

IN THE FIJI COURT OF APPEAL  
Criminal Jurisdiction  
Criminal Appeal No. 46 of 1982

Between

ROBERT TWEEDIE McCAHILL

Appellant

and

REGINAM

Respondent

S.M. Koya and I. Khan for the Appellant  
D.J. Thorley for the Respondent.

Date of Hearing: 1st November 1982.

Delivery of Judgment: 19<sup>th</sup> November, 1982.

JUDGMENT OF THE COURT

Speight J.A.

This is an appeal under section 22 of the Court of Appeal Act (Cap.12) from a decision of the Supreme Court given on the 16th July 1982 wherein the learned Chief Justice dismissed an appeal by this appellant against convictions entered in the Magistrate's Court at Suva on the 6th February 1981 on a number of charges laid under the Copyright Act 1956 (UK), which Act has been applied to Fiji by certain Orders-in-Council by Her Majesty the Queen - these latter matters will be developed more fully shortly. There were fourteen charges details of some of which will also be set out in due course. In summary however, the first charge was of importing into Fiji twenty-four recorded video tape cassettes knowing the same to be infringements of United States Copyright in corresponding cinematographic films. Charges 2-13 inclusive were for allegedly letting for hire individual recorded video tape cassettes being copies of individual and named copyright films.

Apart from differences in film title and dates these twelve counts were identical with each other. The final count was of conspiring over the period represented in Counts 1-13 with certain named persons, with Pacific Crown Video Limited and with other persons to import recorded video tape cassettes into Fiji knowing the same to be copies of films which infringed United States Copyright. On conviction minor fines had been imposed but it is apparent that the matter is of great importance. On the one hand it strikes at the root of Mr. McCahill's business which was apparently conducted on a large scale. On the other hand it raises important questions concerning the subsistence of copyright in Fiji.

A few words on the background of the matter. The appellant was managing director and principal shareholder of Pacific Crown Video Limited and was in business in Fiji providing on hire entertainment equipment in the form of video tape players used in conjunction with television screening equipment. These devices are used to exhibit on television screens from taped films contained in cassettes and usually exhibit films previously recorded as ordinary cinematographic material. As Fiji has no direct television system there is a substantial market for equipment which can show equivalent material in homes, clubs, hotels and similar places. The appellant through his company catered for that market. He hired out the appropriate equipment and he let on hire the tapes necessary for playing. These were almost entirely cinematographic films of United States origin and some are films which many members of the public would recognise as having been screened in movie houses of recent years. The evidence is, and it is common knowledge, that film makers and others usually take copyright over their productions and charge licence fees to those who wish to exhibit them. In former times this would almost always have been in picture theatres but with the

development of television there has been a large number of such films played over television transmissions and presumably the television stations are also required to pay licence fees if they are conducting their businesses legitimately.

The essence of the Crown case was that the appellant acting in concert with other persons obtained and let for hire television tapes for exhibition which were copies of cinematographic films which had been copyrighted in the United States and in respect of which no licence fees had been paid or other permission obtained. In other words this was in breach of copyright and, so it was alleged, amounted to a criminal offence under section 21 of the Copyright Act. For the sake of clarity there are set out hereunder charge 1, charge 2 and charge 14 and it will be understood that charges 3-13 are variations of charge 2.

#### FIRST COUNT

##### Statement of Offence

IMPORTATION OF COPYRIGHT INFRINGING MATERIAL:  
Contrary to Section 21(1)(d) of the Copyright Act, 1956, of the United Kingdom, applied to Fiji by the Copyright (Fiji) Order, 1961 (P.6375 of the Laws of Fiji).

##### Particulars of Offence

ROBERT TWEEDIE McCAHILL, between February 1, 1977, and February 28, 1979 at Suva in the Central Division, imported into Fiji, otherwise than for his private and domestic use, 24 recorded video tape cassettes, being copies of cinematographic films in which copyright subsisted in the United States of America, knowing the same to be infringing copies of such films.

#### SECOND COUNT

##### Statement of Offence

LETTING FOR HIRE COPYRIGHT, INFRINGING MATERIAL:  
Contrary to section 21(1)(b) of the Copyright Act, 1956, of the United Kingdom applied to Fiji by the Copyright (Fiji) Order, 1961 (P.6375 of the Laws of Fiji)

## Particulars of Offence

ROBERT TWEEDIE McCAHILL, between June 1, and November 16, 1978 at Suva, in the Central Division, let for hire a recorded video tape cassette being a copy of a cinematographic film entitled "Harry and Walter Got to New York" in which copyright subsisted in the United States of America, knowing the same to be an infringing copy of that film.

