IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

CRIMINAL APPEAL NO . 68 OF 1981

Between:

PETER BATEY — APPELLANT

-and-

R E G I N A M — RESPONDENT

H.K. Nagin for the Appellant.
A.H.C. Gates for the Respondent.

Date of Hearing: 2nd March, 1982.
Delivery of Judgment: 19 MAR 1982

JUDGMENT OF THE COURT

SPRING, J.A.

The appellant Peter Batey was convicted in the Magistrate's Court at Nadi on 16th December, 1980, on a charge of attempting to export prohibited currency being an offence under section 24(1) and Part II, 1(1) of the Fifth Schedule of the Exchange Control Act, (Cap.186) (1967 Laws of Fiji). Appeals against both conviction and sentence were heard by the Supreme Court of Fiji at Lautoko; both appeols were dismissed on 8th October 1981 and appellant was ordered to poy costs in Magistrate's Court in the sum of $200; and in the Supreme Court in the sum of $150. We are told from the Bar that no order for costs was made in the Magistrate's Court, nor were costs sought by the prosecution in the Supreme Court.

Appellant now appeals to this Court pursuant to section 22(1) of the Court of Appeal Act (Cap.12) and such appeal is confined to questions of law alone.

The facts as found may be briefly stated. On 10th April 1980 appellant, who was booked on a flight leaving that day for Sydney Australia, arrived at Nadi Airport at 5.00 p.m - approximately half an hour before the flight was due to leave; he had two pieces of hand baggage and after passing through the Immigration and Security checks he entered the departure lounge where a duty free shop and an agency of the Bank of New Zealand are located. The Collector of Customs interviewed the appellant who gave his name as Peter Batey; he stated in reply to questions that he was not a visitor as he had a temporary working permit and was a developer and finance manager at Plantation Village Resort Mololo Lailoi. Appellant's passport was checked and the information verified. In reply to a query as to the amount of currency he was carrying, appellant opened his brief case and removed therefrom a bundle of notes; he also produced other notes from his person. When questioned as to whether he had any other money or currency in the form of travellers cheques or bank drafts, he replied he did not know. His two bags were searched by customs officers and amongst his clothing five large envelopes commonly used for the return of photograph prints, and so marked, were found; these envelopes were sealed. Appellant informed the customs officers that these envelopes did not belong to him, nor, did he know what they contained. Appellant upon request opened the envelopes and they were found to contain travellers cheques; these cheques had all been signed twice by the various persons to whom they had been issued by banks and other agencies abroad; the travellers cheques were expressed in Australian, New Zealand and

United States dollars.

When further questioned appellant stated he had $20,000 in his possession inclusive of cosh and hard currencies; at a later stage after being cautioned appellant admitted that all the currency and travellers cheques found in his possession belonged to him. Appellant was subsequently charged before the Nadi Magistrate's Court with the offence of attempting to export prohibited currency to which he entered a plea of not guilty. The charge reads:

> "ATTEMPTED EXPORT OF PROHIBITED CURRENCY, Contrary to Sections 24(1) and 1(1) of Part II of the Fifth Schedule, of the Exchange Control Ordinance.
>
> Particulors of Offence
> PETER BATEY on the tenth day of April, 1980 at Nadi Airport in the Western Division, being a person in Fiji, attempted to export from Fiji without the permission of the Minister of Finance prohibited currency comprising :
>
> Notes of a closs which are legal tender in Fiji - $F2825
> Notes of a class which are legal tender in Australia - $A1071
> Notes of a class which are legal tender in New Hebrides Fr900
> Travellers Cheques expressed in Australian currency - $A23050
> Travellers Cheques expressed in U.S.A.currency - $US1700
> Travellers Cheques expressed in New Zealand currency - $NZ100."

