corroboration. The cases are discussed at length by the New Zealand Court of Appeal in R. v. Collings [1976] 2 N.Z.L.R. 104 and particularly on pp. 115 et seq. No specific alleged lie was so treated in the summing up so the principle laid down in Tumahole Bereng (supra) will apply.

We cannot too strongly stress that it is important to state the rule as to corroboration in simple language which can be understood by the assessors. It should be made clear that it is dangerous to convict

on uncorroborated evidence. The warning ought not to be watered down by such expressions as "safer", "wiser", "highly desirable", "desirable" or similar expressions. If the assessors are fully satisfied of the truth of the evidence after taking the warning into account then they are told that they may convict. The pieces of evidence which are capable of constituting corroboration ought to be pointed out by the judge who should also state that no other evidence can be considered by them on this topic and the assessors then directed that it was for them to decide whether or not they believed that evidence and were satisfied it contained the two limbs of corroboration which had earlier been defined for them. It is not necessary that the word "corroborate" should be used but if it is care should be taken to see that there can be no confusion with the popular meaning of that word. It is possible the judge himself on at least one or perhaps two occasions may have fallen into that error. Synonyms which have been approved by the House of Lords are "support" and "confirmation": vide D.P.P. v. Hester [1972] 3 All E.R. 1056, 1070 and 1073. Reference may also be made to D.P.P. v. Kilbourne [1973] A.C. 729, 741, 758 and 759.

After discussing corroboration generally the judge went on to deal with the evidence of the two accomplices, and, without repeating the warning earlier given, proceeded to deal with corroborative evidence.

First he dealt with Gutteridge in relation to evidence that on January 3, 1977 he reported to first appellant the manipulation of the stock-taking by falsely reducing the actual stock by 698 tons. Although the summing up refers only to the understatement of wheat stocks by Gutteridge it is clear that the judge was dealing with Gutteridge's evidence that the manipulation had just been effected and reported to first appellant. This was a crucial issue. First appellant in evidence denied that on that date any such

conversation took place. The terms "by 698 tons" and "about 700 tons" were both used. The judge referred to the following pieces of evidence:

- (1) Exhibits 1 and 2. These were details of wheat stocks in the silos and bins on January 3, 1977. They were dockets prepared by two accomplices, Gutteridge and Foster, and first appellant had no part in their preparation. There is no independent evidence that they were discussed with first appellant.
- (2) The calculations of two witnesses who carried out a check at the end of April 1977 after the alleged fraud had been disclosed, and,
- (3) That first appellant supported the figure of about 700 tons.

Item (3) was not a correct statement of fact. First appellant did make his own check some time in May 1977 and came to a theoretical figure of an understatement of 576 tons as on December 31, 1977. The judge then went on to say:

"The purpose behind the understatement, and the assertion that the instructions came from Vissanji, albeit through Chanda, you might think must receive strong corroboration from the letter from Vissanji to Fane copied to Sharda Nand dated 19.11.76 (Exhibit 42)."

It is not clear what this means except that in some way the two items were connected. They were not unless Chanda's evidence does that. On this topic Chanda's evidence cannot be so used, and, in particular, to connect first appellant with Vissanji. However, whilst

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items (1) and (2) might support a shortage of 698 tons on January 3, 1977 as stated by Gutteridge they fail to pass the test of implicating first appellant and therefore could not in law amount to corroboration and should not have been so put to the assessors. Even if the calculation of 576 tons did lend support to Gutteridge's assessment of a shortage of 698 tons it did not in any respect implicate first appellant in the fraudulent scheme to make this reduction and so did not amount to corroboration. Unfortunately, although the judge did not say so, this reference to about 700 tons also appears in the evidence of Chanda. There was a danger that the assessors might also apply this direction when dealing with his evidence.

The judge then went on to deal with the evidence of Vijay Singh, the assistant accountant, who said he did not hear the conversation about the suppression of wheat stocks deposed to by Gutteridge and Chanda. He said this was a straight credibility issue which the assessors will have to resolve and referred to evidence which tends to show that first appellant might not be credible. Since this was being dealt with during the directions on corroboration there was a danger that the assessors might apply the earlier general, but insufficient, direction on lies, and conclude that, if this was a lie, it was corroboration. The judge then turned to Gutteridge's evidence concerning a Board meeting in March. He said:

" (First Appellant) A.1 has denied this conversation and so you have another conflict to resolve. But if you accept what Gutteridge said is it not evidence showing A.1's knowledge at least of the plan?"