## AMENDED FOURTEENTH COUNT

## Statement of Offence

CONSPIRACY TO COMMIT MISDEMEANOUR: Contrary to Section 421 of the Penal Code.

## Particulars of Offence

ROBERT TWEEDIE McCAHILL, between February 1, 1977 and February 28, 1979 at Suva in the Central Division, conspired together with Richard B. Sloan, William Hines, Dorethy Hines, Edward Chopot and Victoria Chopot, persons beyond the jurisdiction of the Court, and with Pacific Crown Video Limited, and with other persons, to import into Fiji otherwise than for his domestic and private purposes recorded video tape cassettes, knowing the same to be copies of infringing cinematograph films in which copyright subsisted in the United States of America.

The evidence for the prosecution of which more details will be given later fell into a number of classes:

- (1) There was evidence from certain police officers of a search of the appellant's business premises in Suva and the seizure of certain mechanical equipment appropriate to this class of business. Many hundreds of video tape cassettes were also seized including the 24 which comprised charge No.1 which in their turn included the 12 individual titles in charges 2-13. The cassettes containing the tapes did not appear to carry a title label that one would expect on an original film container but labels indicating the origin of the manufacturer of the tape e.g. Sony.

- (2) There was also recovered a substantial number of documents which were produced as exhibits. Some of these appeared to be records kept by the company, such as lists of local persons and clubs to whom tapes had been supplied, and the amount of hire due therefor, and some of the material amounted to invoices from a company in California purporting to charge Pacific Crown Video Limited for machinery, for tapes, for "copying" and for other services. There were copies of documents which appeared to show periodical payments by the appellant company to persons in California and there were several letters either handwritten or typewritten bearing a California address addressed "Dear Bob" but with no signature or no legible signature.
- (3) There was evidence of a conversation between a police inspector and the appellant in which his business affairs were discussed. No specific admissions were made by the appellant of an involvement in illegal activity but he acknowledged that his company Pacific Crown Video Limited had dealings with a Mr. Sloan (one of the alleged co-conspirators) and Mr. Sloan owned or operated a firm South Pacific Trading Company whose name appeared on the letter-heads of invoices and similar material from California already referred to. The appellant acknowledged that the tapes seized by the police had come into Fiji through the Customs from the United States and that the company hired out machines and tapes to hotels and others in Fiji for entertainment purposes.
- (4) A most important part of the evidence was that of a Mr. Morgan a gentlemen from the United States who had been brought here on several

occasions in connection with the police investigation. He is a Vice President of Universal Pictures Incorporated. He was accepted by the Magistrate as being an expert in United States Copyright Law. He claimed and it was not contradicted that he had a power of attorney from most of the major film companies in the United States to act on their behalf; that he viewed all the pictures these major companies made; and he was almost exclusively engaged in the obtaining of copyright certificates on their behalf and in travelling worldwide investigating copyright infringement. He had viewed all 24 of the tapes referred to in Count No. 1 and gave evidence details of which will be referred to later concerning his claim that the originals were all copyright in the United States.

Charges 1-13 were laid under the Copyright Act 1956 which is a United Kingdom statute and it was necessary for the Court to be satisfied that that law applies in Fiji. Submissions were made by both counsel, and the learned Magistrate, and the learned Chief Justice in his turn, upheld the contention of the prosecution that that Act is, with certain modifications part of the law of Fiji today. The reasoning in those two Courts ran as follows: Prior to the 10th October 1970 of course Fiji was a British Colony. The Copyright Act 1956 applied initially to give protection within the United Kingdom to material of English origin which acquired copyright there under procedures in that and other United Kingdom statutes. A previous statute of 1911 had been applicable throughout the British Empire as it then was, that is to say, within the colonies and the self governing dominions. That situation was changed in the 1956 Act which initially was only made applicable within the United Kingdom. But provision was made for extension - under



