IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 33 of 1977

Between:

DIRECTOR OF PUBLIC PROSECUTIONS
Appellant
(Original Respondent)

- and -

PARMA NAND
(s/o Hari Narayan Maharaj)
Respondent
(Original Appellant)

Date of Hearing : 9th November, 1977
Delivery of Judgment : 25th November, 1977

Mr M. Jennings for the appellant.
Mr F. Lateef for the Respondent.

JUDGMENT OF THE COURT

Gould V.P.

The appellant pleaded guilty in the Magistrate's Court to a charge of obtaining credit by false pretences. The wording was as follows :

"Statement of Offence

OBTAINING CREDIT BY FALSE PRETENCE :

Contrary to Section 343(a) of the Penal Code, Cap.11.

Particulars of Offence

PARMA NAND s/o HARI NARAYAN MAHARAJ, between the 9th day of December, 1976 and 16th day of December, 1976 at Nasea Labasa in the Northern Division, obtained $122.65 cents credit from the Hotel Takia by false pretence."

The appellant was not legally represented in the Magistrate's Court and he admitted the following facts as outlined by the Prosecution :

> "Between 9.12.76 and 16.12.76 accused stayed at Hotel Takia and was allocated room 104. He was given meals and accommodation during that time. He left on 16.12.76 without advising any person. He just took his belongings and left. Made no payment. Reported to Police. Accused seen and admitted obtaining credit by False Pretences. Arrested and charged. Money still not paid to hotel."

He was sentenced to three months imprisonment.

The appellant then instructed counsel and appealed to the Supreme Court against conviction and sentence on the following grounds:

> "1. THAT the verdict is not safe as neither the particulars of offence nor the evidence adduced disclosed what the false pretence was.
>
> 2. THAT the Learned Trial Magistrate erred in law in convicting your Petitioner upon the admitted facts your Petitioner could not in law have been convicted of the offence charged in that there was no evidence of your Petitioner obtaining credit by false pretence.
>
> 3. THAT the sentence is harsh and excessive."

The point was taken in the Supreme Court that no appeal lay against conviction where the appellant had pleaded guilty to the charge and this is so under the provisions of Section 290(1) of the Criminal Procedure Code.

Section 323, however, of the Code is in the following terms :

> "323. No finding, sentence or order passed by a magistrates' court of competent jurisdiction shall be reserved or altered on appeal or revision on account of any objection to any information, complaint, summons or warrant for any alleged defect therein in matter of substance or form or for any variance between such information, complaint, summons or warrant and the evidence adduced in support thereof, unless it be found that such objection was raised before the magistrates' court whose decision is appealed from, nor unless it be found that, notwithstanding it was shown to the magistrates' court that by such variance the appellant had been deceived or misled, such magistrates' court refused to adjourn the hearing of the case to a future day :
>
> Provided that if the appellant was not at the hearing before the magistrates' court represented by a barrister and solicitor, the Supreme Court may allow any such objection to be raised."

The learned judge held that where a charge showed no offence or was fundamentally defective, and where the appellant had been unrepresented in the Magistrate's Court an appeal could be entertained: counsel for the appellant in this court has conceded that this is correct to the extent that the court could enquire into such matters as the fundamental validity of the charge.

In his judgment in the Supreme Court the learned judge came to the conclusion that the particulars laid in the charge in the present case were fundamentally defective in

that the false pretence relied upon was not set out. Even in the statement of facts admitted, as recorded by the learned magistrate, no specific false pretence appeared, and the court was not in a position to decide whether the representation allegedly made by the appellant could amount to a false pretence in law, without which no criminal offence would be disclosed. The conviction could not therefore be allowed to stand and was accordingly quashed. The Director of Public Prosecutions has brought the present appeal from that order.

