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IN THE FIJI COURT OF APPEAL
Criminal Jurisdiction
Criminal Appeal No. 26 of 1982

Between:

MOHAMMED RAFIK KHAN s/o
Mohammed Safiq Khan

Appellant

and

REGINAM

Respondent

Appellant in Person.
K.R. Bulewa for the Respondent.

Date of Hearing: 8th July, 1982.

Delivery of Judgment: 23rd July, 1982

JUDGMENT OF THE COURT

Speight J.A.

The appeal has already been dismissed by this Court and we now proceed to give our reasons.

The appellant was tried in the Magistrate's Court at Suva on charges of fraudulent conversion and of obtaining credit by fraud. The hearing extended over a number of sitting days between 10 February 1981 and 10 April 1981. The appellant was represented by Mr. I. Khan. At the conclusion of the hearing the Resident Magistrate convicted defendant on six charges and acquitted on two, and sentenced him to a total of 5 years imprisonment.

Appellant appealed to the Supreme Court against conviction and sentence. The appeal was heard by the learned Chief Justice and in a fully reasoned judgment delivered on

26th March 1982 the learned Judge allowed the appeal against four of the convictions, principally because in his view, the evidence did not support charges of obtaining credit, but as he thought, were more probably cases of obtaining money by false pretences. He upheld the conviction on two charges of fraudulent conversion (Nos. 1 & 3) and he allowed the appeal against sentence in part, by reducing the sentences previously imposed from 5 years imprisonment to 3½ years.

The appellant then appealed to this Court against the two convictions and, purportedly, against sentence. He apparently drew the latest appeal papers himself, and he appeared in person.

He also filed a motion for leave to produce documents, particularly an alleged agreement relating to the sale of a house property, the subject of Charge 1, and he sought to call witnesses.

Because he was appearing in person the presiding Judge thought it proper to advise him as follows:-

" Before hearing you I must explain the legal position with regard to this appeal. When the original judgment is that of the Magistrates Court, and an appeal from it is heard by the Supreme Court, a further appeal to this Court from a Supreme Court judgment is, under section 22 of the Court of Appeal Act, (Cap.12) limited to questions of law, not including severity of sentence. So we are unable to permit fresh evidence to be called, and can hear no argument as to the findings of fact. It is a little difficult to ascertain from your Notice of Appeal as to what questions of law, if any, are involved; but you will be permitted to submit argument on any points where in your contention a mistake of law has been made. "

As the case proceeded members of the Court endeavoured to explain to the appellant the import of section 22, and in particular pointed out that questions of credibility, and inferences from facts were matters for the lower Court, which could not be re-explored.

At the end of the appellant's submissions, and after hearing briefly from Mr. Bulewa for the Crown, the Court announced that the appeal was dismissed but reasons would be put in writing. This we now do, and we will attempt to relate the matters enlarged upon by appellant to the type of enquiry on a point of law which the Court is entitled to consider, in an appeal of this kind. In doing so we are extracting points from the 14 page typed submissions put in by appellant.

Point 1

As has already been said the appellant sought to put before the Court a supposed Sale and Purchase Agreement relating to Charge 1.

This Charge was:-

"FRAUDULENT CONVERSION: Contrary to Section 311 (1)(c)(i) of the Penal Code.

PARTICULARS OF OFFENCE (b)

MOHAMMED RAFIK KAHAN alias PETER KAHAN s/o Mohammed Safiq between 30 October 1980 and the 5 December 1980 at Suva in the Central Division, fraudulently converted to his own use and benefit certain property, that is to say, two thousand dollars in cash (2,000) entrusted to him by Munawar Naushad Ali s/o Shaukat Ali for the purpose of paying a deposit for the purchase of a house for Munawar Naushad Ali. "

This supposed agreement was, one gathers, aimed at showing that Mr. Ali had signed an agreement relating to an offer to purchase a house the terms of which precluded him from reclaiming his money in the circumstances which developed. As has been mentioned this Court has no power under section 22 (supra) to admit further evidence, although it has under section 28 of the Court of Appeal Act in the case of a general appeal from a Supreme Court trial. Accordingly the document was not received, but it is perhaps worth observing that at the original trial no mention was made of the

existence of such a crucial piece of material, either in the cross-examination of Mr or Mrs Ali (P.W.2 & P.W.3) or, more significantly was it even mentioned by appellant when he gave evidence on the 3rd April at a time when he had had nearly two months to cogitate over prosecution evidence, and confer with his counsel. It was said before us that a similar application was made to the learned Chief Justice /who would have had power under section 320 of the Criminal Procedure Code (Cap. 21)7 but the application was rejected. In view of what has been recited above this is perhaps not surprising.

Point 2

It was submitted that there were two sets of charges extant at the time of trial and at the time of entering conviction (transcript p. 75). This was plainly not so. Prior to the hearing there had been 5 charges. The hearing had been adjourned from 2nd February to 10th February to allow the prosecution to draw fresh charges.

On 10th February the prosecution's application to substitute was opposed by counsel for defence who represented him throughtout the trial. After submissions the fresh set of charges were allowed and the original ones withdrawn by leave.

Point 3

It was submitted by appellant that prosecution evidence had been accepted although uncorroborated, and defence evidence rejected. Once again the nature and limitations of the appeal under section 22 (supra) were explained to appellant and he was unable to advance this point further.

Point 4

It was submitted (quite correctly) that an ingredient of each charge, No.1 and No.3 was an entrustment of money.

Charge 1 has already been set out above. Charge 3 was as follows:-

"FRAUDULENT CONVERSION": Contrary to Section 311 (1)(c)(i) of the Penal Code.

PARTICULARS OF OFFENCE (b)

MOHAMMED RAFIK KAHAN alias PETER KAHAN s/o Mohammed Safiq on or about 17 November 1980 at Suva in the Central Division fraudulently converted to his own use and benefit certain property, that is to say, one thousand six hundred and forty four dollars in cash (\$1,644) entrusted to him by Sahid Abdullah s/o David Abdullah in order that he should pay for Air Tickets for Sahid Abdullah. "

It will be remembered that the prosecution case on Charge 1 was that a deposit had been given to the appellant in a negotiation for house purchase, which fell through. The prosecution case in Charge 3 was that Mr. Abdullah had given some money to the appellant to be used by him towards the purchase of a ticket from Air India. On this charge appellant claimed that, contrary to the evidence of PW6 Abdullah, it was a direct purchase from appellant with no element of entrustment.

As best we could devise the submission was that there was no evidence of any entrustment of money in either case, and therefore as a matter of law a conviction could not stand. This is indeed a valid "point of law" argument, but a careful examination of the record shows that although the appellant claimed it was otherwise, there was clear evidence from PW2 and PW3 on Count 1, and from PW6 on Count 6 that the moneys had been given by them to appellant on terms that he should use them on their behalf in negotiating the purchase of the house and the air ticket respectively. This evidence was accepted by the Magistrate and the appellant's contentions rejected. That must be the end of the matter in this Court.

As mentioned earlier, the papers filed included a purported appeal against sentence, but that of course does not lie, as has been explained to the appellant.

Chas. H. Oarsach

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JUDGE OF APPEAL

Wm. S. Young

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JUDGE OF APPEAL

J. D. Smith

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JUDGE OF APPEAL