IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 7 of 1966.

Between :

BRIJ NAND MAHARAJ
son of Ram Sarup — Appellant

- and -

REGINAM — Respondent

J U D G M E N T

This is an appeal against the decision of the Supreme Court sitting at Suva dated 16th March, 1966, convicting the appellant on five counts of fraudulent conversion.

At all material times the appellant was carrying on business as a travel agent in Suva and his business included the booking of air passages and the purchase of air tickets, together with making other incidental arrangements, such as obtaining passports for travel and entry permits, on behalf of clients. For this purpose the clients deposited with the appellant, in advance, the cost of the fares and other incidental expenses.

In the course of business four persons came to the appellant and requested him to make travel arrangements on their behalf for visits to New Zealand. The air fare to New Zealand was £65.10.0 per ticket. On the 30th September, 1965, Narayan Sami son of Chappa Goundar paid the appellant £10 and a little later the balance of £55.10.0, both sums in cash, and obtained receipts from the appellant. The receipt for the sum of £55.10.0, which was dated the 4th October, 1965, was endorsed with the date of travel, 7th October, 1965, but the earlier receipt for the sum of £10 was not so endorsed. On the 30th September Narayan Sami son of Ram Krishna Goundar paid in cash £65.10.0 to the appellant for a similar passage and was given a receipt endorsed

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for travel on the 7th October. On the 1st October Brij Lal son of Sukh Nandan paid to the appellant the sum of £65.10.0 for a similar passage for his son Parmod Prasad and the appellant issued a receipt to Parmod Prasad indicating that the travel date was also to be the 7th October. Finally on the 18th October the appellant received from Chagan Lal son of Narotam by cheque the sum of £65.10.0 for a passage to New Zealand for his son Dirij Lal and the appellant issued a receipt endorsed to indicate a travel date of the 21st October.

In each of these cases the appellant failed to provide the air tickets and other necessary travel documents in respect of which he had received the money. In spite of several enquiries by the clients no documents were forthcoming by the respective travel dates. In due course they each requested their money back. In the case of the two Narayan Samis the appellant issued cheques post-dated to the 29th October which, on presentation, were dishonoured. Similarly in the case of Brij Lal he issued such a cheque but in the circumstances of that case the cheque was never presented for payment. However, the evidence regarding the appellant's bank account at the relevent time makes it clear that had that cheque also been presented it would have been dishonoured. In the case of Chagan Lal son of Narotam, the appellant, by the hand of one of his staff, issued a cheque dated the 27th October. This cheque was not post-dated. Chagan Lal took it to the bank and it was dishonoured. Chagan Lal reported the matter to the police, and in due course the appellant was charged with fraudulent conversion and convicted in respect of the five sums in issue.

In this appeal the appellant, who was unrepresented both in the Court below and before this Court, gave notice of five grounds of appeal and at the hearing requested leave to add a further four grounds of which he had not given notice, namely :-

"(6) that he should be permitted to introduce fresh evidence which was not available to him at the trial in respect of counts 3 and 4;

(7) that he should be permitted to introduce fresh evidence which was not available to him at the trial in respect of count 5;

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"(8) that the learned trial judge did not permit the appellant to recall certain witnesses for further cross examination to cover points which he had previously failed to put in to prosecution witnesses before opening his defence;

(9) that the conviction cannot be supported by the weight of evidence."

We treated the first two of these grounds as an application to adduce additional evidence, though there was no supporting affidavit. We thought it right to do this as the appellant was not represented by counsel, although he can hardly complain at his lack of representation when it is considered that both in the Court below and for the purposes of this appeal he was offered legal aid but rejected it. However that may be we heard his application; the additional grounds (8) and (9) were admitted without objection from Crown Counsel.

We will deal with the grounds of appeal and the application to adduce further evidence seriatim.

