A

CECIL JOSEPH MASCARENHAS & ANOTHER

v.

ATTORNEY-GENERAL

B

[SUPREME COURT, 1969 (Moti Tikaram Ag. P.J.), 26th November 1968, 20th January 1969]

Criminal Jurisdiction

Criminal law—trial—Magistrate's Court—separate charges against different persons—joint trial by consent of persons charged—trial not a nullity—Criminal Procedure Code (Cap. 14) ss.310, 319—Criminal Procedure Code (Cap. 9—1955) ss.193(1), 193(2) (b) (i), 193(2) (b) (ii), 201—Fiji Constitution (Sched. 2—Fiji (Constitution) Order 1966) s.38(4)—Crimes Amendment Act 1963 (N.Z.) s.3.

C

Criminal law—charge—withdrawal of by prosecution—Magistrate's Court—magistrate's discretion to refuse—Criminal Procedure Code (Cap. 9—1955) ss.193(1), 193(2) (b) (i), 193(2) (b) (ii), 201—Fiji Constitution (Sched. 2—Fiji (Constitution) Order 1966) s.38 (4).

Criminal law—immigration—permit to remain in Fiji—subject to lawful conditions—effect of non-compliance with fundamental condition—Immigration Ordinance 1962, ss.8(1), 13, 14(1), 19(1) (i), 19(1) (k), 19(3).

D

The two appellants were separately charged before a magistrate with the offence of being unlawfully present in the colony, contrary to section 19(1) (i) and (3) of the Immigration Ordinance, 1962. On the application of the prosecution and defence and with the consent of both appellants the charges were heard together.

E

Held: It was competent for the magistrate in the circumstances to try the charges jointly and the trial was not a nullity.

Annamale v. The Police (1948) 4 F.L.R. 5, not followed.

F

The prosecution, after closing its case, applied to the magistrate to withdraw the charges against both appellants. The magistrate refused the application, holding that to allow it at that stage would be an unjudicial exercise of his discretion.

Held: The magistrate had a discretion to refuse the application.

G

Where a permit to remain in Fiji has been issued subject to lawful conditions, non-compliance with any condition which is fundamental, renders the permit invalid and the continued stay in Fiji of the permit holder unlawful.

H

Fiji Constitution (Sched. 2 — Fiji (Constitution) Order 1966) s.38(4). The powers conferred on the Attorney-General by subsection 2(b) and (c) of this section shall be vested in him to the exclusion of any other person or authority:

Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court.

A Other cases referred to :

R. v. Dennis and Parker [1924] 1 K.B. 867; 18 Cr.App.R. 39: *R. v. Brett and Parish* (1848) 3 Cox C.C.79: *Crane v. Director of Public Prosecutions* [1921] 2 A.C. 299; 15 Cr.App.R. 183: *R. v. Ashborne Justices, Ex parte Naden* [1950] W.N. 51; 94 Sol.Jo. 148: *Brangwynne v. Evans* [1962] 1 All E.R. 446; [1962] 1 W.L.R. 267: *Monika v. Police* [1918] N.Z.L.R. 300: *Munday v. Gill* (1930) 44 C.L.R. 38: *R. v. Staffordshire Justices* (1858) B 23 J.P. 486; 32 L.T.O.S. 105: *Reilly v. Police* [1967] N.Z.L.R. 842: *R. v. Biggins* (1862) 5 L.T. 405, sub nom. *R. v. Lipscombe, ex parte Biggins* 26 J.P. 244: *Taylor's Central Garages Ltd. v. Roper* (1951) 115 J.P. 445; [1951] W.N. 383: *R. v. Dartford Justices, ex parte Redman* (1949) (unreported): *O'Toole v. Scott* [1965] A.C. 939; [1965] 2 All E.R. 240: *R. v. Assim* [1966] 2 Q.B. 249; [1966] 3 W.L.R. 64.

C Appeal by Case Stated from conviction by the Magistrate's Court of being unlawfully present in Fiji.

