IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No.18 of 1982

Between:

SUDHAKAR alias PUNDIT s/o Ram Autar — Appellant

and

REGINAM — Respondent

A.B. Ali for the Appellant
D. Fatiaki for the Respondent

Dates of Hearing: 7th & 16th July, 1982
Delivery of Judgment: 20 7 82

JUDGMENT OF THE COURT

Gould V.P.,

This is an appeal from the convictions and sentences of the appellant by the Supreme Court on two counts: the convictions took place on the 22nd February, 1982, and were, on Count 1, of aiding and abetting fraudulent false accounting contrary to section 21(1)(c) of the Penal Code and on Count 2, of attempted fraudulent conversion contrary to sections 279(1)(c)(i) and 381 of the Penal Code. In relation to Count 1, the information contained, after the reference to section 21(1)(c), the words "read with section 307 of the Penal Code" which deals with fraudulent falsification of accounts; though they appear to have been omitted, no doubt by a slip, from the actual judgment.

The two offences were separate, though they related to different aspects of one comprehensive transaction. The particulars of offence in Count 1 were :

> "Sudhakar alias Pandit s/o Ram Autar on the 26th day of June, 1980, at Suva in the Central Division with intent to defraud aided and abetted Asalusi Tavesivesi a fuelman at the Marine Department, Suva, with intent to defraud to wilfully make a false entry, in a Mobil Oil Company Limited Invoice No. 690 which was received by Asalusi Tavesivesi on behalf of the Marine Department, purporting to show that 6020 litres of mobil distillate (retail price $1720.52) had been received and accepted in good order and condition."

For the second count the particulars were :

> "Sudhakar alias Pandit s/o Ram Autar on the 26th day of June, 1980 at Suva in the Central Division being entrusted with fuel, namely 6020 litres of mobil distillate (retail price $1720.52) in order that he may deliver it to the Marine Department fraudulently attempted to convert 'part of' the said fuel to the benefit of City Transport Company Limited."

Very briefly the allegations of the prosecution were that the appellant was the driver of a vehicle which was employed (though it was owned by V.S. Mani Bros. Ltd., an independent contractor) in delivering distillate and other Mobil Oil products to customers of that organisation. Asalusi Tavesivesi was a fuelman employed at the Marine Department, one of those customers. On the 26th June, 1980, the appellant took a truck of distillate to the Marine Department and made available invoice No. 690 of the Mobil Oil Company Limited to Asalusi for him to sign, thus representing that he had received on behalf of the Marine Department 6020 litres of Mobil distillate; Asalusi did so sign the invoice though he received no distillate for it. The appellant took away the truck and the distillate, and the prosecution claim that fraudulent intention on the part of both was manifest.

Later on the 26th June the appellant took the truck to the premises of the City Transport Company Limited, another occasional customer of Mobil Oil Company Limited, but one who had not ordered any products for delivery that day. Here, the prosecution say the appellant was interrupted almost but not quite in the act of transferring some of the distillate into a tank of City Transport. The evidence relied upon is in part circumstantial and in part the evidence of Ronald Peter Berry, Oil Terminal Superintendent for Mobil, who arrived on the scene, and Patrick Leslie Coleman, an engineer employed by Mobil, who was called by Berry.

It will be necessary to examine this evidence further, but before doing so we would refer to the grounds of appeal. The bulk of these were put in, in a way which unfortunately seems to be becoming only too usual, at a very late stage. Some are vague and lack the necessary particularity and some submissions against the summing up counsel found that he could not support. We do not propose to set out the grounds in full but will indicate their purport in dealing with those which merit it.

In his summing up the learned Judge indicated to the assessors the ingredients of the offences and then dealt with the evidence on the first count. He warned them that as Asalusi, the fuelman, had been declared hostile his evidence should be disregarded. There was, however, ample evidence of his employment. He admitted his signatures and they were also identified by another witness Sekove Tagilala. There was evidence from Superintendent Yadram that Asalusi had been charged together with the accused and had pleaded guilty. There was uncontroverted evidence that invoices were brought to the Marine Department by the Mobil carrier, in this case driven by the appellant. There was uncontroverted evidence also that 6020 litres of fuel evidenced by invoice 690 was still in appellant's possession in the tanker, at the City Transport. If, the learned Judge

said, he had the pink copy of invoice 690 in his possession already signed the assessors might think that he had no intention of delivering that fuel to the Marine Department.

The learned Judge then dealt with that aspect of the matter which involves reference to the evidence of Berry and Coleman. We will for the sake of sequence interpose reference to Berry's evidence of what happened when he arrived at City Transport's premises. We quote that part of his evidence which the learned Judge read to the assessors :

> " I arrived there about midday. When I drove in, one of V.S. Mani's delivery truck was pulled up alongside their underground tank. The driver was beside the truck in the process of removing the lid from the underground tank and the City Transport employee had a dip in his hand. It appeared as though he was about to dip the tank prior to receiving a load.
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> The accused was the driver of the tanker. I spoke to him. I asked him how much he was going to deliver there. He said, '1500'."

