IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 22 of 1966

Between:

BISHUN DUTT s/o Dwarka Singh Appellant

- and -

REGINAM Respondent

Mills-Owens, P. JUDGMENT

The argument before this Court has taken a different course from that in the Court below. It is now the case that if a conviction is to be sustained it can only be by the substitution of a verdict of guilty on the alternative count, that of having possession of a passport endorsed with a forged entry permit. It has throughout the proceedings been accepted that permits for entry into New Zealand are issued by the Immigration Department here as agents for the New Zealand Government under an administrative arrangement, not under the Immigration Ordinance. It is accepted also that the appellant was not, in fact, an immigrant. The purpose of such permits is to secure entry into New Zealand, not to authorise departure from the Colony. The question which now arises in this Court is whether section 19(1)(e) of the Immigration Ordinance extends to create the offence in the Colony of possession of a passport endorsed with a forged permit purporting to authorise entry into another territory. The charge is not one of forgery committed in the Colony or of uttering a forged document in the Colony, although analogous.

Section 19(1)(e) is to be construed in the light of the Ordinance as a whole; in the context. In this respect the argument for the appellant is that the Ordinance is concerned with immigration and therefore the section does not extend to the case of the appellant who at the material time was an emigrant. Secondly, it is argued that a question of territorial jurisdiction arises; or, as I would prefer to put it, that in ascertaining the scope of the section the general principles of international law are to be borne in mind, namely that the courts of one territory do not seek to enforce the penal or political laws of another territory. In this respect, it is suggested, a conviction would be a means of indirect enforcement of the immigration laws of New Zealand. It is, of course, open to one territory to give such aid, by means of an appropriate provision in its own penal laws; the suggestion is that section 19(1)(e) is not to be construed as extending unambiguously to the case of a person leaving the Colony. 10

As has been pointed out, the 'long title' of the Ordinance refers to the control of immigration. Paragraph (m) of section 19(1), it may be noted, creates the offence of using any permit issued to or in respect of another person, which is what the appellant in fact did. A prosecution for that offence would not have succeeded because 'permit' is defined as one issued under the Ordinance, that is to say under section 8, 9 or 10, whereas this case concerns a permit issued under an administrative arrangement. I turn to an examination of the Ordinance as a means of ascertaining the context in which section 19(1)(e) is to be construed. Section 4 specifies the powers of immigration officers. It authorises the interrogation and medical examination of persons wishing to enter the Colony; in the case of persons leaving the Colony it authorises only that immigration officers may require such persons to make and sign any internationally recognised form of

declaration. This is the only instance in which clear reference is made in the Ordinance to persons leaving the Colony. It is arguable that this means that the Ordinance is not to be taken as restricted entirely to the control of immigration; on the other hand it may be said that wherever it is intended to refer to persons leaving the Colony the Ordinance does so expressly. It may be noted that section 4, and section 19, provide for offences in the case of immigrants who contravene the provisions of section 4 but not, it appears, in the case of persons leaving the Colony who refuse or neglect to make the required declaration. Part III of the Ordinance is entitled "Entry into the Colony"; the provisions of the sections comprised therein (sections 5 to 14) are in conformity therewith. Part IV is entitled "Removal of unlawful immigrants from the Colony". It comprises sections 15 and 16, which both conform to that heading. Section 19 is comprised in the remaining part of the Ordinance, namely Part V, which is headed "Miscellaneous". The first of the sections in this Part, namely section 17, relates to the protection of immigration officers from liability in the performance of their functions. Section 18 provides for appeals from the decisions of such officers. This section makes no reference to persons leaving the Colony. Section 20 authorises the making of regulations; it refers specifically, in three instances, to persons entering the Colony, but not, in any instance, to persons leaving it. The final section, section 21, is a repealing and saving enactment; it refers expressly to persons entering the Colony, but not to persons leaving it.