section 31 Her Majesty was empowered by order in Council to direct that any of the provisions of the Act specified in the Order should extend to (inter alia) any colony. As a consequence if such an order was made extending jurisdiction to a colony the Act applied to protect within the colony works having United Kingdom copyright or copyright within the colony provided that the copyrights subsisted in a way which was consistent with the mode of acquiring copyright qualification under the Act - a matter which is provided for as far as cinematograph films are concerned in section 13. Additionally, in order to provide copyright protection to material originating from foreign countries, section 32 enabled Orders in Council to be made to apply the protection of the Act to countries not otherwise provided for. In accordance with the powers in section 32 an Order in Council had been made on the 23rd August 1957 called "Copyright (International Conventions) Order 1957". By Article 1 of that Order the provisions of the Copyright Act protecting various material (including cinematograph films) first published in certain nominated countries was to apply in the same manner as such material was protected after first being published in the United Kingdom. The countries specified were those which had been parties to certain international copyright agreements, in particular, the Berne Copyright Union and the Universal Copyright Convention. We digress to say that these unions or conventions are agreements which have been entered into from time to time whereby the contracting states undertake to give to the works of the nationals of other states the same protection as is given to its own nationals, and, amongst other matters, provide that proof of entitlement to copyright is to be evidenced by imprinting the relevant material with the symbol © accompanied by the name of the proprietor and the first date of publication. (See Article III Universal Copyright Convention). Many countries were contracting parties to these conventions. In particular the United States and the United Kingdom and Fiji were parties to the Universal Copyright Convention. It must be understood, however,

that these conventions are promises of protection given by one state to others but do not of themselves become laws of the individual state until incorporated in some way by the sovereign legislation of that country. Relating to the present case such incorporation occurred in the United Kingdom by the combined effect of the Copyright Act 1956 and the subsequent Copyright Order of 1957 whereby the name of the United States along with many others was listed as a country whose nationals would have their copyrighted material protected in the United Kingdom - this by virtue of the procedure under section 32. It is clear however that the International Copyright Convention was not made part of the law of England in toto and in particular the recognition of the symbol © and its accompanying phrases did not provide per se evidence of copyright in the United Kingdom. That was provided by the provisions of section 13 which for present purposes reads as follows:-

"13(1) Copyright shall subsist, subject to the provisions of this Act, in every cinematograph film of which the maker was a qualified person for the whole or a substantial part of the period during which the film was made.

(2) Without prejudice to the preceding subsection, copyright shall subsist, subject to the provisions of this Act, in every cinematograph film which has been published, if the first publication of the film took place in the United Kingdom or in another country to which this section extends."

Apart from certain methods of registration under the Films Act (UK) proof of copyright seems to be a matter of proof by evidence of the foregoing matters in a case under the English legislation whereas in the United States it is achieved in respect of cinematographic films by the compulsory registration followed by the issue of an appropriate certificate.

From 1957 onwards therefore United States material was protected under the Copyright Act in the



United Kingdom and this protection was extended to Fiji by an Order in Council made on the 17th January 1961 pursuant to section 31 and entitled Copyright (Fiji) Order 1961. The operative part of that Order reads as follows:

"1. The provisions of the Copyright Act, 1956, specified in Part I of the First Schedule hereto shall extend to Fiji subject to the modifications specified in Part II of that Schedule.

2. The Copyright (International Conventions) Order, 1957, as amended, the Copyright (International Conventions) (Argentina) Order, 1958, the Copyright (International Organizations) Order, 1957, as amended, and the Copyright (Broadcasting Organizations) Order, 1959, (being Orders in Council made under Part V of the said Act) shall extend to Fiji subject to the relevant modifications specified in the Second Schedule hereto.

3. The Interpretation Act, 1889, shall apply to the interpretation of this Order as it applies to the interpretation of an Act of Parliament.

4. This Order may be cited as the Copyright (Fiji) Order, 1961, and shall come into operation on the 1st day of February, 1961.

W.G. AGNEW.

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## FIRST SCHEDULE

### Part I

Provisions of the Copyright Act, 1956 extended to Fiji.

All the provisions of the Act, as amended by the Dramatic and Musical Performers Protection Act, 1958, and the Films Act, 1960, except section 23 to 30, sections 32, 34, 35, 42 and 44 and the Fourth and Fifth Schedules. "

The Order then continues with modifications set out in schedule form many of which are of the mutatis mutandis variety substituting the word Fiji for

the words United Kingdom and substituting where appropriate different agencies of state. Some alterations were also made to substantive parts of the United Kingdom Act including in particular a substituted section 13(3) making an alteration which is not material for present purposes concerning time limits on film copyright. On the basis of this structure the Magistrate held that the Copyright Act, with modification, continued in force thereafter as part of the law in Fiji while it remained a colony and of course became "an existing law" which was continued after Independence by virtue of Clause 5 of the Fiji Independence Order 1970.