M. V. Pillai for the appellants.

K. A. Stuart for the respondent.

The facts are set out in the Case Stated which is incorporated in the D judgment.

MOTI TIKARAM J. : [20th January 1969]—

This is an appeal, by way of Case Stated, brought under the provisions of Section 310 of the Criminal Procedure Code, Cap. 14. The full text of the Case as stated by the learned trial Senior Magistrate, Lautoka, E in accordance with Section 319 of the Criminal Procedure Code is as follows : —

CASE

1. On the 27th day of November, 1967, charges were preferred by a police officer against the appellants separately in that Cecil Joseph F Mascarenhas was charged with : —

STATEMENT OF OFFENCE

BEING UNLAWFULLY PRESENT IN THE COLONY : Contrary to Section 19(1) (i) and (3) of the Immigration Ordinance, No. 2 of 1962.

G *PARTICULARS OF OFFENCE*

CECIL JOSEPH MASCARENHAS between 28th day of June, 1967 and 25th day of November, 1967 at Lautoka in the Western Division was unlawfully present within the Colony.

and Marie Coline Mascarenhas was charged with : —

H *STATEMENT OF OFFENCE*

BEING UNLAWFULLY PRESENT IN THE COLONY : Contrary to Section 19(1) (i) and (3) of the Immigration Ordinance No. 2 of 1962.

PARTICULARS OF OFFENCE

MARIE CELINE MASCARENHAS between 28th day of June, 1967 and 25th day of November, 1967 at Lautoka in the Western Division was unlawfully present within the Colony.

2. At all the hearings before me both appellants were represented by a barrister and solicitor, Mr. M. V. Pillai and the prosecution was conducted by a police officer.

3. On the 20th December, 1967, both appellants appeared separately before me, the charges were read and explained and both appellants pleaded not guilty.

4. On the same date and on the application of both the prosecution and the defence and with the consent of both appellants I consolidated the hearing and ordered both charges to be heard together.

5. On the 24th January, 1968, I heard the evidence against both appellants and at the close of the prosecution's case counsel for both appellants moved there was no case to answer. At the close of his submission, counsel stated that, if I ruled against him, he would not be calling any evidence. I then ordered that my ruling should be delivered on notice.

6. On the 14th February, 1968, after notice had been given, Court was reconvened for delivery of my ruling. Prior to delivery the police prosecutor stated that he was directed by the Attorney-General through his superiors to ask leave of the Court to withdraw the charges against the accused on the grounds that the charges under Section 19(1) (i) of the Immigration Ordinance 1962 were wrong in law and defective and that the more appropriate section would have been section 19(i) (k) of the Immigration Ordinance 1962.

7. The police prosecutor further stated that he was directed to ask that the accused be discharged under section 193(2) (b) (ii) of the Criminal Procedure Code and not acquitted.

8. Counsel for the appellants asked that the appellants be acquitted under section 193(2) (b) (i) of the Criminal Procedure Code and not discharged.

9. I considered that I would have been exercising my discretion unjudicially if at that stage I permitted the charges to be withdrawn under section 193(1) of the Criminal Procedure Code and I therefore refused the application of the prosecution.

10. In relation to the defence submission of no case to answer, I ruled that there was a case to answer against both the appellants and I put them upon their defence.

11. After the provisions of section 201 of the Criminal Procedure Code had been complied with, both appellants elected to call no evidence.

12. On the 14th February, 1968, I delivered my judgment and convicted both the appellants as charged. I then fined the first appellant £25 and in default two month's imprisonment and the second appellant £10 and in default one month's imprisonment.

A 13. I found the following facts —

(a) That on the 18th February, 1965, under the powers conferred by section 8(1) and section 13 of the Immigration Ordinance 1962, Mr. Cecil Joseph Mascarenhas was lawfully granted a permit to enter and reside in Fiji for 4 years from the date of his arrival which was endorsed as being "subject to the B following conditions", namely —

(i) That security in the sum of £175.0s.0d. be deposited or a security bond for that sum be lodged by the Bank of Baroda Limited, at Suva, dated 4th February, 1963;

(ii) that he engage only in the following occupation or profession — Bank Officer;

C (iii) that in Fiji he will be employed only by the Bank of Baroda, Suva, Fiji;

(iv) that he will report to the Principal Immigration Officer if he fails to comply with any of the above conditions.