This also might be referable either to the direction on lies or matter which lends credence to the evidence of Gutteridge. It is not clear whether the judge had completely passed from possible corroboration because he had been dealing with Exhibit 42 and then immediately

passed to the corroborative effect of Exhibit 5 and ended up with the passage:

" So I suggest that there is already quite a bit of evidence for you to consider against A.1 and Flour Mills of Fiji on the evidence of Gutteridge alone, taken together with the corroborative evidence I have indicated."

The assessors appear to have been left to separate from this part of the summing up what is corroborative and what is not. The direction should have been clear so that no mistake might arise in the minds of the assessors.

We turn next to deal with the letter dated November 19, 1976 and set out earlier sent by Vissanji to Fane and produced as Exhibit 42 which appellants claimed was not admissible, and that, in any event, it did not amount to corroboration. It purports to be a duplicate original, signed by Vissanji, of a letter he addressed to Fane. It has a notation at the bottom "c/c Mr. Sharda Nand Suva Fiji". The letter was found on May 14, 1977 by one of the chartered accountants who assisted Mumtaz Ali in a special audit of the company's accounts. He had the letter photocopied shortly after its discovery. The letter had the words "Monthly Account" printed above the typescript. First appellant handled monthly accounts and dealt with them as part of his duties. Exhibit 42 was found in a file which was not in the office of first appellant but in a different part of the premises. The address at the top of the letter is, it is common ground, the Bombay address of Vissanji. It is also common ground, that Fane was a director who resided in London. A London address follows his name. When first appellant was questioned by his counsel he denied seeing it prior to the special audit and said the relevant file was not kept in his office and that he did not recollect ever seeing that file. First appellant

did not challenge the authenticity of Exhibit 42 - he went no further than to deny having seen it.

The question of "embarrassment" in showing "a profit of 1.2 million" had been under discussion for some time as also had the process of writing down of certain items. The matters discussed were part of a process that had been earlier discussed and put in train by the company including first appellant. Vissanji and Fane were closely associated with it. These were all matters essential to the preparation of annual accounts. Exhibit 42 discussed in some detail a scheme upon which first appellant had embarked under instructions from Vissanji and it sets out the means by which the alleged balance sheet was ultimately falsified. This was a communication between two of the alleged conspirators, a duplicate original of which was sent to a third alleged conspirator. It refers to what has been done and what further steps are contemplated, and, in particular, "stock adjustment" which is the core, so the Crown alleged, of the conspiracy charge. The steps outlined were in fact later carried out.

Apart from any evidence from Chanda there was ample evidence from which it could be inferred that this was an authentic duplicate original letter signed by Vissanji which would in the normal course of business come to first appellant's notice. If first appellant had challenged the authenticity of the letter and not just denied that he had received it the position might have been otherwise. The contents are in accord with known steps taken in respect of adjustment of items which would appear in the annual accounts.

The assessors ought to have been told to disregard the evidence of Chanda identifying Vissanji's signature but in the circumstances set out above this is not of any real importance since first appellant himself impliedly accepted the letter as Vissanji's. We are of opinion that Exhibit 42 was properly admitted and as being capable of being treated as corroboration.

The first reference to corroboration of Chanda appears in respect of Exhibit 34 which is a letter dated November 20, 1975 written by Woodbridge - the predecessor of first appellant - to Vissanji. The judge said:

"..... you will note that the letter from Woodbridge to the Attorney General's personal friend Vissanji dated 20.11.75 Exhibit 34 says that Sir Vijay Singh was to be kept in ignorance of the true position until after the negotiations were finalised - which incidentally you might consider to be some corroboration for Chanda's story because the alleged conversation took place after those particular negotiations were finalised and Sir Vijay Singh is alleged to have said 'Now that you have the formula agreed for 1976, what would be the profit for the year.'"

Exhibit 34 could not possibly implicate first appellant who did not join the company until October 1976. The position might be different in respect of second appellant.

The judge next referred to the mass of correspondence put in by the prosecution some of it going back to 1972 or 1973 showing the background of the case and, the manoeuvres and terrific pressures (sic.) kept up to get a favourable formula. He then said:

"They can only be used as background, evidence of motivation, showing awareness of the various ways of suppressing profit, and for the purpose of attacking the credibility of witnesses. And they cannot be used against A.1 at all - except to a much more limited extent where they might be used to go to his credibility, because they date from a period before he joined the company.

But you might think that they also go some way towards corroborating Chanda in his description of the Company's activities and preoccupation with profit particularly in relation to the formula negotiations and the impending further negotiations in 1977."

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The judge then made a distinction between first appellant and the company. These documents could not implicate first appellant in any way which was apparent from either the evidence or the summing up however much they might apply to second appellant. The assessors should have been so directed. The passage is far from clear and it is difficult to see how they go to his credibility.