We will shortly deal with the next question viz, whether there was proof of infringement, but before doing so it is convenient to interpose a further matter which arose as to the applicability of the Copyright Act to Fiji.

This submission was raised by counsel for the appellant for the first time in this Court.

It was submitted that even if the Act became law in Fiji in 1961 it ceased to be so in 1964 and thereafter. In support of this startling proposition reliance was placed on a further Order in Council by Her Majesty - viz The Copyright (International Conventions) Order 1964.

Mr. Koya drew attention to para.10 which said in its operative parts:-

"10(1) The orders in Part I of Schedule 7 are hereby revoked in so far as they form part of the law of the United Kingdom or any country to which this order extends".

It is clear from Clause 7 that Part III (containing Clause 10) extended to countries in Part 1 of Schedule 4 including Fiji and one of the orders referred to in Schedule 7 was the Copyright (International Convention) Order 1957. Taken only on this recital, the 1957 Order

which extended protection of the Act to the United States was revoked. But the submission was not only bold, it seemed to run contrary to the pattern one expects in subsidiary legislation of this sort. When one examines an updating statutory instrument such as this, which extends beneficial provisions of a protective act, one expects a continuation rather than a curtailment of previous provisions. So it turns out to be, as Mr. Thorley clearly demonstrated.

A moment's examination of Clause 7 of the 1964 Order, to which reference must have been made to found Mr. Koya's submission, shows that in that clause, which precedes the revoking Clause 10, Part I of the Order had been extended to the countries in Schedule 4 - these include Fiji.

And Part I of the Order simply said in Clause 1 that the provisions of the (Copyright) Act which give protection to (inter alia) cinematograph films shall apply to the Schedule I countries (including USA) in the same way as for locally protected material.

An examination of the 1964 Order, put forward in the clear way that Mr. Thorley expounded it, shows that the extension of protection in Fiji given to works copyright in the USA was the same after 1964 as it had been before under the 1961 Order, and of course subsequently became part of the law of Fiji under the Fiji Independence Order 1970. This new submission totally disregards the plain words of the 1964 Order. The 1956 Act is, with modification, "a Fiji Act" and has been from 1st February 1961 down to the present day.

We return therefore to the questions of establishing copyright and infringement. The prosecution had to prove that an offence had been committed against section 21 in the manner alleged in charges 1-13. Count 1 was for importing and the appropriate penal section of the Copyright Act is section 21(1)(d) which

reads (with abbreviation):-

"Any person who at a time when copyright subsists in a work imports into Fiji otherwise than for his private and domestic use any article which he knows to be an infringing copy of the work shall be guilty of an offence. "

As far as Counts 2-13 in relation to the hiring of individual tapes the offence is in the same section 21(1)(b) namely (similarly abbreviated):-

"Any person who at a time when copyright subsists in a work lets for hire any article which he knows to be an infringing copy of the work shall be guilty of an offence. "

Matters requiring to be proved therefore were:-

- (1) importation or letting for hire
- (2) that the original material was copyright
- (3) that the material used was an infringement
- (4) knowledge that the material infringed.

There was no doubt from the appellant's admissions that the material had been imported and let, subject to the qualification that although much of the material was let for hire it might be doubtful whether it was proved that any of the 12 individual tapes had in fact been hired out. For reasons which will emerge later we do not discuss this matter further at this point.

The major issues as counsel and the Court all realised were (a) whether the original material was copyright and (b) whether the tapes in the possession of the appellant constituted infringement. It should be recollected at this point that the wording of the charges alleged that the video cassettes were in each case "a copy of a cinematographic film in which copyright subsisted in the United States", so that the Courts were concerned with

para. 965 note 11, discussing the Universal Copyright Convention. It is true that that note says that the symbol together with the name of the proprietor and the date of first publication is taken by a contracting state to indicate that the necessary formalities for copyright protection under domestic law have been complied with. This is a correct statement of the notice which by virtue of the convention the contracting states undertake to accept. However conventions are but promises of recognition. They are not part of domestic law unless and until they are embodied in a statute. In particular we refer to and adopt the passages to which Mr. Thorley referred us from Copinger and Skone James on Copyright (11th Edition) paragraph 1158:-