(b) I specifically found that the said permit was subject to the conditions (inter alia);

D (i) that he engage only in the occupation of bank officer;

(ii) that he be employed only by the Bank of Baroda, Suva, Fiji.

(c) That on the same date under the aforesaid powers Marie Celine Mascarenhas, the wife of the first appellant, Cecil Joseph Mascarenhas, was lawfully granted a permit to enter E and reside in Fiji for the same period which was endorsed as being "subject to the following conditions", namely —

(i) that security in the sum of £263. 0s. 0d. be deposited, or a security bond for that sum be lodged by the Bank of Baroda Limited at Suva, dated 4th February, 1963;

F (ii) that she engage only the following occupation or profession — domestic duties or other duties as she may prefer;

(iii) that she is the legal wife of Mr. C. J. Mascarenhas holder of permit No. 40/63 dated 18th February, 1963;

(iv) that this permit remains valid for as long as the husband Mr. C. J. Mascarenhas is the holder of valid permit to G reside in Fiji.

(d) I specifically found that the said permit granted to Marie Celine Mascarenhas, was subject to the conditions (inter alia);

(i) that she remained the legal wife of the first appellant, Cecil Joseph Mascarenhas;

H (ii) that the permit of the first appellant, Cecil Joseph Mascarenhas, remained valid.

(e) That on 27th April, 1966 both the aforesaid permits were lawfully extended to 13th March, 1969 subject to the same above conditions.

(f) That from the 26th May, 1967 the first appellant was no longer employed as a bank officer by the Bank of Baroda, Suva.

(g) That on 2nd June, 1967 the person exercising the powers of the Principal Immigration Officer purported to cancel both the aforesaid permits.

(h) That between the 28th June, 1967 and the 25th November, 1967, being the period to which the charges referred, the first appellant was no longer employed as a bank officer by the Bank of Baroda, Suva, and that no new permit had been granted to either appellant.

14. It was contended by Counsel for the appellants when moving that there was no case to answer —

(a) that the Principal Immigration Officer had no power to cancel a permit and that no power was given to him by section 8(1) of the Immigration Ordinance, 1962, or any section thereof, to cancel such permits;

(b) that the said permits were extended to 13th March, 1969, and since the purported cancellation was of no effect they were still in force.

15. It was contended by the prosecution police officer —

(a) that he did not argue that the Principal Immigration Officer had power to cancel the said permit;

(b) that the said permits were granted subject to conditions on the expiration of which the permits became invalid and were surrendered to the Immigration Officer and that the putting of a cancellation stamp thereon was merely administrative to prevent the expired permits being in circulation;

(c) that if the Bank by which the first appellant was employed ceased to operate or the first appellant ceased his employment therewith, his said permit automatically expired and after such expiration, his stay in Fiji was unlawful.

16. By my judgment delivered on 14th February, 1968, I was of the opinion —

(a) that in relation to the question as to whether or not the purported cancellation of the said permits had any legal effect, this was not material because from the date when the first appellant ceased to be employed as bank officer by the Bank of Baroda, Suva, he was in breach of the conditions entitling him and the second appellant to reside in Fiji, causing his permit and that of the second appellant to expire, i.e., to terminate, to become void;

(b) that since no new permit entitling either the first appellant or second appellant to reside in Fiji had been granted both the first and second appellants were guilty as charged by virtue of section 14(1) and section 19(1) (i) of the Immigration Ordinance 1962.

QUESTIONS

17. The question for the opinion of the Supreme Court which the Attorney-General has required to be submitted is :—

A Whether or not because the first and second appellants had been separately charged and separately pleaded and were subsequently tried together, the entire trial was therefore a nullity notwithstanding the fact that the appellants by their counsel and the prosecuting police officer applied for and agreed to the latter course and that both appellants specifically consented.

