**IN THE HIGH COURT OF FIJI**
**AT LABASA**

**APPELLANT JURISDICTION**

**CRIMINAL APPEAL NO. 5 OF 1995**

**BETWEEN : SATYA NANDAN** t/as
**SATYA'S FURNITURE AND HARDWARE**

**APPELLANT**

**AND : THE COMMISSIONER OF INLAND REVENUE**

**RESPONDENT**

Mr A Kohli for the Appellant
Mr A Bale for the Respondent

## JUDGMENT

On 1st June 1994 the appellant was charged in the Magistrate's Court at Labasa with the following offence:-

> ***STATEMENT OF OFFENCE***
>
> ***FAILING TO DELIVER PARTICULARS AS REQUIRED BY THE COMMISSIONER OF INLAND REVENUE CONTRARY TO REGULATION 21 OF THE INCOME TAX [EMPLOYMENT] REGULATIONS AND SECTION 93(2) OF THE INCOME TAX ACT CAP 201.***
>
> ***PARTICULAR OF OFFENCE***
>
> ***SATYA NAND trading as A. SATYA'S FURNITURE & HARDWARE did not on or about 28th February 1993 at Labasa in the Northern Division and on other days between that date and 23 May 1994 fail to deliver to the Commissioner of Inland Revenue Form p4, Annual***

***Summary of Emoluments paid and tax deducted in duplicate together with the triplicate copies of Salary and Wages Slips in respect of his employees for the year ended 31st December 1992 as demanded by the Commissioner by his letter posted to the said SATYA NAND on 23rd December 1993 which failure the said SATYA NAND still continues.***

After trial the learned Magistrate held that the prosecution had proved the charge against the appellant beyond reasonable doubt and found him guilty.

He was convicted, and on 2nd December 1994 was sentenced to a fine of $1,282 ($2 per each day for 642 days) and in default of payment of fine to be sentenced to nine (9) months imprisonment.

The appellant has appealed against conviction and sentence upon the following grounds:

1. ***That the Learned Trial Magistrate erred in law and in fact in failing to directing his mind to the standard of proof and onus of proof required.***

2. ***That the Learned Trial Magistrate erred in law and in fact in admitting the affidavit of a potential witness in lieu of oral evidence.***

3. ***That the Learned Trial Magistrate erred in law and in fact in deciding that requirements of service had been complied with.***

4. ***That the sentence imposed is harsh and excessive having regard to the circumstances of the case.***

On ground I Mr Kohli referred the Court to the learned Magistrate's statement that *"if the accused is not the person liable to lodge the returns as requested he could show that easily"* (page 27 of Record) Mr Kohli says that *"that is not the law"* but *"that it is incumbent to serve on correct person"*. The proof he says has to be proof beyond all reasonable doubt as in a criminal case. It is not one of those cases where the onus shifts. He referred to various discrepancies in the name and description of the appellant by reference to pages 11, 37 and 43 of Record.

In reply to this ground, Mr Bale argued that this is not a prosecution regarding Return; it is regarding P4-1 (Salary and Wages). This is regulated by Regulations 21 of the Income Tax (Employment) Regulations. The onus is upon the employer to lodge. The offence is

under S.93 of the Act. A letter was sent on 23 December 1993 "advising" (p.39 of Record) of the failure to send and its consequences.

On change of name he says that the same information is there as in all the documents except the registration form where it says *"Satya Anand"* whereas the charge says "*Satya Nand"*. There is a "*common theme"* and the discrepancy, if any, goes to form and not to substance (section 122(d) of Criminal Procedure Code). However, appellant was present in Court on three occasions which shows he is the person charged and he not having raised any objection to it before. He did not even give evidence. After lodging the forms for seven years since 1985 he now turns around and says that he is not the person in the charge.

On ground 2, Mr Kohli says that the Respondent is relying on service by post under section 50(1) of the Income Tax Act. Even so, he says *"they must come and give oral evidence"* and he *"could have cross-examined"*. Reference was made by him to sections 44 and 50 of the Act which provide for modes of service. In the latter section reference is to service by registered post.

Ground 3 has already been covered.

Ground 4, he says that the sentence is harsh and excessive.

In reply to ground 2, Mr Bale says that by affidavit the Respondent establishes whether there has been a compliance with the letter of demand. He argues that since regulation21 puts the onus on the employer (the appellant in this case) to lodge then the Respondent does not have to prove anything and the said affidavits are sufficient. In answer to a question by the Court he said that the Respondent does not have to send a reminder of demand.

On ground 3, he said that the appellant was present in Court and he had previously lodged the form. He said that since they do not have to send a demand *"that is why simply posted"* and not by registered post. He further submits that there is no need to send any forms for they are already with the employer (being for wages and salary). He refutes the argument that the appellant has been incorrectly charged.

On ground 4, Mr Bale says that the money's deducted from employees are trust moneys. The Court has, as it states exercised leniency in sentencing in the circumstances of this case.

I shall now deal with the various grounds of appeal.

The appellant is charged under Regulation 21 of the Income Tax (Employment) Regulations and under section 93(2) of the Income Tax Act Cap 201 (hereafter referred to as the "Act").