"1158. While promising protection on the general lines above indicated therefore, this Convention does not describe the details of protection which are to be afforded by the contracting States and substantially leaves the mode and extent of protection to the separate legislation of each State. It only extended further than the Berne Convention in requiring protection to be given to published works, not only if first published in a contracting State, but if first published anywhere, if the author is a national of a contracting State. To meet this requirement of the Convention, and in order to enable the United Kingdom to ratify the Convention, the Copyright Act of 1956 has altered the law of the United Kingdom so as to protect the published works of nationals of contracting States although first published outside the United Kingdom and the Convention area. "

and paragraph 1161

"1161. Implementation of treaties and Conventions. It is clear that the parties to treaties and Conventions can give effect to them, either by making the treaty, which they have ratified, part of the municipal law of the country, or by making separate legislation to carry its provisions into effect. This country, prior to the Act of 1911, had adopted the first alternative since, by Orders in Council made under the International Copyright Acts of 1844 and 1886, the original Berne Convention and the Act of Paris were given full effect in this country and were interpreted by the courts. These Acts, however, were repealed by the Act of



1911 in the dominions to which the Act applied, and the scheme of the Act of 1911 was to give to British works rights as large as those required by the Convention and, by Orders in Council, to extend these rights to foreign works. The Brussels Convention is, therefore, not the subject of interpretation by the courts of this country, except in so far as reference is made in the Orders in Council to certain sections. "

The same matter is expressed even more succinctly in Laddie Prescott and Vitoria, the Modern Law of Copyright (1980) at para. 4.11 on page 158, and see Warwick Film Productions Ltd. v. Eisinger (1969) 1 Ch.508 at 522.

As we have already said the Copyright Act 1956 does not enact or adopt the Universal Copyright Convention which in Article (III) prescribes the symbol © and its accompaniments. The Act together with the 1957 Order merely extends the United Kingdom protection to those countries which are listed in the schedule to the Convention, and these include the United States. This was demonstrated to us by Mr. Thorley on behalf of the respondent and we must hold that as a matter of law there was no evidence upon which the conclusion could be reached that the evidence of Mr. Morgan, who was the sole witness relied on on this point, proved copyright in the originals of which the viewed tapes were obviously copies. These viewed tapes were the 24 which were the foundation of charges 1-13. With the scrupulous fairness which marked Mr. Thorley's submissions throughout, no attempt was made to persuade the Court that copyright could be proved by these means in the absence of statutory adoption of Article III of the Convention.

At the hearing in the Magistrate's Court the prosecution had apparently intended to produce the certificates which are issued by the U.S. State Department in respect of films for which copyright registration has been granted under the United States Act. It emerged however that Mr. Morgan had not brought these documents with him, but relied instead on a catalogue

listing the numbers accorded to registered films, and purported to relate the numbers on the subject tapes to catalogue numbers. The learned Magistrate, in his judgment, quite correctly ruled that this was hearsay and did not become admissible either under section 4 of the Evidence Act or as a public document. Counsel for respondent did not challenge this ruling, either before the learned Chief Justice, or before this Court.

Mr. Thorley, however, endeavoured to support convictions 1-13 by examining the transcript to show that there was evidence to prove the existence of copyright in the subject material in the way in which copyright is conferred by the Copyright Act - viz section 13(1) and 13(2) already quoted. Just to discuss this briefly it will be seen that in subsection (1) copyright exists if the maker was a qualified person for the whole or a substantial part of the period during which the film was made. Qualified person is defined in section 1(5) as (inter alia) a body corporate under the laws of any country and Mr. Thorley suggested that the evidence supported that the film maker must have been one of the big American film corporations that Mr. Morgan referred to. He acknowledged however that there was no proof of the period during film making for which the corporation was the maker, and so conceded that the matter could not be proved under section 13(1). He also referred to section 13(2) seeking to show the date of first publication, but could gain little support from the evidence.

In any event, no matter what evidence was to be found, this was a vain exercise, for this is a second appeal under section 22 of the Court of Appeal Act. No findings of fact nor any conclusions of law were reached on the point by the Magistrate, or the learned Chief Justice, so there was no way in which inferences relating to section 13 could be considered by this Court.

In so far as it was contended that the Copyright Act is of no application in Fiji we are against the

appellant, but for the reasons we have endeavoured to explain it is clear that there was an erroneous conclusion as to the existence of admissible evidence proving copyright, and accordingly we uphold grounds of appeal (b), (e), (g) and (h) and the convictions on counts 1-13 are quashed, and the fines on those charges are set aside.

We turn to ground (k), (l), (m) and (n) dealing with charge 14.