It is now necessary to set out a fairly long passage in the summing up. The judge said:

" However the knowledge of A.1 is on rather a different basis. Proof of that rests in the evidence of Gutteridge and Chanda. I have dealt with corroboration of Gutteridge's evidence directly implicating A.1. I have dealt with corroboration of Chanda's testimony when it comes to the knowledge of and participation by the Company. With regard to A.1 the corroboration of Chanda's evidence implicating A.1 is more by implication. The monthly accounts or variance sheets sent to Vissanji, the telexes sent to Vissanji on the subject of the accounts, the letter of explanation of the draft of the annual accounts sent to Vissanji, all under the authority and signature of A.1; implying knowledge of the true position of the accounts, because he could hardly fail to realise the full implications of those accounts, unless he deliberately shut his eyes. Chanda said that A.1 discussed the accounts and knew what was involved. We said that A.1 even corrected some of the items - at least in the letter explaining the draft annual accounts, and put an exclamation mark next to an item referring to operational loss so that Vissanji would know that he had to read that item in relation to his knowledge that the wheat stocks had been understated. That letter of 25/1/77 is Exhibit 46."

The use of the expression that "implicating A.1 is more by implication" is not very illuminating and would not help the assessors in their task. We have underlined one passage. It is not permissible to have regard to the

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evidence of Chanda on the question of corroboration of his evidence. The documents themselves must involve first appellant or it must appear from some independent evidence that they not only involve first appellant but also that they implicate him in the fraud alleged. When some of the documents mentioned are examined and the evidence considered it is clear that much again depends on the evidence of Chanda to find anything which might implicate first appellant. It is true that Vijay Singh, the accountant, had some discussion with first appellant about the monthly account for October 1976. This was when Chanda was away. Vijay Singh said he drafted the letter to Vissanji and that first appellant had altered the word "perused" to "scrutinized" in reference to Foster's part in respect of this account. It was important that the assessors should be carefully directed on these documents to show where they implicated first appellant independently of the evidence of Chanda. In this regard admissions made by first appellant may also be taken into account but any such admission ought to be related to the particular document to which it referred. The claim that first appellant deliberately shut his eyes may well be the key to first appellant's involvement but this depends to an extent, not made clear, on Chanda's evidence. The statement that all the documents referred to were under the authority and signature of first appellant ought to have been carefully related to each document to show how it was either under the authority or (we will make it alternative rather than cumulative) under the signature of first appellant. A signature is a plain token of acceptance - authority requires some extraneous evidence which, on this question, cannot come from an accomplice.

We will deal with Exhibit 46 separately but in our opinion the direction on the other documents was insufficient and unsatisfactory and the judge erred in not carefully eliminating the evidence of Chanda in considering these documents. His evidence was irrelevant

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because the issue was whether this material, not in itself clearly defined and explained, confirmed his testimony in the special sense of corroboration of an accomplice. The judge should have taken care to see that no material, which did not measure up to this test, was before the assessors on this point. It was not sufficient to give a general description of the documents and to leave the assessors without further assistance. In particular as an example first appellant said in evidence:

" I recall saying M.F.I. 2 was kept in my office. (Shown document). That is my writing on it. That is the telex I received from Bombay I referred to. It comes from Vissanji dated 7.2.77. Vissanji refers to p. 3 item 4(d) 'closing stock of wheat revealed an operational loss of 451 tons rather surprising. Please enquire with Gutteridge why should there be milling loss when it should be milling gain.' There appears to be handwriting next to that. There is an exclamation mark. None of it is in my handwriting. I recognise it as Chanda's handwriting. This is the first time I have seen it. I didn't see it before. The telex with those words on it was not shown to me. I'm not sure the telex is in the right file.

I sent it to Chanda with no instructions."

The telexes, whilst referred to in evidence, were never produced so that the assessors could examine them. It was also not enough simply to refer to monthly accounts and variance sheets en bloc.

This direction is clearly wrong. The evidence of Chanda could not be considered on this head. The documents ought to have been put to the assessors as exhibits which they could examine - evidence of the contents of existing documents was not permissible. The manner in which they could be ascribed to first appellant should have been explained as also ought the

respects in which they might be considered to be implication of first appellant in the charges made.

Importance was attached to Exhibit 46 which was a letter dated January 25, 1977 sent to Vissanji by first appellant together with the draft annual accounts. These accounts are the basis upon which it is claimed that false figures, understating the wheat stocks, were included after manipulation of the measurements took place on January 3, 1977. The letter Exhibit 46 was signed by first appellant and contains three pages of normal comment about which no importance is attached except that on page 3 the following appears:

(3) Manufacturing Trading and Profit
& Loss Account

(1) Wheat cost

- (a), (b) and (c) (deal with items not relevant)
- (b) The closing stock of wheat revealed an operational loss of 451 MT of wheat during the year!