B 18. The questions for the opinion of the Supreme Court which the first and second appellants desire to be submitted are :—

(a) whether or not I had a discretion to refuse the application of the prosecution that the charges be withdrawn on account of the provisions of section 38(4) of the Constitution;

(b) whether or not the permit to enter and reside issued to the first appellant did expire or become invalid on breach of the C aforesaid conditions, making the first appellant's stay in Fiji unlawful and also the stay of the second appellant."

Although the Attorney-General is intituled as the respondent in this case, he does not, however, support the conviction against either appellant. Indeed, it is the Crown's contention firstly that the trial was a nullity by reason of the consolidation and secondly, even if the trial were D not a nullity, the convictions, nevertheless, cannot stand as the Attorney-General shares the appellant's contention that the permits in question did not become invalid because of failure on the part of the appellants to continue to comply with the conditions upon which they were issued. The question as to whether the joint trial was a nullity or not does not admit of an easy answer. The learned counsel appearing for the respondent has cited the case of *Annamale v. The Police* 4 Fiji Law E Reports 5 wherein a former Chief Justice of Fiji, (Seton J.), quashed the conviction of the appellant on ground that the magistrate's court had no jurisdiction to try the charges against him jointly with other charges against three other defendants. In this case, the appellant was convicted of the offence of criminal trespass and common assault. Arising out of the same facts, three other persons were charged with F assault upon the appellant. At the request and with the consent of the parties, all the charges were tried together. Relying on the decision in *The King v. Dennis* and *The King v. Parker* [1924] 1 K.B. 867, the learned Chief Justice said that, "it was clear that two persons charged in separate indictments cannot be tried together, even with their consent, a previous decision on the subject, *Brett and Parish*, (1948) 3 Cox C.C. 79 being completely overruled." His Lordship held that the principle must be G the same whether the case is one of a joint trial of two persons charged on separate indictments or a joint trial of two persons charged on separate information or charges in a magistrate's court. However, the learned Chief Justice did say in the course of his judgment that neither the counsel for the appellant nor counsel for the Crown were able to cite to him any 'decided case on the point so far as regards procedure in courts of summary jurisdiction.' It is undoubtedly true that H in England two indictments for separate offences against different persons cannot be tried togther, *Crane v. The Director of Public Prosecutions* [1921] A.C. 299; even by consent, *R. v. Dennis and Parker* (supra). But two separate informations against the same defendant may, by consent, be heard together in the course of summary jurisdiction, see

R. v. Ashborne Justices 1950 W.N. 51; *Brangwynne v. Evans* [1962] 1 All E.R. 446 and *Monika v. Police* (1918) N.Z.L.R. 300. However, in *Munday v. Gill* (1930) 44 C.L.R. 38, the High Court of Austraila held that although the defendants charged upon different informations on summary offences were entitled to separate hearings, it was a right which could be renounced or waived by them and did not go to the jurisdiction of the magistrate, though courts having appellate jurisdiction have frequently interfered or set aside convictions so obtained. The decision of the High Court followed the English case of *Rex. v. Staffs. J.J.* (1858) 23 J.P. 846. The head notes in the English case (R. v. *Staffs. J.J.*) read as follows :—

> "A separate information and separate summons were respectively laid and issued against two persons for having used nets for the purpose of taking game contrary to the 1 Will. 4, c.32, s.23. The summonses were returnable at the same time; and, as the two persons had been using the nets together, the two cases were heard as one. The two persons were severally convicted in full penalties. The 45th section of the act takes away the writ of certiorari. On cause shown against a rule nisi for a certiorari to bring up the convictions that they might be quashed on the grounds that the justices had imposed two distinct penalties for one joint offence, and that they had heard the two cases as one :— Held, that there was no excess of jurisdiction, and that the rule must be discharged."