Grounds (k) and (l) overlap and complaint is made that as a matter of law there was no sufficient admissible evidence to convict the appellant of conspiracy. Ground (m) is in part a repetition but it also alleges that conclusions were based on inadmissible evidence and ground (n) complains that the Magistrate erred in not staying proceedings on the conspiracy charge, which was heard in conjunction with charges for the substantive offences.

We deal first with the last ground (n) concerning a possible stay of proceedings.

The Courts have frequently been confronted with cases where an indictment combines charges in this way and questions sometimes arise as to whether it is proper for the two classes to be heard together.

A Practice Direction was issued by Lord Widgery LCJ and this can be found in (1977) 2 All E.R. 540. It reads as follows:-

"LORD WIDGERY CJ at the sitting of the court announced the following practice direction made after consultation with the judges of the Queen's Bench Division:

1. In any case where an indictment contains substantive counts and a related conspiracy count, the judge should require the prosecution to justify the joinder, or, failing justification, to elect whether to proceed on the substantive or on the conspiracy counts.

2. A joinder is justified for this purpose if the judge considers that the interests of justice demands it. "

The effect of this Note and the principles to be followed in applying it are discussed in Archbold's Criminal Proceedings (40th Edition) at pages 1873-1875 at greater length than can be conveniently reproduced here.

We take it to be the general principle that the addition of a conspiracy charge is undesirable where it adds nothing to the effectiveness of the indictment on the evidence to be offered - that is to say where, if the evidence is believed the substantive charge will be proved. The impropriety and inconvenience is brought about by the additional complications which seem to be inherent in a conspiracy trial including inter alia the special rules governing the admissible evidence. See R. v. Cooper & Anor. (1947) 32 Cr. App. R. 102. If a case is straight forward and essentially one of whether or not the substantive crime was committed, the jury's task is merely made more complicated by the undesirable practice of adding allegations of conspiracy. On the other hand one cannot speculate on the view which a jury may take of evidence. It may accept that the offence was committed, or the accepted evidence may fall short of proof but establish that there had been a conspiracy. See Cooper's case at pp. 109 and 110:-

"In a great many cases there is no doubt at all that a verdict of Guilty of conspiracy but Not Guilty of the particular acts charged is a perfectly proper and reasonable one. In such cases it would be very wrong not to insert in the indictment a charge of conspiracy. Criminal lawyers know that often while a general conspiracy, for example, a conspiracy to steal, is likely to be inferred by the jury from the evidence, it may be that the evidence of the particular acts forming the larcenies, which are charged in the indictment, are supported by rather nebulous evidence. In such a case the jury may say, and very likely will say, Not Guilty of larceny, but Guilty of conspiracy to commit larceny. "

One should not clog a perfectly simple case with a count for conspiracy, but it may be proper to do so if one of the possibilities is that the evidence may fall short of proving the commission of substantive crime, but yet prove a conspiracy to do so. R. v. Dillon & Cowie (1956) NZLR 110 (C.A.).

Alternatively the substantive counts may be examples which on their own do not show the overall criminality of the matter before the Court. R. v. Jones & Ors. (1974) 59 Cr. App. R. 120.

It was on this second ground that the learned Magistrate refused to put the prosecution to its election, and in the Court's view he was right in doing so. As now appears, with the conclusion we have already reached as to the deficiency of proof in charges 1-13 this case is also a good example of the first class we have discussed - consequently we are against the appellant on ground (n) and we move to consider whether there was evidence which was capable of demonstrating conspiracy.

This involves consideration of the matters which were argued collectively in support of grounds (l) (m) and (n). Two topics were raised.

- (i) What was the admissible evidence and could the learned Magistrate have legitimately inferred an agreement of the kind alleged.
- (ii) What knowledge on the part of the appellant needed to be demonstrated.

On the question of admissibility Mr. Koya, while criticising inferences which he claimed had been taken from the evidence of the police interview with the appellant principally concentrated on the admissibility of the documentary exhibits seized from the business premises.