Evidence wos called by the prosecution from four Customs Officers, the Manager of the Central Monetary Authority and a Police Inspector. The defence colled two witnesses and the appellant mode an unsworn statement in which he claimed that his intention was to purchase duty free goods from the duty free shop and attend at the Bank of New Zealand agency in the departure lounge to either encash the travellers cheques or leave them with the bank for safekeeping.

The learned Magistrate disbelieved the appellant's statement that he intended to go to the agency of the Bank of New Zealand and the duty free shop. The learned Magistrate stated :

> "But this Court has no doubt of the intention or mens rea of the Accused at the point of interception for the reasons already set out in this judgment. The Court is satisfied that the Accused had the intention to complete an offence and was performing an act immediately connected to the commission of the completed offence at the time he was intercepted."

The appellant was accordingly convicted; as stated appeals to the Supreme Court were dismissed.

In his appeal to this Court the appellant has filed 6 grounds of appeal.

The first two grounds of appeal can be dealt with together; thereunder appellant claims that the learned appellate Judge erred in law in failing to hold that the learned trial Magistrate had drawn incorrect inferences from the facts as to appellant's intention and further failed to hold that the learned Magistrate had drawn wrong inferences against the appellant in considering the evidence relating to the overt acts constituting the alleged attempt to export prohibited currency.

Mr. Nagin, counsel for appellant, argued that the learned Magistrate and the learned trial Judge had drawn inferences which could not reasonably be supported by the evidence and, accordingly, there was o question of law raised, namely, whether the evidence was sufficient to support the finding that the appellant was guilty of the offence charged.

Mr. Gates for the Crown was not called upon to reply to counsel for appellant's orgument on the first two grounds of appeal.

It is clear from the authorities that it is for the Court that sees the witnesses and hears the evidence to find the facts and to draw the inferences from those facts; however, it is always a question of law which will warrant the interference of this Court whether there was any evidence to support those findings of fact; and whether the inferences that have been drawn are reasonable and proper inferences from the facts as found.

In Bracegirdle v. Oxley [1947] K.B. 349 at p.358 Denning J. said :

> "The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deduced by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal which sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law."

In Edwards v. Bairstow [1955] 3 W.L.R. 410 Viscount Simonds at p.417 said :

> "For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think fairly summarised by saying that the court should take that course if it appears that the Commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained."

Bearing the aforementioned principles in mind we turn now to review the evidence and the following points emerge therefrom :

(1) When the customs officer found in appellant's baggage the 5 sealed envelopes appellant denied that they belonged to him, and he stated he did not know what they contained. Later he admitted that all the travellers cheques and notes were his property.

(2) The envelopes were concealed in appellant's baggage and packed away among his clothing, they were commonly used for the return of photographic prints and were so marked; they were not in his brief case and readily accessible if he wished to bank them.

(3) The branch of the Bank of New Zealand in the departure lounge is for the convenience of tourists - changing currency and not for the depositing of large sums of money in commercial transactions. There was another branch of the Bank situated outside the departure lounge available for this purpose which the appellant had passed by. The officer from the Bank called by the defence said :

> "We operate from 1 hour prior to arrival until departure. Two employees there at the time..... Normal practice of the agency is to serve departing or transit passenger exchanging foreign currency for foreign currency or Fijian for foreign currency."

(4) Appellant made no mention to any of the customs officers that interviewed him on 10.4.80 that he intended to bank the travellers cheques or notes in the Bank; or purchase from the duty free shop gifts for his fiancee.

(5) Appellant on his own unsworn statement confirmed he was experienced and well versed in financial matters. The explanation given by appellant that he planned to find out from the agency of the Bank of New Zealand, in the lounge, whether he would have to deposit the travellers cheque or leave them to be dealt with later stretched credulity to the limit. The witness from the Bank said :

> "I know the accused. He or his business organisation, has an account with our Bank. He operates Plantation Island Resort in Malolo. I understand he is either financial controller or Solicitor."

(6) Appellant arrived late at the Airport and the evidence confirmed that when he was challenged by the customs officers he was heading towards the stairs leading out to the walkway and the aircraft; he made no attempt to enter the duty free shop or attend at the Bank agency.

