IN THE FIJI COURT OF APPEAL
Criminal Jurisdiction
Criminal Appeal No. 69 of 1981

Between:

PETER BATEY — Appellant

and

REGINAM — Respondent

H.K. Nagin for the Appellant.
A.H.C. Gates for the Respondent.

Date of Hearing: 2nd March, 1982.
Delivery of Judgment: 19 MAR 1982

JUDGMENT OF THE COURT

Spring, J.A.

This is an appeal from the Supreme Court of Fiji sitting at Lautoka in its appellate jurisdiction. Peter Batey, the appellant, was convicted in the Magistrate's Court at Nadi on 16th December, 1980, on a charge of failing to give information as required by the Fifth Schedule Part 1(i), Section 1(i) Part II Sections (1) and (3) of the Exchange Control Act (Cap. 186) (Laws of Fiji 1967 Edition).

The appellant was carrying on business in Fiji as a principal of the tourist resort known as Plantation Island Resort and was the holder of a temporary work permit. On 10th April 1980 Batey arrived at Nadi International Airport approximately 30 minutes before he was due to depart on an aircraft bound for Sydney, Australia; he passed through immigration and security checks and was making his way towards the aircraft when he was intercepted in the departure lounge by customs officials who found that he had in his possession

$29,000 in travellers cheques all of which had been negotiated in Fiji and other currency.

(a) On 11th April, 1980 he was charged with exporting prohibited currency.

(b) On 4th May, 1980, the Director of Public Prosecutions gave his written consent to the institution of criminal proceedings against appellant for attempting to export the currency and travellers cheques found in appellant's possession in breach of section 24(1) and 1(1) of Part II of the Fifth Schedule to Cap. 186 (supra).

(c) On 5th May, 1980, a complaint was duly laid charging appellant with the attempted export of prohibited currency.

(d) On 1st May, 1980, the Minister of Finance signed directions under Part I section (1)(i) of the Fifth Schedule to the Act requiring the appellant to furnish to Hari Pal Singh, the Manager of the Central Monetary Authority in writing within 7 days information in his possession or control which the Minister may require for the purpose of detecting evasion of the Act.

(e) On 8th May, 1980, Batey was served with the directions issued by the Minister of Finance and the time for supplying the information to the Minister - namely 7 days expired on 15th May, 1980. Appellant did not comply with the directions.

(f) On 20th May, 1980, appellant was charged with failing to give the information required by the Minister.

(g) On 21st May, 1980, Batey appeared before the Magistrate's Court at Nadi when the charge of exporting the prohibited currency was withdrawn; to the charge of attempting to export prohibited currency Batey pleaded not guilty; likewise Batey pleaded not guilty to the

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charge the subject of this appeal which reads:

" CHARGE

Statement of Offence

FAILURE TO GIVE INFORMATION: Contrary to the Fifth Schedule Part 1(i), Section 1(i) and Part II, Section (1) and (3) of the Exchange Control Ordinance.

Particulars of Offence

PETER BATEY, having been required on the 8th day of May, 1980 at Plantation Village, Malolo Lailai in the Western Division by the Minister of Finance to furnish Hari Pal Singh with information in his possession by replying to the following questions for the purpose of detecting evasion of the Exchange Control Ordinance, failed to do so within the seven days specified in the directions:-

1. By whom were you given the Fiji currency, foreign currency and travellers cheques found in your possession at Nadi International Airport on 10th April, 1980?

2. What was its sources?

3. Who is the owner of this money?

4. To whom were you taking this money?

5. What was your destination in Australia?

6. Why were the cheques and currency not lodged with a bank in Fiji?

7. What was the purpose of taking this money out of Fiji?

8. Have you a bank account in Fiji? If yes, give the name of the bank and branch and the balance in that account on 10th April, 1980?

9. Were you taking this money on behalf of someone else? If so, give the name of that person?

10. What was the purpose of your ten previous trips to Fiji and out of Fiji between February, 1977 and April, 1980?

11. What was the purpose of your visit to Australia on 10th April, 1980. "

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On the last mentioned charge appellant was convicted on 16th December, 1980 and fined $50.