The passage of the summing up which follows has been criticised in the Notice of Appeal. The learned Judge said -

> " If you accept the evidence to be true then, gentlemen, you may consider this piece of evidence as being almost overwhelming. The act of the accused consisted of things done and said by him at the time. He was removing the lid of the underground tank and, when asked how much he was delivering, said, 'Fifteen hundred'. That is the act of the accused that the prosecution are relying upon.
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> At that time there was no accusation or allegation against him. He was Mobil Oil's regular carrier and City Transport was a Mobil Oil customer. There was nothing unusual about that question or that answer."

The objection is to the use of the words "almost overwhelming". In counsel's view it overstressed the weight which should be given to the evidence, particularly as not mentioned in the same breath as aspects of evidence favourable to the appellant. We do not agree. The evidence for the defence was in fact put fully and fairly to the assessors immediately afterwards. Further, it is to be noted that the passage opens with the words, "If you accept the evidence .....", and even if taken as a qualified expression of the learned Judge's opinion, the comment does not go beyond what is permissible. The learned Judge had adequately directed the assessors that on issues of fact they must make up their own minds independently and impartially, and that what evidence they accepted as representing the truth was always an issue of fact for them to determine.

Berry's evidence continued that he asked the appellant to show him the delivery documents he was carrying. He said he was shown a loadslip in respect of the fuel to be delivered to the Marine Department and covered by two invoices, a total of 9360 litres. He said one of the invoices was covered by the loadslip, the one in respect of 6020 litres (the witness "thought"). That one was unsigned. Another invoice, for 3,340 litres, was produced by the appellant. It was signed and the customer's copy had been removed. Berry telephoned to Coleman, who testified that when he arrived Berry showed him two Mobil Oil invoices made out to the Marine Department. The one that was signed was for 6020 litres and it had the customer's copy torn off. The other invoice was for 3,340 litres and bore the number 689. This had not been signed by the customer and the customer's copy was still there.

Invoice No. 690 for a quantity of 6020 litres is of course what is made the subject of the charge in the first count and the learned Judge rightly called the assessors' attention to this direct conflict between the versions of two major prosecution witnesses. They could,

he said, not both be correct.

At the same time he reminded them of the further evidence of Coleman of a visit to the Marine Department which then ensued, and during which they obtained from Asalusi the customer's copy of invoice 690 and of invoice 687. (The latter, Ex. 4, was for an earlier delivery made the same day). To the customer's copy of invoice 690 (Ex. 16) was attached a delivery docket of V.S. Mani Brothers Limited, the appellant's employer, referring to invoice 690 and the quantity 6020 litres. It was signed by Asalusi. That evidence, if accepted, pointed to Asalusi having the customer's copy and the signed delivery docket for invoice 690 covering 6020 litres.

No specific ground of appeal was directed to this divergence of evidence, which indeed was fully explained to the assessors and left to their decision. The evidence does however serve as a background to a challenge by counsel for the appellant based on a series of rather strange errors in figures made by the learned Judge. The position was not made easier for the assessors by the fact that certain of the original exhibits had been lost and photostats of them were not always fully decipherable. The invoice numbers which were relevant in the case were 689 and 690, the two which the appellant produced at the City Transport, 687, which related to the first load delivered to the Marine Department the same morning, and 389 which was a sample blank invoice used for illustration or the like. There was no invoice 390.

Having dealt correctly with the evidence as to the discrepancy in relation to 689 and 690 the learned Judge began to refer to them as 389 and 390 and fell into this error two or three times. A few pages later in the summing up, the learned Judge made the error of referring to those same documents as 489 and 490. Later, in dealing with the defence he reverted to 389 and 390.

Counsel for the appellant submitted that there was a grave risk that the minds of the assessors would have been confused by those errors. On a careful reading of the summing up we do not consider that there was any real such risk. There were only the four invoices in any way mentioned in the case. As we have said one was a blank specimen and 687 related to an earlier and unconnected consignment. The context in which the learned Judge was speaking in each of the cases complained of precluded any possibility of the assessors thinking that either of those documents could be meant. It is quite clear that the learned Judge was referring to the invoices handed over by the appellant to Berry and about which there was a conflict of evidence between Berry and Coleman. The first two references arise when the learned Judge is speaking of Berry and Coleman having had the whole load of fuel delivered to the Marine Department. The next reference, to 489 and 490, is related to Berry and Coleman's evidence about them. Then, the learned Judge quoted the appellant as saying that the invoices 389 and 390 were both unsigned when he gave them to Berry. Neither of the other invoices mentioned, 389 or 687, played any active part in the story and we are not of opinion that the assessors could have been misled by these errors in numbers.