In respect of ground (1): the appellant states that the learned trial Judge did not direct the assessors adequately as regards the need for proof of fraudulent intent. We find no substance in this contention. Having regard to the facts of the case and the defence that the moneys were handed over by way of loan, there was in our opinion an adequate direction. The learned Judge said, in the relevant portion of his summing up to the assessors :-

"The essence of the offence is fraud, dishonesty, and the essence of the case is conversion of the money to his (the appellant's) own use fraudulently."

In respect of ground (2): the appellant alleges that he was prejudiced in the eyes of the assessors by the demeanour of the trial Judge and by certain questions which the Judge put to him. He drew attention to one question in particular which was put to the appellant during his cross examination and which the appellant alleges was put by the Judge. This had reference to the issue of the cheques which were dishonoured, and was in these words :-

"Was that the action of an honest man?"

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We have been assured by Mr. Mishra for the Crown that according to his recollection that question was put not by the learned judge but by himself, and we accept this assurance. In no other respect can we find anything in the record to indicate any improper questions or comment by the judge which might in any way have given rise to unfair prejudice against the appellant.

In respect of ground (3): the appellant says that it was unfair for the judge in his summing up to suggest to the assessors that they might consider the appellant's evidence to the effect that the moneys in question were given to him as a loan to be repaid by the issue of travel tickets in due course an unlikely story. We can see nothing unfair in the manner in which the learned trial judge put this matter to the assessors. He made it quite clear that that was a matter for them to consider.

In respect of ground (4): the appellant suggests that the learned trial judge misled the assessors regarding the date of travel in respect of count 3, namely the receipt issued by the appellant for the sum of £10 paid to him on the 30th September, 1965, by Narayan Sami son of Chappa Goundar, in that that receipt made no mention of a date of travel. It is correct that the judge did not specify this in his summing up, but we consider the matter of no consequence because the receipt dated the 4th October, 1965 in respect of the balance of the fare, namely £55.10.0 was so endorsed. It was clear that the total sum was received in respect of a passage to be taken on the 7th October.

As to ground (5): the complaint under this head was that the appellant, while in the police station, but before he was charged, was confronted in turn with the four complainants who asked for the return of their money. The evidence was that the appellant said that he could not pay it. In his summing up the learned judge said that this was an opportunity for the appellant to say that the complainants knew very well that the moneys had been lent to him, and the appellant said that this, in effect, put the onus on him to prove his innocence. We are unable to approve of the procedure adopted at the police station which purported, according to the police

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officer concerned, to give the appellant an opportunity to obtain the money. In the circumstances disclosed by the evidence it is difficult to accept that it had any such object, and we consider that it would have been preferable if the learned judge had not suggested any inference from this episode. It is, however, only a comparatively minor matter in a trial which extended over a fortnight. The learned judge was careful throughout his summing up to make it quite clear that the onus of proof was upon the prosecution, and though this aspect of the trial may be open to criticism to some extent, we are satisfied that no miscarriage of justice was occasioned thereby. This ground of appeal therefore fails.

We now proceed to the application to adduce further evidence, which was formulated as grounds (6) and (7). The basis of the appellant's case in the Court below was that he had received the respective sums of money not in trust to buy air tickets but by way of personal loans to be repaid in due course either by the return of the cash or by the issue of tickets. The relevant witnesses denied this and the receipts given for the money contained no indication that this might be the case. However, the appellant has produced before this Court what purport to be two receipts signed respectively by the two Narayan Samis on the 23rd (?) October, 1965, acknowledging receipt of the cheques issued to them by the appellant on that date in repayment of their money. These receipts specifically refer to the money being by way of loan. The appellant alleges that this evidence was not available to him at the trial and that had it been available then the result might have been different. The question which we have to consider is whether such evidence ought to be admitted now. Crown Counsel has drawn our attention to the case of R.v. Parks (1961 1 W.L.R. 1484) and contends that at all times this evidence was available to the appellant and that he was aware of its potential importance. In order to enable us to arrive at a conclusion as to whether this evidence was or was not available to the appellant at the time of the trial we have heard him in evidence on the point. The appellant said that after his arrest his possessions and papers were taken from his office by his landlady and placed in a box. He admitted that he was taken to the landlady during his time in custody in order to get