Appeals to the Supreme Court against both conviction and sentence were dismissed on 8th October, 1981; and the appellate Judge ordered that appellant pay costs in respect of his trial in the Magistrate's Court in the sum of $100; and $100 costs in respect of the appeal to the Supreme Court.

Appellant now appeals to this Court and by virtue of section 22(1) of the Court of Appeal Act this appeal is confined to questions of law alone.

Part I, 1(1) of the Fifth Schedule to the Exchange Control Act (Cap. 186) reads:

> " Without prejudice to any other provisions of this Ordinance, the Minister may give to any person in or resident in Fiji directions requiring him, within such time and in such manner as may be specified in the directions to furnish to him, or to any person designated in the directions as a person authorised to require it, any information in his possession or control which the Minister or the person so authorised, as the case may be, may require for the purpose of securing compliance with or detecting evasion of this Ordinance. "

Part II(1) of the same schedule contains a comprehensive provision making it a criminal offence to contravene any restriction or requirement of the Act.

The directions signed by the Minister of Finance pursuant to the Fifth Schedule and served upon appellant on 8th May, 1980, called upon appellant to supply within 7 days any information in his possession or control in relation to the questions stated in the above mentioned charge of failing to supply information. The purpose of this power vested in the Minister is to ensure compliance with the Act or the detection of evasion thereunder.

In his first ground of appeal Mr. Nagin, counsel for appellant, submitted that the learned appellate Judge erred in law in not holding that the above directions issued

by the Minister were unlawful, ultra vires, unconstitutional (as having contravened Article 10(7) of the Constitution) and unreasonable. 420

Turning now to the submission that the directions were unlawful and unreasonable. Mr. Nagin claimed that when the Minister's directions were issued on 1st May, 1980, appellant had already been detected and charged and that the purpose of the Minister's directions was to assist the police to obtain evidence against appellant to ensure the conviction of appellant. That the police had completed their investigations and had brought the evader - the appellant - to Court. In other words it was clearly a case of interference with the administration of justice and a departure from the established practice that an accused person has the right to remain silent; further at common law there is no duty to answer questions put by police or other officers who are seeking to detect crime or other evasion of the law.

It is clear from authorities that the very object of the Exchange Control Act, in the sections and Part which relate to this matter is to give the Crown power of obtaining information to ascertain whether there is any evasion of the Act taking place. In Customs Commissioners v. Ingram /1948/ 1 All E.R. 927 Lord Goddard, C.J. said at p. 929:-

> " To my mind, no new principle here is introduced into the law. It is said that this is compelling a man to incriminate himself or putting an onus on a man to show that he has not been committing an offence, but, it is quite a commonplace of legislation designed to protect the revenue of the Crown, as it is realised that all the information must generally be within the knowledge of tax-payer or the subject, to put an onus on him or to oblige him to do certain things which may have the effect of incriminating him. "

In Commissioners of Customs & Excise v. Harz & Power /1967/ 51 Cr. App. R. 123 Lord Reid at p. 153 said:-

> " The right of the Commissioners to require information is quite different. If a demand for information is made in the proper manner, the

trader is bound to answer the demand within the time and in the form required whether or not the answer may tend to incriminate him, and if he fails to comply with the demand, he can be prosecuted. If he answers falsely, he can be prosecuted for that and, if he answers in such a manner as to incriminate himself, I can see no reason why his answer should not be used against him. "

Mr. Nagin agreed that a person who is served with a questionnaire authorised by the Minister is bound in law to produce written answers thereto whether or not the answers are incriminatory, but submitted that if, as in this instant appeal, that person has already been charged with a related offence then the directions given by the Minister are unlawful and the person charged is not obliged to answer the questions so directed by the Minister.