In itself paragraph 3(d) is innocent because it refers to a matter of common concern, namely, operational losses, but Chanda said that the exclamation mark was used by first appellant and that it signified to Vissanji the fact that the scheme for understating the wheat had been put into effect in the annual accounts. This if true, clearly implicated first appellant. On the question of corroboration, Chanda's evidence must be put to one side. The question is, putting aside Chanda's evidence, does the inclusion of the exclamation mark, singular in the long letter, carry some significance of itself in that context which implicates first appellant in the crime or crimes charged? It may well be that manipulation of wheat stocks could affect operational loss but that does not give the words "operational loss"

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such a significance without the evidence of Chanda. however striking, unusual or even suspicious it may be for an exclamation mark to be used only on that item. The quantity of 451 tons does not coincide with the figures of alleged falsification and appears to have no special relationship with it. Some such figure was bound to emerge from the accounts but the question is how did it signify complicity.

First appellant deposed to discussions on operational loss and the efficiency of the mill and explained the figure of 451 tons. Attention should have been drawn to the evidence. There was even at this time some further action taken on operational loss as appears from evidence earlier cited. Even if the mark were to draw attention to the item it may be that such a loss might merit an exclamation mark. Of itself it was not open to the construction put forward by the judge.

Later in the summing up reference was again made to Exhibit 46. The judge said:

" And you might consider Exhibit 46, and Chanda's explanation about the exclamation mark in the same light. If you do believe that A.1 knew what he was signing, would that not be corroboration for Chanda's evidence?"

First, this question includes the evidence of Chanda which ought to be excluded since it was his evidence which required corroboration, and, secondly the question really is: If you disbelieve first appellant does not that corroborate Chanda's evidence? This latter question is not permissible: vide Tumahole Bereng's and Collings' cases (supra).

In our opinion therefore Exhibit 46 was not corroborative for the reasons stated above.

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The judge dealt with Chanda's evidence during the critical period from October 1976 at least till April 1977 and referred to Exhibit 42 as very strong corroborative evidence and then after referring to certain matters he said:

"But in all these matters it is generally Chanda's word against A.1's word except for certain pieces of evidence that you have to consider, together with improbabilities and you may think lies told by A.1 in his evidence."

A danger arises here, first, since the judge stated to the assessors that the evidence of Chanda, if believed, showed first appellant was involved and secondly they were invited to take into account unspecified lies they might think were told by first appellant in his evidence. This was a direction in which corroboration was being discussed and it is clear that it was an invitation to the assessors generally to see if they found any lies, and if so, they might be used as corroboration in determining Chanda's credibility. This passage has a further serious defect in that it includes Chanda's evidence when considering the question of corroboration. This was not a proper direction on the use of lies. Although the direction on Exhibit 42 was correct it was wrong for the judge to supplement it by a casual reference to unspecified lies told in evidence which lies could be judged by the use of Chanda's evidence. The question was whether or not Chanda's evidence was corroborated so his evidence could not be used to determine if lies were told by first appellant.

Counsel for appellants also challenged the validity of the admission of Exhibit 5 as corroboration. It is a copy letter written by Gutteridge and sent to the chairman through first appellant. It is dated April 4, 1977. According to Gutteridge it sets out the true picture and gives the correct figures under the heading "Actual" and "Adjustment". Mumtaz Ali

said he confronted first appellant with this letter when first appellant said he knew of it and knew of its contents although the significance of its contents had escaped him at the time.

Exhibit 5 was capable of being treated as corroboration but the assessors should have been told to ignore the evidence of Gutteridge and to consider only the evidence of Mumtaz Ali and first appellant. The judge made considerable use of Gutteridge's evidence when discussing this exhibit. Only if they accepted the evidence of Mumtaz Ali alone could Exhibit 5 be accepted as corroboration. It was an error on the part of the judge in failing so to direct the assessors.

Lastly, counsel for appellants raised the question whether a warning should have been given in respect of the witnesses Mumtaz Ali, Dickson and Lucie-Smith on the ground that they had some interest that required such a step to be taken. We are of opinion that this objection has neither merit nor substance. In our opinion, therefore, the summing up on the whole question of corroboration was thoroughly unsatisfactory and must lead to the quashing of the convictions unless the proviso to section 23(1) of the Court of Appeal Ordinance (Cap. 8) can be applied. In view of the conclusions which we have expressed we do not propose to deal with further grounds of appeal although we wish to make some observations on the issue of conspiracy.