The learned judge arrived at his conclusion by considering a statement in Archbold's Criminal Pleading Evidence and Practice (36th Edition, Paragraph 1935) where it is stated - "It is essential that the false pretences shall be set out in the indictment.... and with sufficient certainty." The learned judge also quoted the brief judgment in R. v. Thomas (1931) 23 Cr. App. R. 21, where the Lord Chief Justice said :

> " Without going into further matters, it is enough to look at the indictment itself. Nowhere does it say what the false pretences were said to have been. The Crown very properly does not seek to support the conviction, and the appeal is allowed, and the conviction quashed."

In this court counsel for the appellant has submitted that the passage from Archbold quoted above is not in point in that it deals with charges under the Larceny Act 1916, whereas the offence now under consideration

followed upon Section 13 of the Debtors Act 1869, the equivalent section of that Act being dealt with in the same edition of Archbold in paragraph 3692. Under section 32(1) of the Larceny Act the charge is obtaining goods by false pretences and the authorities quoted by the learned judge were in point. The present charge of obtaining credit by false pretences emanating from the Debtors Act was, it was submitted, in a different category and was regulated by different authorities.

Counsel then referred to Archbold paragraph 3692 where a specimen form of indictment for the offence of obtaining credit contrary to section 13(1) of the Debtors Act, 1869, is set out. The important words are : "obtained credit ..... under false pretences or by means of fraud other than false pretences." It is not stated what the false pretences relied upon were, unlike the form for obtaining goods by false pretences in paragraph 1935, which does contain such details after the words "by falsely pretending that .....". That last mentioned form is in fact the form prescribed as Form 12 in the Schedule to the Indictments Act, 1915, and the same form is prescribed in Fiji for that identical offence, as Form 12 in the Second Schedule to the Criminal Procedure Code. In neither enactment is a form specifically prescribed for obtaining credit by false pretences.

Reliance was placed by counsel for the appellant on R. v. Perry (1945) 31 Cr. App. R. 16 in which the charge of

obtaining credit contrary to section 13(1) of the Debtors Act, 1869 was expressed as "obtained credit to the amount of ..... under false pretences or by means of fraud other than false pretences." Two points were dealt with in that case - first whether it was bad for duplicity because of the inclusion of "false pretences" and, "fraud other than false pretences" in the same count. The second point was whether the particulars given in the indictment were inadequate. As to the first point, it was ruled that the indictment was not bad for duplicity, a finding which was criticized in R. v. Holmes [1958] Crim. L. R. 394. That criticism did not extend to the second finding in R. v. Perry (the one which is in point here) relating to the particulars. That finding was expressed at page 18 as follows:

> "As regards the second complaint, that the particulars given were inadequate, we are all agreed that they certainly are not very informative. However, no complaint on that ground was made at the trial. No suggestion was put forward that the appellant did not know perfectly well the nature of the charges which he was called on to meet, and no doubt those who were advising him did not make the application because they were not themselves in the least embarrassed. They had the depositions and they knew precisely the case which they had to meet and consequently no application for further enlightenment was made. In our view, having regard to all these circumstances, it would be entirely wrong to give effect to the argument of the appellant that because the defence did not get particulars which they did not want and for which they did not ask, a conviction which is perfectly proper on other grounds should be set aside."

We find it difficult to understand why there should be any difference in principle between a charge of obtaining goods by false pretences and a charge of obtaining credit by false pretences which would account for the different approach by this well known text book in the matter of the particulars required to be stated in the charges. We will refer to two cases which may have an indirect bearing on the question.

In R. v. Gill and Henry (1818) 106 E.R. 341 the indictment was for comspiracy, by divers false pretences, to obtain money from A and to cheat and defraud him thereof. It was held that it was not necessary to set out the specific pretences in the indictment. This was because the gist of the offence was the conspiracy - the parties might not have even decided upon the exact means. What is interesting in that case is the statement by Holroyd J. in his judgment on the difference between the conspiracy charge and one of obtaining money by false pretences : "There (i.e. in the latter) the false pretences constitute the offence; but here the conspiracy is the offence."

In Taylor v. The Queen [1895] 1 Q.B. 25 there was an indictment under section 95 of the Larceny Act, 1861, for "receiving goods, knowing the same to have been unlawfully obtained by false pretences." There again the charge was held good without the false pretences having been set out. The reasoning followed that of Gill and Henry, and it was said that the gist of the offence was the receipt of the goods with knowledge that they had been unlawfully obtained by some false pretence.