Counsel for appellant relied on A. v. H.M. Treasury /1979/ 2 All E.R. 586. In this case, for the purpose of investigating into alleged offences against the Exchange Control Act 1947, customs officers seized documents belonging to several companies of which A and B were directors; B was arrested and charged with conspiracy and other offences under the Exchange Control Act. Later B was served with a questionnaire directed towards obtaining information relevant to the conspiracy charge against B; and it was conceded that B might incriminate himself in respect of all the charges against him if he answered the questionnaire. On 29th December A, who had not been arrested or charged, was served with a similar questionnaire and a request to produce documents. A and B took out originating summonses seeking the court's determination whether they were bound in law to comply with the directions so issued. It was held on the true construction of Sch. 5, Part I, to the 1947 Act (U.K.) the power in para. 1(1) to direct a person to furnish information could not be invoked once that person had been charged and cautioned, and was limited to an earlier stage when matters were being investigated, for otherwise the right of a person charged and cautioned to remain silent would be removed; that the Treasury did not have power under para. 1(1) to direct B to furnish information, since he had already been charged and

cautioned, and accordingly he was not bound to comply with 422
the letter of direction served on him. However, there was power to direct A to furnish information since he had not been arrested or charged, and was therefore to be treated like any other potential witness from whom information was sought for the purpose of detecting evasion of the 1947 Act. Accordingly, it was held that A was bound to comply with the letter of direction served upon him.

Mr. Gates for the Crown submitted that although under the common law a person cannot be forced or required to incriminate himself nevertheless statute law can, if the legislature so chooses, by statutory direction require a person to answer the questions whether he incriminates himself or not; he agreed that the Exchange Control Act (Cap. 186) creates an exception and puts the citizen under a legal duty to answer questions. He submitted further that a person can be required to answer the questions directed to be answered by the Minister even where such a person has been charged; he relied upon the decision of the Divisional Court in D.P.P. v. Ellis [1973] 2 All E.R. 540. The facts in this case are: Ellis paid £14,000 to a resident of Kuwait and in return received 138,300 francs which his sister used to buy a property in France; later she paid £3,000 to another resident of Kuwait and used the proceeds to repair the property. In reply to inquiries by the Treasury the defendant Ellis referred to those payments and his sister and brother-in-law were convicted of contravening the Exchange Control Act 1947 (U.K.). Subsequently a Treasury official wrote to Ellis asking if he knew the purpose of the payments and if not, what he thought was the business underlying them. The defendant declined to answer the questions and was charged under Part I, 1(1) and Part II of the Fifth Schedule to the Exchange Control Act 1947 - (a provision practically identical with the Fiji legislation) - for refusing to furnish information required for the purpose of detecting evasion of the Act. The defendant contended that as his sister and brother-in-law had already been detected and convicted, and that the questions put to him were not valid directions requiring information for the purpose of detecting evasion. The prosecutor submitted that the questions were properly authorised since

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they were designed to ascertain whether Ellis - the defendant - himself had made a payment and aided and abetted his sister in the commission of the offence. The Magistrate held that the section envisaged the discovery of a non compliance with the Act rather than the prosecution of an offender and that non compliance having been detected the Treasury were in effect asking the defendant whether he was guilty as well which they had no power to do. The Divisional Court allowed the appeal in so doing stated that the information was needed to ascertain whether there had been an evasion of the Act distinct from those already charged and convicted and whether the defendant had himself committed an offence. The Court held it would be factitious to say that once the existence of an evasion was known powers under the Act did not extend to detecting other persons or person who may be concerned in the evasion. The object of the provision in the Fifth Schedule was to detect offenders as well as offences.

It is necessary to analyse the decisions in D.P.P. v. Ellis (supra) and A. v. H.M. Treasury (supra). In the latter case the learned Judge regarded the fact that Ellis had not been charged as being the distinguishing feature between the defendant in Ellis' case and B in the case he was deciding, viz A. v. H.M. Treasury.

