A

## AKARIVA NABATI

*v.*

B

## REGINAM

[COURT OF APPEAL, 1969 (Gould V.P., Hutchison J.A., Marsack J.A.) 23rd, 27th June]

Criminal Jurisdiction

C *Criminal law—direction to assessors—fraudulent conversion of property—necessity for direction on fraudulent intention as essential factor in offence—Penal Code (Cap. 11) s.311 (1) (c) (i)—Larceny Act 1916 (6 & 7 Geo. 5, c.50) (Imp.) s.20(4).*

Where a person is charged with fraudulent conversion of property the assessors must be directed that a fraudulent intention on the part of the accused person is an essential factor in the offence. Cases in D which the absence of such a direction can be excused because the evidence is so clear that fraud can be the only inference are exceptional.

Cases referred to: *R. v. Bryce* (1955) 40 Cr.App.R.62: *R. v. Martini* [1941] N.Z.L.R. 361: *R. v. Carr* (1916) 12 Cr.App.R. 140.

Appeal from a conviction of fraudulent conversion of property in the Supreme Court.

E

*S. M. Koya* for the appellant.

*G. N. Mishra* for the respondent.

Judgment of the Court (read by HUTCHISON J.A.): [27th June 1969]—

F There were seven counts in the Indictment against appellant, each charging him with fraudulent conversion of property, contrary to section 311(1) (c) (i) of the Penal Code.

That section reads:—

"311. (1) Any person who —

G .....

(c) (i) being entrusted either solely or jointly with any other person with any property in order that he may retain in safe custody or apply, pay, or deliver, for any purpose or to any person, the property or any part thereof or any proceeds thereof

H .....

fraudulently converts to his own use or benefit, or the use or benefit of any other person, the property or any part thereof or any proceeds thereof,

is guilty of a misdemeanour ....."

Each count charged him that he fraudulently converted to his own use and benefit a sum of money entrusted to him by the Headmaster or Acting Headmaster of Nabua Fijian School in order that he might deposit it in the current bank account of the School at the Bank of New Zealand.

The assessors found him guilty on all counts, and the trial Judge convicted him on all counts.

A great many points were taken on the appeal by counsel for appellant. Some of them we found to be slight and of no merit, but others raised substantial questions, in particular ground 1, with which grounds 5 and and 12 were connected. The point is that the learned trial Judge nowhere told the assessors that fraud on the part of accused is an essential factor in the offence charged. He read them the charges and read them the relevant part of section 311 but said no more about the factors of the charge. In summing-up on the first count — and his summings-up on the other counts were similar — he said :—

> "In this connection the Crown relies upon the evidence of P.W. 1 Jemesa Robarobalevu. Page 92 is the relevant page of Exhibit A to which Jemesa has referred the court. Jemesa has sworn on oath that the accused acknowledged receipt of this sum £41.0.9d. by his signature, the carbon copy of which is page 92. It is the Crown case that you can have no reasonable doubt about this. Assuming that it is so the prosecution maintains that it has established the particulars of this first count against the accused, that is to say, this sum of £41.0.9d. was entrusted to him by Jemesa in order that he might deposit it into Nabua Fijian School account at the Bank of New Zealand, Suva. Having regard to the date (21st June) appearing at page 92 and to the fact that this money was not paid into the bank by the 14th October, then the only inference that you can draw is that the accused fradulently converted it to his own use as charged. If you so find, he is guilty upon count one."

It may be that the learned Judge had, for himself, formed a view that there was no possibility of anything other than fraud on the part of appellant if the facts were established of his receiving the money and of his not paying it into the Bank. Yet the way the matter was put to the assessors cannot appear to us to be anything other than a misdirection — see the cases of *Bryce* 40 Cr.App.R. 62 and the *King v. Martini* [1941] N.Z.L.R. 361. Mr. Mishra contended that, where the evidence is so clear that fraud can be the only inference, the Judge need not direct that it is a necessary factor in the charge and cited *Carr* 12 Cr.App.R. 140. No doubt there are cases in which that can be said, but we think that they are rare and we do not think that this is one of them. On this account the appeal is allowed, the convictions on the seven counts are quashed and a new trial is ordered.

Of the other grounds taken, one was that, on account of the historical development of section 20 of the Larceny Act, 1916, (U.K.), of which paragraph (4) is in the words of paragraph (c) of section 311(1) of the Penal Code, the latter paragraph is not applicable to the circumstances of this case, but that appellant should have been charged under section 291 of the Code. It is unnecessary for the purposes of this appeal to say anything about this contention, and we mention it only so that the Judge taking the new trial may be apprised that such a point may come up.

*Appeal allowed; new trial ordered.*