his papers and that he could have taken the box away and gone through his papers while in custody before the trial. He refused to do this because he says that he considered the landlady had acted in some way illegally in the matter and he preferred to require her to attend at his trial, under subpoena, and bring his papers with her. He therefore rejected every opportunity of going through his papers and selecting such documents as he might require. At the trial he says that his landlady gave him a bag of papers which she had brought to the Court but that among these papers he did not find the receipts in question. He did not mention this matter to the Court. He says that only after his conviction when further papers, magazines and forms were sent to him in the prison did he find the receipts. That he was well aware of the existence of these receipts and of their potential importance is clear from his cross examination by Crown Counsel :-

"Q. When you went through the documents which were given to you by Mrs. Fong, the first night, did you then know these two receipts were not among them?

A. Yes.

Q. Did you then know that these two receipts were important evidence so far as your case was concerned?

A. Yes.

Q. Did you then know that in addition to these documents given to you by Mrs. Fong you had other belongings locked up in the large box?

A. Yes.

Q. Did you request the learned trial judge to make these documents available to you?

A. I did.

Q. And the box itself, you have told Their Lordships you could have taken it to prison?

A. Yes, Sir.

Q. You could have taken the box and you would agree that the learned trial judge gave you an adjournment on several occasions when a witness was not available; e.g. a witness was coming from Ba and an adjournment was granted for a whole day to enable this witness to come?

A. Yes.

"Q. In fact no request of yours was turned down by the learned trial judge where your witnesses were concerned? 21

A. Yes sir, that is right.

Court: Do you wish to say anything arising from anything counsel has put to you?

A. No Sir.

It is plain to us that at all times the appellant knew where the documents were to be found and could have obtained them had he wished.

Upon this ground alone we consider that the appellant is not, as a matter of law, entitled to introduce this evidence at this stage. Bearing in mind, however, that the appellant was not represented at the trial, albeit as a result of his own fault, we have gone further and have considered what might have been the likely effect upon the case if these two receipts had been put in. After careful consideration we do not think that that evidence would have been likely materially to alter the course of the trial or to have raised a reasonable doubt. Indeed, it might well have militated against the appellant. It is quite clear from the original receipts given by the appellant for the moneys received that at that stage it was intended that tickets would be issued for travel on the 7th October and 21st October, 1965, respectively. There was no suggestion at that time that the money was given to him by way of loan. It was only after the appellant had defaulted and was being pressed for the return of the money or delivery of the tickets that he obtained the receipts in question from the two Narayan Samis. Furthermore, the receipts were in English and the evidence shows that the Narayan Samis were illiterate in English and could do little more than sign their names. In these circumstances it does not seem to us at all likely that this evidence, even if tendered, would have altered the result of the trial. For the reasons we have given in this and the immediately preceding paragraph we rejected the application of the appellant at the conclusion of his evidence before us.

In respect of ground (8): the appellant complained of the judge's refusal of an application by him to recall

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prosecution witnesses for further cross examination. It would appear that the reason for his application was that during his own evidence it emerged that he had failed to put his case in some respects to various witnesses and he wished to remedy this. It is to be noted that the learned judge had granted an application by the appellant to recall one witness for further cross examination before the close of the case for the prosecution and that the appellant had availed himself fully of his right to cross examine throughout the trial. Having regard to the stage at which the application referred to in this ground of appeal was made, we are not of the opinion that the learned judge exercised his discretion wrongly in any way and this ground fails also.

Finally in respect of ground (9): we find no substance in this ground. There was, in our opinion, ample evidence upon which the Court below could find as it did, and we see no reason to intervene.

The appeal is therefore dismissed.

(sgd.) T. J. Gould
VICE-PRESIDENT

(sgd.) C. C. Marsack
JUDGE OF APPEAL

(sgd.) Jocelyn Bodilly
JUDGE OF APPEAL

SUVA,
7th June, 1966.