We say at once that we see no validity in the first of these complaints. At page 110 of the case, on the first page of the learned Magistrate's judgment there are listed the following admissions by the appellant, which were accepted as having been made to the police:

- "(i) that he was one of the directors of Pacific Crown Video Limited;
- (ii) that he had been acting in such capacity since 1977;
- (iii) that when the company was formed it was done so with the intention of providing entertainment;
- (iv) that Pacific Crown Video had dealings with South Pacific Trading Company;
- (v) that one R.B. Sloan, one of the alleged co-conspirators referred to in Count 14, owned or operated South Pacific Trading Company;
- (vi) that certain video tapes seized by the police had come into Fiji through the customs;
- (vii) that they were used as entertainment in the form of closed circuit video;
- (viii) that his company were hiring out T.V. sets, machines and video tapes to hotels and others in Fiji;
- (ix) that the tapes were obtained from the USA;
- (x) that he had known Mr. Sloan, since about June 1978. "

An examination of the transcript of the interview by PW2, Assistant Superintendent C.B. Singh shows that all the above conclusions were justified and we do not consider this point any further.

Dealing with the contested documents it will be seen that they fall into two classes. The first class included ordinary type of invoices and accounting and other documents which one would expect to find in the records of such a business as the appellant was

running.

Some of the principal ones are:-

Letters to customers in Fiji offering to hire out cassettes from "our large library of tapes".

Copies of balance sheets.

Lists of films including well known titles, and other up to date items featuring current world sporting events.

Accounts from South Pacific Trading Company (California) for a variety of supplies and services including "video taping services -

110 hours @ \$10 per hour

1000 Sony video tape cassettes at \$12.50 ea."

Invoices from the same company addressed to appellant's company for a large number of tape recorders, tape players and television sets.

Lists of receipts from various hotels and other hirers in respect of monthly payments totalling many thousands of dollars.

Copies of monthly reconciliation statements sent to Mr. Edward Chopot in the United States - these statements appearing to be derived from the previous receipts just referred to.

The second class of documents comprises letters, some handwritten, some typed, found in the appellant's office addressed to "Bob" and appearing to originate from the office of South Pacific Trading Company, or from other addresses on the West Coast of the United States.

Now we have classified the documents in this way because different principles as to admissibility may apply.

In our view the first group are within section 4 of the Evidence Act (Cap. 41). They are clearly part of a record relating to the business of appellant's company compiled in the course of business and in all other respects comply with the requirements of subsection (a) -

R. v. Jones & Sullivan (1978) 2 All E.R. 718. In so far as they were not personally made by appellant (and therefore admissible in any event) they were made either by persons who cannot be identified or are beyond the seas (subsection (b)).

Regardless of the nature of the charge these are admissible. Different considerations might apply concerning the letters. If tendered to show knowledge of the existence of certain statements contained in them - as distinct from the truth of those statements - then, being in the possession of the appellant they would be admissible as to state of mind. Subramaniam v. Public Prosecutor (1956) 1 WLR 965 (P.C.) - and this of course is of relevance when one comes to a question of knowledge or intentions.

In a charge of conspiracy, as in other cases of common purpose, acts and declarations of one in pursuance of a proved agreement are admissible against other parties. Obviously the existence of a common plan and the participation of the accused in it must be first proved, but given that proof then statements<sup>or</sup> actions of one of a number of co-actors in pursuance of the common purpose are admissible against the others. It has been said that before the declarations of one conspirator may be admissible against another alleged conspirator the existence of the conspiracy must be proved, and also the fact that they were parties to the conspiracy and that the act was in furtherance of the common design - Archbold (40th Edition) paras. 1329 & 4078.

If the use of the word "conspiracy" means an agreement to act in concert then we do not see any difficulty, for no one would suggest that a letter or other declaration by one alleged offender without more could be admissible to prove the involvement of another. But if it is a prerequisite for the admissibility of the statement that the offender shall have been proved aliunde to be party to a conspiracy i.e. an agreement to

commit an unlawful act, then one questions why the subject evidence is necessary. We take the true position to be as stated in Tripodi v. R. (1961) 104 C.L.R.1 at p.6:

" The first point made is that no sufficient ground existed for admitting the evidence of what was done and said about the cars in the absence of the prisoner or out of his hearing. This relates to the instructions for the alteration of the cars and the reducing and the conversations then taking place. It is urged that the rule under which upon charges of conspiracy evidence is admitted of what is done and said by the parties to the combination in furtherance of the conspiracy is a rule of a special nature and is incapable of application to charges of a substantive offence. In the Supreme Court the contrary view was adopted and moreover a very wide rule was laid down. It is a mistake to think that the rule the chief application of which is in charges of conspiracy is a special rule of evidence confined to that offence. But at the same time it may well lead to error if the question of the admissibility of such evidence in any given case is treated exactly in the same manner as it might be on a charge of conspiracy. For upon a charge of conspiracy the proof of the crime may well consist in evidence of the separate acts of the individuals charged which, although separate acts, yet point to a common design and when considered in combination justify the conclusion that there must have been a combination such as that alleged in the indictment. When that is so evidence may readily be let in of what each party to the conspiracy alleged may do or say in furtherance of the common purpose. But when a substantive crime, not a conspiracy, is charged in the indictment it is the ingredients of the substantive crime that must be proved, not combination for a common purpose. When the case for the prosecution is that in the commission of the crime a number of men acted in preconcert, reasonable evidence of the preconcert must be adduced before evidence of acts or words of one of the parties in furtherance of the common purpose which constitutes or forms an element of the crime is admitted. In fact the other or others, or any one of them, must be shown to have acted in concert with the party whose acts or words are in question in the given case.