We return now to our reference above, to the evidence of Asalusi and of A.S.P. Yadram. In order to convict the appellant of aiding and abetting Asalusi in fraudulent false accounting (Count 1) it was necessary for the prosecution to show that Asalusi did make a false entry in invoice 690 with intent to defraud. The learned Judge directed the assessors in those terms. There was some evidence that Asalusi had done so, but in dealing with a submission of no case to answer at the close of the prosecution the learned Judge accepted that there was very little until A.S.P. Yadram gave evidence.

Before this Court counsel for the appellant has made no submission that A.S.P. Yadram's evidence was inadmissible of itself (the major part of it was elicited by the defence in cross-examination) but it was claimed that it was too vague to be helpful to the prosecution. The main features of his evidence were -

(a) He was the investigating officer and arrested the appellant;

(b) At the same time he arrested a Fijian;

(c) The Fijian was charged together with the appellant and his name was Asalusi Tavesivesi.

An answer given by this witness in cross-examination to Mr. Parmanandam, who appeared for the appellant at that stage, is not without interest. He said - "Not true that I asked the Fijian man to plead guilty on 2.6.1981 and that he would not be sent to prison if he did, and keep his job." Asalusi's own evidence at a stage before he was declared hostile, included that he had pleaded guilty and been sentenced to 18 months' imprisonment. He so pleaded because the police had told him to do so. The charge was not specified but he admitted working for the Marine Department as an engineer; he knew the fuel system, the trucks owned by V.S. Mani & Company, their drivers, including the appellant. As has been mentioned, he admitted his signatures on the various documents.

We do not accept that the totality of this evidence is too vague to be considered. It is true that the precise form of the charge against the appellant was not mentioned, but it clearly arises from the same set of facts as have been given in evidence in the present trial; it has also been shown that the proceedings were commenced as a joint trial. The appellant's notice of appeal on the first count, in fact quotes the first count as commencing -

" FIRST COUNT

Statement of Offence

ASALUSI TAVESIVESI, FRAUDULENT FALSE ACCOUNTING: contrary to section 340(1) of the Penal Code, Cap. 11.

SUDHAKAR alias PUNDIT s/o Ram Autar, COUNSELLING PROCURING THE SAME OFFENCE: Contrary to section 21 (1)(d) read with section 340 of the Penal Code, Cap. 11."

The count was clearly amended later and this is an error, but the technical nature of the objection is made manifest. We are satisfied that there was evidence fit to leave to the assessors that Asalusi was guilty of fraudulent false accounting.

We have felt that, though it has not been made a ground of appeal, we should direct our thoughts to whether the evidence of the plea of guilty by Asalusi, though admitted without challenge, was rightly admitted. The effect of what has been called the rule in Hollington v. Hewthorn & Co. Ltd. [1943] K.B. 587, which has been the subject of much criticism (see the New Zealand case of Jorgensen v. News Media [1969] N.Z.L.R. 961, in which it was not followed) has been greatly reduced by legislation. In Hollington's case the decision was that evidence of the conviction of one defendant of careless driving was inadmissible as proof of his negligence in an action for damages on that ground against him and his employer. It related to civil proceedings and, in that respect, has been largely negatived in England by the Civil Evidence Act, 1968 sections 11-13, which has its counterpart in Fiji in the Evidence Act (Cap. 41): section 9 of the Fiji Act provides that in civil proceedings the fact that a person has been convicted shall be admissible to prove that he committed that offence, on a plea of guilty or otherwise, and whether or not he was a party to the civil proceedings. This legislation, however, does not touch the application of the principle to subsequent criminal proceedings. As to this aspect

of the matter there is this passage in Cross On Evidence (4th Edn) at p.398 :

> " Although there is very little authority on the point, it seems that the principle of Hollington v. Hewthorn & Co., Ltd. applies to criminal cases. As between the Crown and the accused, the latter's previous conviction estops him from denying his guilt of the offence for which he was convicted, but the conviction of a third party is inadmissible as evidence of the facts on which it was based. For example, the conviction of a principal is inadmissible as evidence of the commission of the main crime at the trial of an accessory, and the conviction of the thief is inadmissible as evidence that the goods received were stolen at the trial of the handler. One of the oldest justifications of the principle we have been considering applies in such cases for it would be possible for the principal or thief to have been convicted on evidence which is inadmissible against the accessory or handler, evidence of their spouses, for instance, but it is doubtful whether this warrants the retention of the principle even in criminal cases, and the 11th Report of the Criminal Law Revision Committee recommends the adoption of a clause for criminal proceedings similar to s.11 of the Civil Evidence Act, 1968. "

Nevertheless we think the evidence was rightly admitted in the present case. It was not res inter alios acta; the two parties were in effect being jointly tried and there was no breach of the hearsay rule. Asalusi himself told the assessors on oath that he had pleaded guilty. He implied at the same time that it was a false plea made because of the blandishments of the police. It was for the assessors to determine the value of his evidence in that respect in the light of the whole of the evidence. Part of that evidence was the testimony of A.S.P. Yadram which emphasized the fact that the plea was made in the course of joint proceedings against Asalusi and the appellant, and would tend to confirm that the admission which Asalusi made to the assessors related to the matters in issue in the proceedings before the Court. We do not find that there is anything in this aspect of the trial which resulted in any miscarriage of justice.