After careful study of the record we are satisfied that there was the clearest evidence from which the learned appellate Judge was entitled to conclude that the appellant was attempting to export the notes and travellers cheques illegally, accordingly we are driven irresistably to conclude that all the ingredients of the offence that are relevant to guilt were established; both the learned Judge and the learned Magistrate were able, and indeed bound, to form their own respective opinions as to the proper inferences to be drawn from the proved facts. We find ourselves therefore in entire agreement with their respective conclusions.

Accordingly grounds 1 and 2 fail.

We turn to a consideration of Ground 1(c) that the charge was bad for duplicity.

Mr. Nagin submitted that the word "or" is used between each paragraph of section 24(1) of the Exchange Control Act and accordingly it must be read as creating a separate offence for each paragraph; that attempting to export notes without permission is a separate offence from attempting to export documents to which section 6 of the Act applies without permission.

Mr. Nagin argued that the use of the disjunctive "or" in section 24 connoted that separate and distinct offences were charged in the one count and for this reason the information was bad for duplicity. Mr. Gates for the Crown submitted that the charge was not bad for duplicity; that no prejudice was occasioned to the appellant nor did he suffer any miscarriage of justice. In our opinion the act of attempting to export notes and travellers cheques was one activity. The mischief the legislature was clearly seeking to deal with was the preservation of the country's overseas funds and to prohibit the exportation of funds which would deplete the nation's reserves.

The question of duplicity has been considered in this Court in Shanti Lal & Ors. v. Reginam F.C.A. Cr. App. 10/78 and William Roj Dayol v. Reginam F.C.A. Cr. App. 50/1981 where the authorities are reviewed.

In D.P.P. v. Merriman [1972] 56 Cr. App. Reports 766 Lord Diplock at p.796 said :

> "The rule against duplicity, viz, that only one offence should be charged in any count of an indictment, which is now incorporated in rule 4(1) of the First Schedule to the Indictments Act 1915, has always been applied in a practical, rather than in a strictly analytical, way for the purpose of determining what constituted one offence. Where a number

> of acts of a similar nature committed by one or more defendants were connected with one another, in the time and place of their commission or by their common purpose, in such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise, it was the practice, as early as the eighteenth century, to charge them in a single count of an indictment."

See also Cheung Chee Kwong v. The Queen [1979] 1 W.L.R. 1454.

In our opinion, therefore, it was permissible to charge the exportation of the notes and the travellers cheques in the one count as it reloted to the same piece of conduct; it was the same activity; further the appellant cannot be heard to say he was emborrassed or prejudiced in any way; nor was there any miscarriage of justice; nor any departure from the principles of fairness.

Accordingly for the reasons given this ground of appeal fails.

In Ground 1(d) of the notice of oppeal, appellant argues that the trovellers cheques seized by the customs officers were not expressed in Fijian currency and, therefore, were not travellers cheques within the meaning of section 6 of the Exchange Control Act (Cap.186). In order to resolve the arguments addressed to the Court hereon it is necessary to examine in some detail the Exchange Control Act (Cap.186).

Section 24(1), in Part V of the Act, concerns restriction of exports of (inter alia) notes; postal orders; documents to which section 6 applies not issued by any authorised deoler, or in pursuance of a permission granted by the Minister of Finance. The relevant portions of section 24(1) reads :

"24.(1) Except with the permission of the Minister, no person shall export from Fiji -

(a) any notes of a class which are or have at any time been legal tender in Fiji or in ony other territory; or.....

(d) .....

(iv) any document to which section 6 opplies not issued by any authorised dealer or in pursuance of a permission granted by the Minister, and any document certifying the destruction, loss or cancellation of any of the documents aforesaid; or....."