The distinction between the two cases referred to and the present one is sufficiently apparent, and in them the details of the false pretences appear more as "particulars" than as essential elements of the charges. But if Holroyd J. is correct in saying that in "obtaining money by false pretences" the false pretences constitute the offence, his reasoning must apply with equal force to "obtaining credit by false pretences."

The passage from R. v. Perry which we have quoted, it must be remembered, related not to a simple case of obtaining credit by false pretences but included the additional element "or by means of either fraud." Whether the wider field thus opened weighed with the court in any way cannot be said, but what is actually held was that in fact the defence was in possession of full information as to the case they had to meet and did not ask for particulars. In saying that it would be wrong to set the conviction aside, the court might have intended to do no more than apply the proviso on the ground that no miscarriage of justice had occurred. If that is the correct interpretation it is wrong to treat the case as an authority for saying that in a charge or information for obtaining credit by false pretences it is unnecessary to set out the false pretence. If, upon a proper construction, the case does have such an effect, it is a decision which we would respectfully decline to follow in relation to a charge in a magistrate's court in Fiji.

In Fiji, the framing of both charges and information is governed by section 123 of the Penal Code and by the opening words of the section a charge or information is not open to objection in respect of its form or contents if it is framed in accordance with the provisions of the Code. Paragraph (a) (iv) of the section deals with forms as follows :

> "(iv) the forms set out in the Second Schedule to this Code or forms conforming thereto as nearly as may be shall be used in cases to which they are applicable; and in other cases forms to the like effect or conforming thereto as nearly as may be shall be used, the statement of offence and the particulars of offence being varied according to the circumstances of each case;"

As we have pointed out, Form 12 has been provided for obtaining goods by false pretences and in it the false pretences are set out. In our view it is in conformity with the words in paragraph (iv) that obtaining credit by false pretences, an offence created by the same chapter of the Penal Code and in almost the same words, is intended also to be treated as in Form 12 with the appropriate changes.

What we are saying is that in the particulars of the charges relied upon in the present case, the false pretence ought to have been set out. We do not say that the charge was incurably bad on this account as it lay in the power of the magistrate to order further particulars. That is an inherent power and there is power to dismiss if directions for particulars are ignored - see

R. v. Aylesbury Justices; ex parte Wisbey [1965] 1 All E.R. 602, as quoted by McCarthy J. in Police v. Wyatt [1966] N.Z. L.R. 1118. The concluding words of section 323 of the Criminal Procedure Code, quoted above, by implication recognise such a power in Fiji.

That section is really designed to meet situations like the present, where a charge has been badly framed, to provide a remedy for the appellant as well as to suggest the proper means of rectifying the charge: though we note in passing that in our opinion the word "reserved" in the second line thereof, must be a printing error for "reversed". Under its terms a defect in form or substance can only be called in question in the Supreme Court if:

(a) Being legally represented the accused objected in the magistrate's court and was refused relief, or

(b) the accused was not legally represented.

In the present case the appellant was not legally represented and so was entitled to make his objection in the Supreme Court.

In principle in our opinion the learned judge might well have treated the case as one in which the plea of guilty by the appellant was equivocal. Perusal of

the record indicates that no false pretence was ever specified, and it could easily have been the case that the appellant thought he had committed the offence merely by leaving the hotel without paying, which was not necessarily the case. The learned judge could therefore have ordered a venire de novo. It would seem, however, that the respondent had served a substantial part of his sentence which renders such an order inappropriate.

In the result we find that there was a fundamental defect in the charge which was not cured by amendment or by any information given to the respondent before his plea of guilty, and that the learned judge in the circumstances rightly quashed the conviction.

The appeal is therefore dismissed.

(Sgd.) T. Gould
Vice-President

(Sgd.) C.C. Marsack
Judge of Appeal

(Sgd.) T. Henry
Judge of Appeal

SUVA,
15th November, 1977.