In Ellis' case the defendant had not been charged and the Court held that he must answer the questions notwithstanding that the answers thereto may incriminate him. As Bridge J. said in D.P.P. v. Ellis (supra) at p. 545:-

> " However, as soon as one looks at the provisions of para. 1 of Part I of this schedule, it is quite clear that, as counsel for the respondent frankly accepts, they are not susceptible of any construction which would hold that information sought in a direction given by the Treasury under this provision must stop short of requiring a man to incriminate himself. In the course of detecting evasion the Treasury may require information from a person who will have to disclose that he has been an evader. Once that conclusion is reached it seems to me that the strict construction which the chief magistrate was seeking, which would enable him to avoid conviction in this case by distinguishing between detection of an evasion and detection of the evader, becomes quite untenable. "

It appears to be an artificiality to say that because a man has been charged with a related offence under the Act he is relieved of answering any questions, required to be answered by the Minister, which are aimed at securing compliance with the Act or detecting breaches of the Act. The fact that a person had been charged would on the authority of A. v. H.M. Treasury (supra) place that person in a position of advantage vis-a-vis a person who had not been charged.

While the Act creates an exception to the common law position as we have stated above, it is perfectly clear that the provisions contained in the Fifth Schedule put a citizen under a legal duty to answer questions. There is nothing in the legislation to suggest that this duty is inapplicable where a person has already been charged. Clearly Parliament had no such limitation in mind when the Act was passed into law. We agree with the learned appellate Judge when he said:-

> " The Minister's statutory power to request information would be virtually nullified if one introduces provisions into the statute which curtail its straightforward language. It deliberately takes away certain common law rights and this is acknowledged and accepted by the Court of Appeal in D.P.P. v. Ellis. I do not see how one can begin to say it only takes away those rights under certain circumstances. "

Accordingly in our view the directions issued by the Minister were neither unlawful nor unreasonable.

We turn now to a consideration of the submission that the Minister was acting outside his powers in issuing the questionnaire to appellant.

The essence of this submission was that the Police had sufficient evidence to bring appellant to trial on charges under the Exchange Control Act; that there was no need for the questions to be answered for the purpose of detecting evasion of the Exchange Control Ordinance as the Police had detected the evasion and seized currency and $29,000 in travellers

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cheques which the appellant was allegedly attempting to export from Fiji. However, an examination of the questions reveal quite clearly that the Minister was not merely asking the appellant to provide information restricted to appellant's involvement, but was vitally concerned with others who may have been implicated in the offence or other smuggling activities in breach of the Act. The questions asked were for the purpose of detecting whether others had aided and abetted the appellant in contravening the Act and thereby themselves evaded the Act.

The Fifth Schedule Part I, 1(1) is couched in wide terms and once the fact of an evasion is known the Minister is within his powers in endeavouring to obtain information which may extend to the identity of all persons participating in that evasion.

Reference was made by counsel for appellant to the evidence of Hari Pal Singh - the Manager of Central Monetary Authority - who stated under cross-examination:-

> " The information sought was to assist D.P.P.'s office in getting a conviction of the accused in the currency case."

Admittedly Hari Pal Singh was the person deputed by the Minister to receive the information sought by the Minister, but it is clear from the legislation that it is the Minister alone who has the authority to seek the information required for the purpose of securing compliance with or detecting evasion of the Act. What Hari Pal Singh or other witnesses called by the prosecution considered to be the purpose of the directions given to appellant by the Minister is in our view quite irrelevant; answers given by the witnesses in cross-examination were in our view not pertinent to the matters in issue and should have been disregarded; it was the Minister alone who was clothed with the power to issue the directions and seek the information; the Minister was not called to give evidence and counsel by cross examining witnesses, other than the Minister, cannot establish the reasons which prompted the Minister to issue the directions and act in this matter; the Minister alone is

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vested with the powers under the Fifth Schedule Part I, 1(1), and the Minister alone decides what course of action should be taken.

In our opinion the Minister was acting within his powers and accordingly we reject counsel's argument to the contrary.

We consider now the submission urged upon us by Mr. Nagin that the proposition that under the Exchange Control Act if a demand for information is properly made, the person receiving such demand is bound to answer the demand within the time and in the form required whether or not the answer may tend to incriminate him, is contrary to the provisions of Article 10(7) of the Constitution of Fiji. The Constitution is the supreme law of Fiji.