It will be observed that this section does not make it an offence to contravene the prohibition imposed. Section 36(1), however, states that :

"The provisions of the Fifth Schedule to this Ordinonce sholl have effect for the purpose of the enforcement of this Ordinance."

Port III of the Fifth Schedule relates exclusively to Part V of the Act and in our view contains the code for its enforcement.

Paragraph 1 of Part III (as amended) reads :

"The Customs Ordinance shall, subject to such modifications, if any, as may be prescribed to adapt it to this Ordinance apply in relation to anything prohibited to be imported or exported by any of the provisions of Part V of this Ordinonce except with the permission of the Minister as they apply in relotion to goods prohibited to be imported or exported by or under any of the soid enactments, and any reference in the Customs Ordinance to goods shall be construed as including a reference to anything prohibited to be imported or exported by ony of the provisions of the said Part V except with the permission of the Minister."

Section 6(1) of the Exchonge Control Act reads:

"This section opplies to any document of o kind intended to enoble the person to whom the document

> is issued to obtain foreign currency from some other person on the credit of the person issuing it, and in particular to any traveller's cheque or other droft or letter of credit so intended."

Mr. Nagin submitted that section 6(1) is confined or restricted to documents or trovellers cheques issued in Fiji. He based his argument upon the definition of "foreign currency" which reads :

> "foreign currency" means any currency other than Fiji currency, and includes a reference to any right to receive foreign currency in respect of any credit or balance at a bank."

In essence Mr. Nagin was soying that for a travellers cheque to be a document embraced by section 6 of the Act it must be one issued in Fiji in foreign currency i.e. currency other than Fijion and thot as none of the trovellers cheques mentioned in the chorge were issued in Fiji they were not documents coming within the meaning of section 6 of the Act.

Section 6 although expressed in clear ond unequivocal terms contains an ellipsis and without doing violence to the language of section 6(1) the words "this section applies" should be reod before the words "in particular to any travellers cheque".

Section 6 does not define a traveller's cheque; the form thot the customary traveller's cheque takes is that it is an order given upon a bonk directing the poyment of a specified sum in a currency, nominated or requested by the person seeking the issue of the trovellers cheque, to an unnamed payee; the person obtoining the travellers cheque must sign the cheque once at the time of issue. The person to whom the cheque is presented for payment who will normally be a banker, travel bureau, hotel or other money changer will ensure that the cheque is countersigned by the holder thereof

(and the signatures compared) and then pay over the amount specified less commission and any other charges. The person paying the money after completing the date and place of negotiation is in a position to collect the amount of the overseas funds from the issuing banker or agency.

In effect the person who obtains the travellers cheque in the first place buys the overseas funds from the bank or other issuer thereof and sells those funds to the paying agent or the person who negotiates the cheque who in turn collects those overseas funds from the issuing bank or agency.

It is clear from the record that the travellers cheques in the possession of the appellant had been used to purchase goods or services in Fiji and accordingly these travellers cheques should have been banked in the ordinary way in Fiji so that those overseas funds that these travellers cheques represented would have flowed into the banking system in Fiji.

Applying the construction which we have given to section 6(1) it is clear that the prohibition preventing the exportation of the travellers cheques in section 24(1)(d) (iv) applied to the travellers cheques in the possession of appellant.

Mr. Nagin submitted in the alternative that if his argument on section 6(1) did not prevail then the travellers cheques in the possession of the appellant were not caught by section 24(1)(d)(iv) as they were isssued by an authorised dealer. In developing his argument Mr. Nagin referred to Authorised Dealers Order (Cap. 211 1978 Edn.) which lists various banks as being authorised dealers for the purposes of the Act in relation to foreign currencies; he submitted that all the travellers cheques in possession of appellant were issued by either the Bank of New South Wales or the Australia and New Zealand Banking Group Limited both of whom

were outhorised dealers and accordingly being issued by an authorised dealer; section 24(1)(d)(iv) had no application to those travellers cheques seized from appellant.