In the course of the argument in this case Lord Campbell C.J. observed —

> "The jurisdiction to decide the informations did not cease . . . . . They had jurisdiction to hear each case . . . . . We must assume that the magistrates applied to each case the evidence that was given in support of it. The proceedings were irregular but not null."

In a recent New Zealand case, *Reilly v. The Police* [1967] N.Z.L.R. 842, the Supreme Court (Tomkins J.) in its appellate jurisdiction held that a court of summary jurisdiction may by consent hear several charges against several defendants together but it was of the view that it was not desirable that this be done unless the evidence relevant to all the charges is substantially the same and there is no likelihood of prejudice to a defendant by the court being influenced in regard to one charge by evidence inadmissible on that charge but admissible on one of the other charges. The Supreme Court further expressed the opinion that if upon appeal it appears likely that the learned magistrate was so influenced the conviction cannot stand. In giving the judgment of the Supreme Court, Tomkins J. however observed at page 849 that whereas in England two indictments for separate offences against different persons cannot be tried together even by consent, this was not so in New Zealand by virtue of Crimes Amendment Act, 1963, Section3.

In addition to the *Staffordshire Justices* case which found favour with the High Court of Australia in *Munday v. Gill* (supra) there is at least one English case which supports the proposition that separate charges against two or more defendants may be heard together in a summary trial. In *Rex. v. Lipscombe, ex parte Biggins* 26 J.P. 244 where six servants were brought before a Justice and their cases were heard all together in the lump being founded on the same circumstances a certiorari was

refused to be granted by Cockburn C.J., and two other Judges merely on that ground, especially when the men didn't ask to have each case taken separately. In addition there are judicial pronouncements which subject to certain safeguards appear to favour or approve of joint trials of persons charged separately in a court of summary jurisdiction. *Taylor v. Roper* 115 J.P. 445 was a decision on the method of hearing charges against two defendants, the one charged with using a motor vehicle without a road service licence and the other with permitting such use. In the Divisional Court Hilbury J. said that —

> "The proper course would have been to ask the representatives of the respective parties whether they would agree to the two informations being heard together, and, if they did so, to give each representative the opportunity of crossexamining the witnesses for the prosecution."

Similarly in an unreported case of *R. v. Dartford Justices ex parte Redman* which concerned an application for certiorari, and which was decided by the King's Bench Divisional Court in 1949, Lord Hewitt C.J. in giving the judgment of the Court refusing the rule said that it would be better if the decision in the first case had been announced before the second had been considered and continued —

> "It is also unfortunate that the two cases were not heard together. Where there are two summonses arising from a collision at a crossroads it seems the proper course that the two informations should be heard together. The necessary ingredient is that the persons concerned should consent."

Although the passage quoted is *obiter dictum* it has been said with much force that any definite pronouncement which falls from the Lord Chief Justice must be given the most serious consideration.

Delivering a judgment of the Privy Council in *O'Toole v. Scott* [1965] A.C. 939 Lord Pearson made the following observations at p.959 with regard to the right of a judge or magistrate to regulate proceedings of his Court where there is no statutory limitation of the discretion —

> "It can be exercised either on general grounds common to many cases or on special grounds arising in a particular case. Its exercise should not be confined to cases where there is a strict necessity; it should be regarded as proper for a magistrate to exercise the discretion in order to secure or promote convenience and expedition and efficiency in the administration of justice."

The Court of Criminal Appeal expressed very much the same view in *Regina v. Assim* [1966] 3 W.L.R. 55 wherein at page 64 it said —

> "The court has already emphasised, and desires to repeat, that it is the interests of justice as a whole that must be the governing factor and that amongst those interests are those of the accused. It is essentially a matter for the discretion of the court whether several offenders can properly be tried together at the same time and it is necessary for the trial judge to scrutinise matters closely with the same degree of care that is applied in dealing with the question whether a single person can be charged with several offences before the same jury."