The next ground argued by counsel for the appellant relates to the second count. He submitted that there was no sufficient evidence of actions amounting to an attempt in law, and that the direction of the learned Judge did not sufficiently warn the assessors of the equivocal nature of the acts of the appellant, or some of them.

The learned Judge summed up the law as to attempt in the following terms :

> " What is 'attempt' in law? It is defined in our Penal Code as follows :
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> ' When a person, intending to commit an offence, begins to put his intention into execution by measures adopted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.'
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> Put simply, the accused must have the intention of committing the offence but that is not enough. He must do something towards committing that act which clearly and unequivocally shows that intention. If he does that, then, if he cannot complete the crime he would still be regarded as having attempted to commit it.
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> The act, however, which he commits towards showing his intention to commit the crime must be close to the actual commission of it. Mere preparation to commit a crime is not an attempt in law if what is done is remote from its actual commission.
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> Whether the accused's act was close enough to the actual discharge of the oil into City Transport tank and whether his act i.e. 'things said and done' by him at the time clearly and unequivocally showed his intention of doing so, is an issue of fact for you to determine. "

Counsel relied on the case of Campbell and Bradley v. Ward [1955] N.Z.L.R. 471, in which the "equivocality" rule was discussed, though the New Zealand legislation on the subject of attempts was not in the same terms as the Fiji section quoted above. It was held

(we quote from the headnote) that an overt act, no matter how proximate it may be, cannot be an attempt unless the act is in itself sufficient evidence of the intent to commit the particular crime.

In dealing with the evidence the learned Judge advised the assessors that if they accepted the evidence about getting an invoice signed by Asalusi, though it was relevant to the appellant's intent not to deliver part of the fuel in the tanker, was an earlier act and would be regarded as preparation and not of itself an attempt. The learned Judge then dealt with the passage from Berry's evidence which we have discussed above, and we repeat the important passage from the Judge's direction :

> "The act of the accused consisted of things done or said by him at the time. He was removing the lid of the underground tank and, when asked how much he was delivering, said, 'Fifteen hundred'. That is the act of the accused that the prosecution are relying on. "

The direction also included the following passage :

> " He was later questioned by Berry and Coleman. What he said to them later is not part of the overt act of the accused for the purpose of deciding whether or not what he did amounted to an attempt to give the oil to City Transport Limited. For that purpose you should take into account the fact -
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> (i) that he had parked his tanker where it would be parked for the purpose of discharging oil into the underground tank;
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> (ii) that the accused himself was removing the lid of the underground tank while the City Transport employee was getting ready to dip the tank; and
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> (iii) when asked how much he was delivering there the accused replied 'Fifteen hundred'.

If you accept this evidence, gentlemen, then, say the prosecution, that there can be no doubt whatever that the accused's intention at the time was to discharge fuel into City Transport's underground tank and that the very next step would have been the discharge of fuel i.e. the commission of the crime itself. "

In summary at the close of the summing up the learned Judge said :

" As for the second count, if you are satisfied beyond reasonable doubt that the acts of the accused at the City Transport garage clearly and unequivocally show an intention on his part to dishonestly deliver fuel to City Transport, you will find him guilty on the second count. "

We have quoted as part of the summing up the first part of section 380 of the Penal Code. The learned Judge did not find it necessary to quote the remainder of the section, but for completeness we set it out here :

" It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence. "

It seems clear that the section is not intended to be construed too narrowly.

In our opinion the learned Judge's direction was an amply sufficient statement of the law as to attempts in Fiji, as applying to the circumstances of the case. The assessors were told that the appellant must be shown to have the intention to commit the completed crime, were warned that mere preparation was not enough, and that the act relied upon must "clearly and unequivocally" show the intention, a phrase used

repeatedly. The evidence itself, if accepted by the assessors, as it was by the majority, amply supported their opinion. Even regarded in the light of what was said in Campbell and Bradley v. Ward (supra), though we do not regard everything which was said there as being necessarily applicable in Fiji, the summing up in this respect was in our opinion adequate and could have left the assessors under no misapprehension.

For the reasons we have given we do not consider that any of the grounds of appeal against conviction have merit: the appeal against sentence was not pursued. Both appeals are accordingly dismissed.

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Vice President

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Judge of Appeal

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Judge of Appeal