The reference in section 24(1)(d)(iv) to an authorised dealer means an authorised deoler in Fiji and we agree with the learned appeal Judge when he said :

> "Mr. Koyo says that since all the travellers' cheques in the oppellant's possession were issued by outhorised dealers it is not an offence to export them. When section 24(1)(d)(iv) speoks of an outhorised dealer it can only meon a dealer within Fiji. The Fiji Parliament con scarcely purport to authorise dealers of other nations to issue internationally acceptable travellers' cheques. Section 24(1)(d)(iv) obviously refers to the illegolity of exporting travellers' cheques which were not issued by a dealer based in Fiji and authorised under Fijian law. How could a Fijian statute mean anything else? Section 24(1)(d)(iv) obviously means that only travellers' cheques which are issued in Fiji are exportable but those brought into Fiji from foreign sources cannot be re-exported."

Therefore we conclude that the travellers cheques taken from appellont's baggage were documents within the meoning of section 6 of the Exchange Control Act, and, further they were not issued by an authorised dealer or in pursuance of o permission granted by the Minister.

Accordingly ground 1(d) of the notice of appeol fails.

We turn now to a consideration of Ground 2 which states thot the prosecution failed to prove that the travellers cheques were not issued by an authorised dealer - (and we add) in Fiji. Not only were the travellers cheques taken from appellant produced as exhibits to the Magistrate's Court and viewed by Court but evidence wos also given by Ranjit Singh - the Collector of Customs who stated

that the travellers cheques were all issued abroad. He said :

> "There were a large quantity of Travellers cheques in the envelopes, $100 and $50 issued by various banks and agencies abroad and were in Australian, New Zealand and U.S. currencies. The cheques were signed by various people on top and bottom."

Ranjit Singh prepared a list of the travellers cheques taken from appellant and in evidence he said :

> "These are the 5 packets which contained Travellers Cheque. I prepared a list of the contents.
>
> Tenders five packets - Ex.2,3,4,5,6 (equivalent to packets 1,2,3,4 & 5).
>
> List to form part of this record.
>
> This is the currency accused had in his possession. I prepared a list of that currency - I handed back to accused what he was allowed ($45.75 & $A200) $2880F & $871A & NHFr.900 was total seized - tenders this sum and list - Ex.7..... I did not examine each Travellers Cheque. I was satisfied that no Travellers Cheque was in Fiji Currency. In the list is shown the issuing body. It appeared to me all were issued outside Fiji."

In the circumstances that obtained in this case where the travellers cheques themselves showed on their face the necessary particulars it was not in our opinion incumbent upon the prosecution to call evidence verifying matters which were patently clear from an examination of the cheques.

We are satisfied that there is no merit in this ground of appeal and it fails accordingly.

We turn now to Ground 3 and the substance thereof is that when the travellers cheques were signed by the Grantee and negotiated in Fiji they became foreign currency as defined in the Act. In other words the travellers cheques lost their identity as such and in their place emanated a right to

receive foreign currency; accordingly as foreign currency they were not subject to the prohibition on exportation contained in section 24(1)(d)(iv) in respect of travellers cheques.

We reject this argument as in our view nothing changes the nature of the document. The travellers cheques still remained as such, and when they were negotiated, reimbursement would be made of the overseas funds stated in the travellers cheques to the person entitled.

In Ground 4 Mr. Nagin submitted that no evidence had been led by the prosecution that the appellant was not a traveller and accordingly under the Exchange Control (Import and Export) Order 3(1)(h) the appellant could take the travellers cheques with him.

Order 3(1)(h) of the above Order reads :

"3(1) There shall be exempted from the provisions of subsection (1) of section 24 of the Act the exportation from Fiji".....

(h) by any traveller who is not resident in Fiji on his person or in his baggage or any travellers cheque or letter of credit which has been imported by that traveller."

(The emphasis is ours)

There was evidence that the appellant held a temporary work permit.