Glanville Williams, a writer of eminence on criminal law, has this to say at page 248 of his book 'The Proof of Guilt' (3rd Ed.) on the subject of trial together of different defendants — A

> "The law is curiously different where there are separate indictments or informations against two or more defendants; here the separate charges, provided that they arise out of the same facts, may be heard together if the defendants consent; but the rule is that any objection is decisive. Thus the rights of the defendants will often depend on whether the prosecution has chosen to make a joint B charge or a number of separate charges."

It is with considerable diffidence that I have come to the conclusion that the principle applied by the Hon. the Chief Justice (Seton J.) in *Annamale's* case, already cited, cannot be applied to the present case. It is a matter of some conjecture as to what extent the decision in Annamale's case was influenced (and if I may say so if it was so influenced C then there was considerable justification for it) on the grounds of conflict of interest and possibility of prejudice. Furthermore I am respectfully of the view that had the English cases of *R. v. Staffordshire J.J.* and *R. v. Lipscombe,* to which I have already made reference, been cited to the Hon. the Chief Justice togther with the Australian case of *Munday v. Gill* which is at least of strong persuasive effect, I am strongly of the view that *Annamale's* case might not have been held to be a nullity solely D on the ground of joint trial.

In the appeal case before me there was no question of any conflict of interest. Indeed, it was in the common interest of all concerned that the two charges should be heard together. The first appellant was the husband of the second appellant. The offences were identical and indeed arose from the same set of facts. The second appellant's defence was also identical with that of her husband. No prejudice or miscarriage E of justice has in fact occurred. I am, therefore, of the opinion that, in the absence of any statutory provision to the contrary, it was competent in the particular circumstances of this case for the learned trial magistrate to have held a joint trial on the application and with the consent of the parties concerned.

The answer, therefore, to the question submitted on behalf of the F Attorney General is that the joint trial was not a nullity, notwithstanding the fact that the first and second appellants had been separately charged and that they had separately pleaded. As regards the first question submitted on behalf of the Appellants the appeal on this ground has been abandoned. The learned counsel for the appellants having stated to the Court that the appellants concede that the learned trial magistrate had discretion to refuse the application of the Prosecution that the charge G be withdrawn on account of the provisions of Section 38(4) of the Constitution. Although the ground of appeal implicit in this question of law has been abandoned by the Appellants, I nevertheless, think that for the purposes of record an answer is called for. The answer is that the learned trial magistrate had discretion to refuse the application. He exercised his discretion judicially.

I now turn to the second question submitted on behalf of the appellants H namely —

> "Whether or not the permit to enter and reside issued to the first appellant did expire or become invalid on breach of the aforesaid

A conditions, making the first appellant's stay in Fiji unlawful and also the stay of the second appellant."

The learned trial Magistrate was of the view that as from the date when the first appellant ceased to be employed as a bank officer by the Bank of Baroda Limited, he was in breach of the conditions entitling him and his wife to reside in the Colony, "causing his permit and the second accused's permit to expire (i.e. to terminate, to become void, B *vide* the Shorter Oxford Dictionary 3rd Edition Vol. 1 page 656)." The finding and the reasoning of the learned trial Magistrate which led him to the view that the appellants' presence in Fiji was unlawful, is summarised in the following passage of his judgment:—

> "The evidence and correspondence clearly reveal that and I find that between the 28th June, 1967 and the 25th November, 1967 (being C the period to which the charges refer) the First Accused was no longer employed as bank officer by the Bank of Baroda, Suva, Fiji, that his permit (Exhibit 5) had accordingly expired, and that no new permit entitling him to remain in the Colony had been granted; and as regards the Second Accused that her permit (Exhibit 6), being conditioned upon the conditions of the First Accused's permit being complied with, had similarly expired and that no new permit D entitling her to remain in the Colony had been granted."

Section 14(1) of the Immigration Ordinance No. 2 of 1962 provides that it shall be unlawful for any person to remain in the Colony after the expiration or cancellation of any permit issued to him and under Section 19(1) (i) of the Immigration Ordinance No. 2 of 1962 any person who is unlawfully present within the Colony in contravention of the provisions of the Ordinance shall be guilty of an offence. Section 19(1) E (k) provides that any person who refused or fails to comply with any lawful term or condition subject to which any permit is or has been issued to him under this Ordinance and with which he is required by this Ordinance to comply shall be guilty of an offence.