Section 19 is an offences and penalties enactment. In subsection (1) it sets out, in some fifteen paragraphs (a) to (o), various offences. Subsections (2) to (5) prescribe penalties, with supplementary provisions. Subsection (6) relates to removal orders, that is in relation to unlawful immigrants. Subsection (7) relates to the

case of prohibited immigrants. Subsections (8) and (9) contain supplementary provisions. No single paragraph of subsection (1) refers specifically to persons leaving the Colony. A number of the paragraphs refer expressly to immigrants; for example, paragraphs (g), (h), (i), (l) and (o). Other paragraphs do so by implication, by referring to permits or exemptions granted under the Ordinance; for example, paragraphs (a), (b), (f), (k), (m) and (n). 'Permit' is defined, by section 2, to mean a permit issued under the Ordinance, and 'exemption', in the context of the Ordinance as a whole, means an exemption from restriction on entry (vide sections 6 and 7). It is particularly to be noted that the earlier part of section 19(1)(e), under which the appellant was charged in the first count, refers to permits and documents issued under the Ordinance, and can thus have reference only to immigrants. The wording of this earlier part of section 19(1)(e), so far as material, is: "... has in his possession any forged ... passport, permit or other document issued ... under this Ordinance ...". It is accepted that the reference to passports issued under the Ordinance is an error, as passports are not so issued. The latter part of the paragraph, under which the second count is laid, created the offence of possession of "any passport in which any visa, entry or endorsement has been forged ...". This may be compared with paragraph (f), which, as in the case of the earlier part of paragraph (e), refers expressly to passports, permits or documents issued under the Ordinance. Although there may be room for doubt, I would be prepared to hold that in the latter part of paragraph (e) "passport" means a passport wheresoever issued, be it a Fiji passport, an United Kingdom passport, or a foreign one. The question then is do the words "visa, entry or endorsement" include permits for entry into some country other than Fiji. It will be observed that to conclude that to be so it would be necessary to hold that what is elsewhere referred to

as a 'permit' is, for the purposes of departure from the Colony, an "entry" or "endorsement". This change of language may, perhaps, operate both ways; in favour of the construction that as the word 'permit' (defined as it is to mean a permit to enter the Colony) is no longer used, the provision in question is not concerned solely with immigrants; to the contrary, that if that was what was intended it would not have been left to mere implication, and that the words "visa, entry or endorsement" were chosen as words appropriate for reference to whatever form a foreign 'permit' might take. Use of the word "visa" is, I think, a neutral factor. What is clear is that, ostensibly, full force and effect may be given to the latter part of section 19(1)(e) by the construction that it applies to persons who enter the Colony. 13

From the foregoing examination of the provisions of the Ordinance it is apparent, in my view, that with the single exception specified in section 4 (relating to international forms of declaration) the Ordinance is exclusively concerned with immigration. The purpose of section 19 is to provide in an 'omnibus' form for the offences to which the provisions of the Ordinance give rise, in support of and for the furtherance of the object of the Ordinance. It would, in my view, require an express reference to persons leaving the Colony before any part of section 19 could be held to apply to them; here we have an equivocal expression contained in a portion of a single paragraph of the section. I think this is especially so where the so-called "endorsement" is not one sanctioned by the Ordinance but is an administrative act deriving no authority from the Ordinance. There is no reason why such an administrative arrangement should not be made, nor why a penal provision should not, by the use of appropriate language, be extended to such a case. But as the present case stands a penal provision of the Ordinance is sought to be applied to a circumstance, and to a document,

which come into existence by reason only of an arrangement which is not contemplated by the Ordinance; in effect, as I see it, a sanction intended by the Ordinance for one purpose is sought to be applied for another purpose; what is, in fact, a forgery intended to achieve entry into another country is sought to be made punishable under provisions designed to control entry into and residence in this country. Were it not for the administrative arrangement referred to, it would never, I feel sure, have been contemplated that section 19(1)(e) refers to persons leaving the Colony. It would not ordinarily be the case that the penal laws of one country are considered as designed to give effect to the immigration policy or requirements of another country. One would look for an express, possibly even a reciprocal, enactment unambiguously to that effect. Nor would it ordinarily be of interest to one country to control entry into another country, least of all to the extent of endeavouring to enforce compliance with the immigration policy of that country. The Ordinance expresses no such interest, either directly or indirectly. In my view the arrangement which has been made in respect of persons wishing to enter New Zealand from Fiji, whilst no doubt good in itself, does not have the necessary legal substratum or foundation whereon to enforce, by penal means, compliance with New Zealand immigration requirements. It is, of course, a situation which can be easily remedied by legislation.

For these reasons I find myself unable to agree that there should be a conviction on the alternative count and would allow the appeal.

PRESIDENT.

SUVA,

December, 1966.