Ranjit Singh said in evidence :

"I asked Mr. Batey his name and why he was visiting Fiji. He told me his name, Peter Batey and he was not a visitor as he had a temporary working permit and he was a property developer and finance manager at Plantation Village Resort, Malolo Lailai. I asked for his passport. I verified the details."

Again Dectective Inspector Mohammed Yakub Khan said in evidence :

> "On 12.4.80 at Nadi Airport I interviewed accused under caution. I made a contemporaneous note of the interview.....
>
> Q. Are you a permanent Resident of Fiji?
>
> A. I am on a Working Permit."

The residence of the appellant for the purposes of the Act had been determined by the trial Court upon the evidence; the learned Magistrate found as a fact that the appellant was not a traveller and said :

> ".....the Accused who was not a traveller and was a resident of Fiji on 10.4.80, by virtue of his work permit, and his carrying on in Fiji the business at Plantation Island Resort."

We are satisfied that in arriving at his conclusion the learned Magistrate was correct as there was ample evidence for him to so find; further we are satisfied that the learned Magistrate did not misdirect himself in law as to the correct interpretation to be accorded to the provisions of the above recited Order 3(1)(h).

This ground of appeal, as drawn, does not in our view raise a question of law, but in saying so we would add that in our opinion the said Order does not extend to exempt the appellant from the provisions of section 24 of the Act.

This ground of appeal fails accordingly.

Turning now to Ground 5, Mr. Nagin submitted that the fine of $20,000 and the Order made forfeiting the cash and travellers cheques contravened Article 10(4) of the Constitution of Fiji and was therefore unlawful to the extent that it exceeded the maximum penalty prescribed

thereby.

Part II of the Fifth Schedule to the Act sets out in clauses 3 and 4 the sentencing provisions. Clause 3 provides that on summary conviction the sentence should not exceed 3 months imprisonment, a fine or both, and in addition the Magistrate may, where currency is concerned, order its forfeiture.

Under clause 4 the fine shall not exceed $1000 on summary conviction, but the section provides that if the offence is concerned with currency a fine not exceeding three times the value thereof may be imposed. The relevant portion of clause 4 reads :

> "(4) Except in the case of a body corporate convicted on indictment, the maximum fine which may be imposed for an offence punishable under this Part of this Schedule shall be -
>
> (a) on summary conviction five hundred pounds.....
>
> so however, that (in either case) where the offence is concerned with any currency, any security, any payment, any gold, any goods or any other property, and does not consist only of a failure to give information or produce books, accounts or other documents with respect thereto when required so to do under Part I of this Schedule, a larger fine may be imposed not exceeding three times the amount or value of the currency, security, payment, gold, goods or property."

The relevant portion of Article 10(4) of the Constitution of Fiji provides :

> "(4).....no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed."

It was submitted by counsel for appellant that the penalties imposed by the learned Magistrate contravened the constitutional provisions as clause 4 fixes the maximum fine of $1000 and Article 10(4) provides that no sentence

shall exceed that allowed by law.

However, clause 4 makes a distinctian between offences involving currency ond those offences relating to foilure to give information, produce books, occounts or other documents.

Parliament has, no doubt, thought fit in its wisdom to treat the smuggling of currency out of Fiji as a matter of very grave public importance ond the provisions of section 4 demonstrote that offences under the Act cannot be regarded os other than grave and serious.

The provisions of Article 10(4) relied upon by counsel for oppellont are inapplicoble ond in our opinion were not controvened by the penalty imposed.

Mr. Nagin argued alternatively thot the fine imposed under clause 4 (supra) was a discretionory matter for the learned Magistrate to determine; he argued thot the fine was far outside the normal discretionary limits os to enoble this Court to soy thot its imposition must involve a question of law.

Section 22(1) of the Court of Appeal Ordinance (Cap.12) reads:

> "Any porty to an appeal from a magistrate's court to the Supreme Court may appeal, under this Part, against the decision of the Supreme Court in such appellate juri'sdiction to the Court of Appeal on any ground of appeol which involves a question of law only (not including severity of sentence)."