The Crown's view is that on ceasing to be employed by the Bank of Baroda Limited the First Appellant's obligation in terms of condition F 4 of his permit was to report this fact to the Principal Immigration Officer and this, the Crown concedes, the First Appellant did. Condition 4 of the First Appellant's permit states:

> "that he will report to the P.I.O. if he fails to comply with any of the above conditions."

The Crown therefore argues that upon compliance with the obligation placed on the First Appellant the permit cannot be deemed to have G expired notwithstanding the fact that the First Appellant was in breach of conditions Nos. 2 and 3 of his permit. The arguments advanced by the learned counsel for the Appellant were identical with those advanced by the learned counsel who represented the Attorney General. The real question for this Court is to decide whether breach by the First Appellant of conditions 2 and 3 had the effect of causing his permit, and consequently that of his wife, to expire. If this was the effect of H the breach of these conditions then undoubtedly the presence of the Appellants in Fiji became unlawful.

The problem is essentially one of construction. It could be argued with much force that since the legislature made specific provision under

Section 19(1) (k) with regard to breach of condition (s) or term(s) of permits, it must have intended that those permit holders who committed breach(es) should be dealt with under Section 19(1) (k). Putting it in another way, it could be argued that if the legislature intended that upon breach of conditions, at least breach of those conditions which are fundamental, then the permit would become void, it would have said so. A

Although the learned trial Magistrate did not say why the First Appellant's permit must be construed to have expired upon breach of conditions it is obvious that he must have considered conditions 2 and 3 of the First Appellant's permit fundamental and that they went to the root of the matter. It is quite clear that the only purpose for which the First Appellant was granted a permit, on his own application, to enter and reside in Fiji for four years was to enable the Appellant to work as a bank officer for the Bank of Baroda Limited. The permit was issued subject, inter alia, to conditions 2 and 3, which conditions I consider to be fundamental. Those conditions were specifically incorporated into the permit. Condition 4 was in the nature of an ancillary term which did not go to the root of the matter. The First Appellant voluntarily destroyed the very basis upon which the permit was granted by ceasing to be employed as a bank officer by the Bank of Baroda Limited. Under such circumstances to continue to regard the permit as valid would be to defeat the object of the Immigration Ordinance. It was within the power of the Immigration Authorities to refrain from instituting prosecution and to issue a fresh permit. This they did not do. However, I might add in fairness to the Immigration Authorities that the prosecution was not launched until the Appellants failed to leave the Colony in spite of written requests to do so and in spite of purported cancellation of their permits, whatever the legal effect of the cancellation might have been. In my view the fact that the First Appellant might have been prosecuted under Section 19(1) (k) for breach of conditions and the fact that he complied with condition 4 of his permit does not affect the issue in this case as I have come to the conclusion that the learned trial Magistrate was correct in treating the permit of the First Appellant as having expired or as having become invalid, making the First Appellant's stay in Fiji unlawful, and also the stay of the Second Appellant. In coming to this conclusion, I have not sought to diminish within its proper sphere the principle that in doubtful cases a penal provision ought to be given that interpretation which is least unfavourable to the accused. Whichever way one looks at it, the presence of the accused person was at the material time unlawful. It is, however, open to the authorities to issue fresh permits to regularise the position. B C D E F G

To summarise the position therefore, the answer to the first question is that the joint trial was not a nullity. The answer to the second question is that the learned trial Magistrate had discretion to refuse the prosecution's application to withdraw the charges and the answer to the last question is that the First Appellant's permit, on the particular facts and in the particular circumstances of this case, must be deemed to have expired, making the stay in Fiji of the First Appellant, and also that of the Second Appellant, unlawful. H

Consequently this appeal is dismissed.

Appeal dismissed.