Regulation 21 reads as follows:

> ***"21. On or before the last day of February of each year next following the year in which tax was deducted from emoluments of employees, every employer shall deliver personally, or send by post, to the Commissioner a summary in duplicate made out in the appropriate from containing the following particulars:-***
>
> ***(a) the name and address of the employer;***
>
> ***(b) the gross amount of all emoluments paid to all employees during the year immediately preceding that for which the summary is, under the provisions of this regulation, required to be delivered or sent;***
>
> ***(c) the total amount of tax deducted from all employees from their emoluments in accordance with the provisions of these Regulations; and***
>
> ***(d) the total amount of basic tax accounted for in accordance with the provisions of the Income Tax (Collection of Basic Tax Regulations on all emoluments of employees:***
>
> ***Provided that, on the cessation of business by the employer, the Commissioner may require the employer to deliver or send the summary within such time as he may specify".***

Section 93(2) which creates an offence for failure to deliver, inter alia, "form" and lays down the fine to be imposed on conviction. It provides:

> ***"(2) If any person fails to deliver personally or send by post any certificate, form or other document account or return within such time or times as may be prescribed by section 54 or by regulations made under the provisions of section 81 or 107, he shall be guilty of an offence and liable, on conviction therefore, to a fine of $10 for every day during which such failure shall continue:***
>
> ***Provided that it shall be a good and sufficient defence to any complaint brought under this subsection that any such failure was not due to the neglect or default of the defendant or of any person acting on his behalf."***

In this case the failure to deliver Summary of Emoluments (hereafter referred to as the "form") was in respect of the year ended 31st December 1992 despite the letter of advise dated 23rd December 1993 sent by ordinary post by the Commissioner to the appellant's address.

The appellant pleaded not guilty to the charge before the learned Magistrate.

To prove its case the prosecution tendered to Court two affidavits. One was from **PENI SINTAUTAU,** administrative officer (page 37 of Record) and the other from **LOPETI KAU TUKANA,** Officer in charge PAYE (page 43 of the Record. No oral evidence was adduced and the prosecution rested its case on the said affidavits.

The said **PENI'S** affidavit is to the effect that the form has not been filed to date and the other affidavit states that the document had been posted to the appellant's address.

The Record shows that Mr Kohli had "*no objection to the matter contained in the affidavits"*.

After submissions of no case was ruled against the appellant no evidence was adduce by him and that was his right.

As for ground I, I uphold Mr Kohli's arguments. This is a criminal case and the proof has to be beyond all reasonable doubt. The burden does not shift to the appellant. The said statement of the learned Magistrate does give the impression despite the fact that the Magistrate has towards the end of his judgment stated that he finds the charge proved beyond all reasonable doubt.

Although Mr Bale says that onus is on the appellant to deliver the *"form"* under Regulation and that the Commissioner does not have to send a *"notice"* and yet he relies on S(1) of the Act which provides as follows:-

> ***"50. – (1) If the Commissioner, in order to enable him to make an assessment or for any other purpose, desire any information or additional information or a return from any person who has not made a return or a complete return, he may, by registered letter or by personal service of a notice in writing, demand from such person such information, additional information or return, and such person shall deliver to the Commissioner such information, additional information or return within the period of time determined by the Commissioner in such registered letter or notice. For the purpose of any proceedings taken under this Act, the facts necessary to establish compliance on the part of the Commissioner with the provisions of this section as well as default thereunder shall be sufficiently proved in any court of law by the affidavit of the Commissioner or any other responsible officer of the Department of Inland Revenue. Such affidavit shall have attached thereto as an exhibit a copy or duplicate of the said letter or notice."***

It should be noted that S.50(1) talks of service by *"registered letter"* or *by "personal service"* and not ordinary post as in this case. Furthermore the section deals with *"demand for additional information"* or *"return"* and not *"form"* as in this case.

Particular reference was also made to S.44 (1) of the Act, but this deals with return of Income and has nothing to do with prosecution under Regulation 21 and S.93(2). The requirement there is that notice should be sent by ordinary post.

In response to a question from the Court Mr Bale did agree that Sections 50 and 44 are not applicable to this case and yet he goes ahead and argues that because of the wording of S.50(1) in regard to *"proceedings taken under this Act"* the Respondent is empowered to use the said affidavits.

I am of the firm belief that this part of Section 50(1) cannot be used *"for any proceedings under the Act"* It has particular reference to S.50(1) did not empower him to do so. Oral evidence should have been adduced to enable the appellant to cross-examine the witnesses.

I therefore agree with Mr Kohli in his submissions on grounds two and three. He therefore succeeds on these grounds.

While arguing ground I, Mr Kohli did go to great lengths pointing out the differences in the various documents in regard to the name of the alleged employer. The name in S N *"B"* is given as *"SATYA ANAND F/N AJAYBIR"* and the business is *"A. SATYA'S FURNITURE"*. In S N *"A"* advise letter it is *"Mr Satya Nand T/A A. Satya's Furniture and Hardware"*.

There is a marked difference in the name and it is absolutely necessary that the right person is before the Court. It is the duty of the prosecution to do that. Had oral evidence been adduced the matters in dispute in regard to identity and service of notice would have been ironed out.

For the above reasons the appellant succeeds on the first three grounds of appeal. Hence I do not have to consider ground 4 which relates to sentence.

The conviction and sentence are therefore set aside.

The appeal is allowed and the fine if paid is to be refunded to the Appellant.

**D PATHIK**
**JUDGE**

At Labasa
30th March 1995