In Prem Chand & Anor. v. Reginam F.C.A. Cr. App. 5/1976 this Court said:

> "We read section 22(1) as meaning thot there is no jurisdiction to entertain an appeal against sentence which goes to the quantum or extent of a sentence even if a question of law is involved."

The Court went on to say :

> "It might seem that such an argument would prevent an appeal even if the sentence were beyond the powers of the Magistrate's Court or the Supreme Court. We do not think so. Such a sentence would be illegal and without jurisdictian; as such it would be a nullity and could impose no degree of severity at all, which would result in there being a question of law to be resolved on the second appeal the result of which would determine the existence or otherwise of the sentence."

However, in this case there was no suggestion that the penalty imposed by the Magistrate was illegal and without jurisdictian.

We are of the opinion therefore that this alternative argument advanced by Mr. Nagin involves severity of sentence and we have no jurisdiction to entertain it.

However, may we say in passing that having regard to the serious and grave nature of the offences and the effect that such smuggling activities can have on this country's economy we have no hesitation in endorsing the learned appellate Judge's comment when he said :

> "In my view the fine is not severe and forfeiture of the money was appropriate."

Accordingly ground 5 fails.

Ground 6 of the notice of appeal states :

> "THAT the Learned Appellate Judge erred in law in awarding costs against the Appellant for the costs incurred by the Prosecution at the trial and the Appeal."

This ground raises the point whether the Supreme Court was entitled to order costs against the oppellant in the Magistrate's Court when no order for costs was made therein; and whether the Supreme Court should have

made an order for costs in the Supreme Court when the Crown did not seek an order for costs.

We are advised from the Bar that there was no order for costs made by the learned Magistrate when appellant was convicted nor was an order for costs sought by the Crown.

We are further advised that in the Supreme Court there was no discussion as to the awarding of costs in the Magistrate's Court nor did the learned appellate Judge call upon the parties to address him thereon with the result that the appellant was not given an opportunity of being heard upon the question. The question of costs in the Magistrate's Court was within the discretion of the trial Magistrate; we do not know what his thoughts on the subject were. It was a matter entirely for him.

In essence the learned trial Judge has enhanced the fine by the sum of $200 without giving the appellant an opportunity to be heard. This Court considered the question in Naidu v. Reginam F.C.A. Cr.App. 20/1974 and said :

> "We see this as an application of the rule, be it of natural justice or the common law, that a judicial body will not condemn a person who has had no opportunity of being heard."

As we see the problem the appellant was entitled to be forewarned that the appellate court was considering enhancing the fine.

We are of the opinion that a party whose rights or liberty may be adversely affected must be given an opportunity to be heard as a matter of natural justice and universal practice. As such we consider that it is a matter cognizable by this Court under section 22 of the Court of Appeal Act (Supra). Appellant was not accorded

the right to be heard in the Supreme Court on the matter of costs being awarded in the Magistrate's Court when no order was made therein and in our opinion such an award of costs amounted to an enhancement of the fine and ought not to stand and the order made should be quashed.

It is clear that the Supreme Court had the power to make the order of $150 costs in respect of the appeal - section 317 of the Code of Criminal Procedure. Complaint was made that the Crown had made no application for costs and that the learned appeal Judge erred in law in making the award of costs. While it might have been desirable for the learned Judge in the circumstances obtaining to alert the parties that he was contemploting making an award of costs, we see no reason to interfere with his award and accordingly dismiss this portion of this ground of appeal.

In the result the appeals against conviction and sentence are dismissed except that we allow the appeal in respect of the order for payment of $200 costs made by the Supreme Court against appellant in respect of his trial in the Magistrate's Court at Nadi; accordingly we quash the said order for payment of $200 costs.

.....
(Vice President)

.....
(Judge of Appeal)

.....
(Judge of Appeal)