Three of the counts charged conspiracy and the case called for a full definition or description of the crime. Instead the learned judge confined himself to two brief passages which appear almost to be in the nature of a side wind. The first is -

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 "But that is immaterial, on these three counts at least, if you are satisfied that there was a conspiracy, that is a venture, with a common intended purpose by two or more of those persons mentioned in the charge, to undervalue the wheat stocks, to reduce the operating profit of the company, and that this venture was embarked upon, e.g. by Gutteridge falsely measuring the wheat stocks, by the employment of the other devices, such as writing off usable stores, and putting capital expenditure down to maintenance, and the preparation or publication of accounts intended to reflect the resulting reduction in profit, then that is sufficient for the purpose of the prosecution case. There must of course be the necessary fraudulent intent, and you must be satisfied on this point, but I suggest that once you have decided that there was a conspiracy it is not a big step to decide that the purpose was fraudulent."

The second, used in distinguishing counts 1 and 2 from the others, was -

"These two counts are not conspiracy charges, where an agreement to effect an unlawful object constitutes the offence....."

With respect, these are meagre directions in relation to an offence of which mens rea is an element and in which the extent of the knowledge of one of the accused and indeed one of the accomplices is among the issues. It is a course fraught with risk to rely on discussion of the evidence to remedy gaps in the direction. On one ground of appeal it was contended that the conspiracy charges were laid under the wrong paragraph of section 221 of the Penal Code (Cap. 11).

We agree with appellants counsel that the summing up on this subject was in the circumstances of the case lacking in clarity and particularity, though had this stood alone as a defect we do not say it would necessarily have been fatal to the convictions.

We turn now to the important question of the proviso.

Section 23(1) of the Court of Appeal Ordinance (Cap. 8) enacts that notwithstanding that certain grounds of appeal may have been decided in favour of an appellant the appeal may be dismissed if the Court considers no miscarriage of justice has occurred. This appeal in respect of both appellants turns on the credibility of the first appellant on the one hand and that of two accomplices on the other hand on important central issues on which they were in direct conflict. There were substantial deficiencies in the general directions on law relating to corroboration, and, in particular on the use to which lies might be put. Some important individual documents were wrongly treated as capable of being considered as corroboration. The same occurred in respect of a number of documents or matters dealt with as a single item of corroboration. On reading the summing up as a whole there were other matters of lesser concern. The effect, if the jury accepts evidence not amounting to corroboration, is that the warning may then be disregarded. In R. v. Lewis [1937] 4 All E.R. 360, 364 Lord Hewart L.C.J. said:

"The question for this court is: Does there exist in this case corroboration of such manifest cogency that the conclusion is not to be resisted that the jury, properly directed, would certainly have arrived at the same conclusion? Evidence there was, strong evidence there was, but, in the opinion of this court, the evidence was not so strong as to entitle us to say that the jury must inevitably have convicted if the chairman had not inadvertently omitted to give a proper direction. In such circumstances, we are bound to allow this appeal, and to quash this conviction."

The exact point arose in R. v. Ridgway [1949] N.Z.L.R. 269, 272, where the New Zealand Court of Appeal said:

"The jury was given the customary warning of the danger of convicting upon the uncorroborated evidence of the girl. This has been followed by an erroneous statement that certain evidence was corroborative. We think it would be dangerous, in the circumstances of this case, to speculate that the jury relied upon that which is now claimed to be corroboration but to which their attention was not drawn, instead of upon that upon which the Judge had misdirected them. For these reasons, we are of opinion that the appeal should be allowed and the conviction set aside."

The case of Reeves [1979] 68 Cr. App. R. 331 at p.334 is also apposite. After a careful review of all relevant considerations we are unable to say in view of the importance and character of the errors that no miscarriage of justice has occurred.

Therefore, in respect of the first appellant we quash the convictions on counts 1, 2 and 3 and set aside the sentences imposed; in respect of the second appellant we quash the convictions on counts 4 and 5 and order that the fines and costs be repaid.

There was a strong body of evidence upon which a court with assessors properly directed might well have convicted both appellants. We are mindful that the appellants have undergone a long and arduous trial, but we believe in view of the importance of the issues involving as they do, the public of

Fiji, that the interests of justice will be served by an order for a retrial of both appellants.

We order accordingly.

(Sgd.) T. Gould
VICE PRESIDENT

(Sgd.) T. Henry
JUDGE OF APPEAL

(Sgd.) B.C. Spring
JUDGE OF APPEAL