

**IN THE MAGISTRATES COURT OF FIJI**  
**(WESTERN DIVISION) AT LAUTOKA**

**CRIMINAL CASE**

**NO. 993 OF 1982**

**BETWEEN : THE COMMISSIONER OF INLAND REVENUE**

**PLAINTIFF**

**AND : ARTHUR EVANS**

**DEFENDANT**

Mr R M Raza Counsel for the Prosecution.

Mr A Patel Counsel for the Accused.

**J U D G M E N T**

The Accused Arthur Evans is charged on two counts under Section 50(1) of the Income Tax Act Cap. 201. On the First count he is charged with “Failing to Deliver Returns of Income as required by the Commissioner of Inland Revenue contrary to Section 50(1) and 96(1) of the Income Tax Act”. On the Second Count he is charged with “Failing to Deliver Assets and Liabilities required 50(1) and 96(1) of the Income Tax Act”.

As far as Count 2 is concerned, it is apparent that the Statement of Offence is incorrect since no one is required to deliver his “assets and liabilities’ to the Commissioner of Inland Revenue under Section 50(1) of the Income Tax Act. Unfortunately this appears to have been overlooked by all concerned. However, in view of the reasons that I shall give on another issue this does not matter. But it demonstrates the need for greater care to be taken by people who draft charges. It is not really the duty of a Magistrate to see that the charges properly framed. In any event because of the number of charges that come before a Magistrate he can hardly be expected to check all of them.

Be that as it may, the Prosecution did not adduce any oral evidence in this case. It said that it was relying on an affidavit of one Abdul Sattar sworn on 23<sup>rd</sup> day of February, 1983 and closed its case. This Affidavit was already in the Court file when the trial commenced on the 25<sup>th</sup> April 1983. No submission was made on

behalf of the accused at the end of the prosecution case. The Accused elected to remain silent and legal submissions were then made by Mr A Patel, the Defence Counsel. I have since wondered whether proper procedure was adopted by the Prosecution in adducing evidence in the manner that it did. Whilst the Defence Counsel did not raise any objection or make any submission in this regard, so that I have been deprived of any assistance that I may have had from both the Counsel, the issue is an important one and I would be failing in my duty if I did not consider and rule upon it.

The Accused in the instant case pleaded ‘Not Guilty’. Section 209 of the Criminal Procedure Code provides for the procedure to be followed when a plea of Not Guilty is entered. The relevant parts read:

*“209. If the Accused person does not admit the truth of the charge, the Court shall proceed to hear the witnesses for the prosecution and other evidence (if any).*

*The Accused person or his barrister and solicitor may put questions to each witness produced against him.*

.....”

*It has been said that in criminal cases:*

*“..... whenever there is a plea of not guilty, everything is in issue, and the prosecution has to prove the whole of their case, including the identity of the Accused, the nature of the act and the existence of any necessary knowledge or intent .....” R v Sims (1946) 1 All ER 667 at 701 per Lord Goddard CJ.*

In the present case no witness was called on behalf of the prosecution who could be cross-examined by the Defence. The Prosecution relied on the Affidavit referred to hereinbefore under the provisions of Section 50(1) of the Income Tax Act C.p 201, the material part of which reads:

*“50(1) ..... 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 (underlining mine)”.*

It is worth noting at this stage that Section 50(1) is not a new provision in the Income Tax Act Cap. 201. Section 61(1) of the Income Tax Ordinance Cap. 176 and Section 60(i) of the Income Tax Ordinance 1964 (No. 34) had exactly the same provision.

As I understand it, Section 50(1) of the Income Tax Act is a procedural provision providing for the admissibility of an Affidavit before a Court when it comes to hear a case and deal with the evidence. Such an Affidavit, under normal circumstance would be inadmissible. It does not conflict with or exclude either expressly or by implication the obligatory provisions of Section 209 of the CPC when a plea of not guilty is entered. It merely makes the task of the prosecution witness from the Department of Inland Revenue somewhat easier in that, inter-alia, he does not have to bring all the records from the Department with him. The two sections must be read together and not in isolation in order to ascertain the intention of Section 50(1). Section 50(1) does not dispense with the necessity of calling a witness to give oral evidence. The Accused must 'hear' something from a witness in open Court so that he has some idea as to what the case against him is all about as required by Section 209 of the CPC. And it does not take away the right of an accused person or his barrister and solicitor from cross-examining such a witness. The Affidavit relied on by the Commissioner is not, and can not be regarded as a 'Statement' under Section 192 of the CPC. In arriving at my decision I have not overlooked the provision of Section 144 of the CPC. Perhaps the most important feature of a criminal trial in the Magistrate's Court in Fiji is its 'orality'. In my view the Affidavit relied on by the prosecution should have been produced by the witness and opportunity should have been available to the Defence to cross-examine him if it so wished. A case which is not directly on point but which gives some support to the view I have taken is Commissioner of Inland Revenue v West Walker (195L) NZLR 191 where the Court of Appeal held that Section 163 of the Land and Income Tax Act 1923 requiring 'every person' to furnish information in writing and produce necessary books or documents for income tax purposes did not abrogate a solicitor's privilege to decline to produce them without the authority of his client. It is the reasons given in West-Walker's case which is really important as some of them can apply with a equal force in interpreting Section 50(1) in the way that I have done.

Furthermore, it had been the practice in the past for a witness to be called to give oral evidence in prosecutions such as the present one. This is borne out by the case of Ram Kirpal Hira v R 13 FLR 176 where the Accused had been charged under Section 60(1) of the income Tax Ordinance 1964 (which was in the same terms as the present Sector – the Section under which the Accused is charged). At page 177 it is said, "Mr KcKean, a Senior Assessor, produced an Affidavit to prove the demand and failure, as is permissible under Section 60(1), exhibiting thereto a copy of the demand. He was cross-examined to the effect that .....". So why the departure in the procedure in this case? As the matter stands now although I have heard counsel for the Prosecution and counsel for the Accused make submission, I have not 'heard' any witness(es) and evidence on behalf of the prosecution as required by Section 209 and 215 of the CPC .

In the result, for the reasons stated I have come to the conclusion that because of non-compliance with the proper procedure in adducing evidence by the prosecution – and this

non-compliance is of a fundamental nature – the charge against the Accused must be dismissed on these grounds.

As regards the submissions made by Counsel for the Defence, I must say that after having given full and careful consideration to them and perused the authorities referred to by him and also considered other cases on the issues not cited by him, I have come to the conclusion that his submissions do not have much merit. I am satisfied that the charges are not bad for duplicity. I am also not convinced by the submission that there is no evidence that the Commissioner made the demand and I reject this submission. As far as the submission that the charges “fail to disclose an offence” and that an “*essential ingredient is missing*” is concerned, I must say that the charges could have been better drafted. But in my view the words “to enable him to make an assessment as contained in his letter” is not an essential ingredient of the offence. Whilst it may have been better to include these words, it is obvious that the Defence has in no way been misled, prejudiced or embarrassed by their omission. In fact the Defence Counsel concede this. It was of course open to the Defence Counsel to ask for particulars and had the prosecution refused to supply the particulars, then it may have been another matter: *Vijay Singh v R* 13 FLR 27.

It follows from what I have said that the Accused is found not guilty and is acquitted on both Count 1 and Count 2.

**S ANAND**  
**RESIDENT MAGISTRATE**  
**6.5.83**