Article 10(7) states:-

> " No person who is tried for a criminal offence shall be compelled to give evidence at the trial."

Counsel for appellant argued that the questionnaire sent out by the Minister was unconstitutional and therefore void.

It was submitted that the demand by the Minister for the information was equivalent to requiring the appellant to give evidence at his trial.

The questionnaire issued by the Minister required the appellant to provide information and for the reasons we have given appellant in our view was bound to comply with the statutory obligation cast upon him by the legislation. He was not by virtue of the Minister's direction being required to give evidence at his trial. Appellant was being required to supply information to the Minister in accordance with his directions which did not involve compulsory testimonial self-incrimination. The use that the Minister may make of the answers he received to the questions posed to appellant

is a matter we are not called upon to consider. Questions of admissibility of such evidence and admissions (if any) of appellant are not matters which call for our consideration .

In our opinion therefore the directions issued by the Minister pursuant to Part I, 1(1) of the Fifth Schedule to the Act were not unconstitutional and did not offend against Article 10(7) of the Constitution.

For the reasons we have given ground 1 of the notice of appeal fails in its entirety.

Turning now to ground 2(a) that the learned appellate Judge erred in law in (1) awarding costs against the appellant in respect of the hearing in the Magistrate's Court when the Magistrate made no order as to costs and (2) awarding costs to the Crown on the hearing of the appeal in the Supreme Court.

In our opinion and for precisely the same reasons as we gave in Batey v. Reginam F.C.A. Criminal Appeal 68/81 the award by the Supreme Court of costs of $100 in the Magistrate's Court amounted to an enhancement of the fine and ought not to stand and the order made should be quashed.

In respect of the award of costs of $100 in the Supreme Court on the hearing of the appeal the matter of costs was entirely within the discretion of the learned appellate Judge and we see no reason to interfere with his award and we dismiss this portion of this ground of appeal.

Ground 2(b) of the notice of appeal states that the learned appellate Judge erred in law when he made an Order that the appellant comply with the Minister's direction.

At the conclusion of the hearing of the appeal in the Supreme Court the learned appellate Judge in dismissing the appeal made the following order:-

> " Under Part I of the Fifth Schedule, Section 1(4) It Is Ordered that the appellant within 7 days of the date hereof shall reply to the

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questions put to him by the Minister which are the subject of these proceedings. "

Counsel for appellant submitted that the learned appellate Judge had no power to make the above order.

The Fifth Schedule Part I, 1(4) states:-

" Where a person is convicted on indictment for failing to give information or produce documents when required so to do under this paragraph, the court may make an order requiring the offender, within such period as may be specified in the order, to comply with the requirements to give the information or produce the documents. "

The appellant was convicted in the Magistrate's Court at Nadi of failing to give information by way of summary process and not by way of indictment.

From a study of the Act it appears that the power to make an order such as that made by the learned appellate Judge requiring the offender to comply with the directions given by the Minister arises only where the person is convicted upon an indictment.

Part II, 1(3) and (4) of the Fifth Schedule prescribes differing penalties where a person is convicted summarily and where a person is convicted on indictment of offences under the Exchange Control Act.

The Act clearly makes a distinction between summary conviction and conviction on indictment. In our opinion, although we did not have the benefit of detailed argument from counsel, the learned appellate Judge in our view was in error in making the order to which objection is taken, as the power to make such an order appears to be restricted to those cases where a person is convicted on indictment. Accordingly this order should be rescinded and set aside.

Accordingly for the reasons we have given the appeal is dismissed except to the extent -

(a) that the order for payment of $100 costs by appellant in respect of the hearing in the Magistrate's Court at Nadi is quashed and

(b) the order made by the Supreme Court on 8th October 1981 that the appellant shall reply to the questions required by the Minister of Finance within 7 days is rescinded and set aside.

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VICE PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL

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