With respect we feel that this is an admirable and succinct expression of the principle, coming as it

does from a powerful bench of the High Court of Australia. On this view we hold that the contents of the "Dear Bob" letters are admissible, not only as to the knowledge of the appellant that the writer or writers had made the statements, but as to their truth. We hold that the remarks in the letters, having been received by the appellant, are admissible to show the existence of an agreement and its nature.

In the event this conclusion is not crucial, for an examination of the first class of documents alone would provide sufficient evidence to justify the conclusion which was taken, of conspiracy to import taped copies of films regardless of copyright.

It is true that we have felt obliged to quash the substantive charges because of the failure of the prosecution to bring admissible evidence of the technicalities of copyright existing in 24 named films. That however is not the question. It is: Was there an agreement, to which the appellant was party, to import into Fiji films which it was known would not be imported with the approval of the copyright owners? - regardless of whether appellant knew that this was an offence under the Copyright law of Fiji? It is beyond question, even from the first class of documents that there was a business arrangement for importing hundreds of tapes. From the contents of the invoices it is clear that appellant's suppliers in the United States of America were in some instances doing the taping. In many instances his company was being charged for the purchase of blank tape - in one invoice some \$12,500 worth. The Fiji company itself had tape recording machinery and would be familiar with the techniques involved, including the need to have blank tape and original material to copy. Mr. Morgan's evidence showed that some film was obviously copied from television transmissions. He also proved that the symbol © was on all the films he viewed, and although his evidence failed to prove that the specified films



had indeed been registered under the United States Act, no knowledgeable person, least of all, a man whose business was letting out films for exhibition could be in any doubt that that symbol is at least a claim by the maker that he has copyright.

The scale of the operation provided ample evidence admissible in law, on which the Magistrate could and did conclude that this was a large scale scheme entered into in total disregard of the protection which as Mr. Morgan said all the major film companies take over their films. Indeed no one engaged as was the appellant in the commercial side of film exhibiting could have any other view.

Quite apart from the letters we are of the opinion that the submissions (k) (l) and (m) cannot succeed.

Given the conclusions we have reached as to the common purpose being pursued and the appellant's involvement in it, the contents of the letters become unnecessary, but an examination of them shows even more clearly the nature of the agreed plan - with such references as "the guy from Sony may feel like he's gone out on a limb for us"; "There should be over a 100 hours of tape waiting for you"; "where is the money coming from for taping time?" "the Betamax (equipment) has a remote pause control which can be used for editing".

Finally a submission was made as part of ground (2) on the question of knowledge.

The charge was of conspiring to import the tapes knowing the same to be copies of infringing films in which copyright existed. The question of knowledge is discussed in Reg. v. Churchill (1967) 2 A.C. 224 and the effect of that decision has since been given statutory effect in England in The Criminal Law Act, 1977. Put briefly it is said that -

"the offence is the making of an agreement to do an unlawful act. It is the character and content of the agreement that matters, and the accused's knowledge of what in fact has been done if it throws light on that" -

Churchill's case at 232.

Again at 237 -

"If what they agreed to do was, on the facts known to them, an unlawful act, they are guilty of conspiracy and cannot excuse themselves by saying that, owing to their ignorance of the law, they did not realise that such an act was a crime. "

No question appears to have arisen as to whether the appellant knew the law of Fiji on copyright, but in any event that is irrelevant.

The conclusion reached by the Magistrate was that he must have known that the plan would involve importing infringing material, and in our view there was ample admissible evidence to support this conclusion.

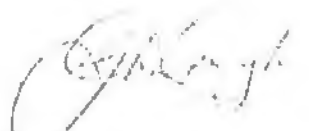
Accordingly the appeal in respect of Charge 14 is dismissed.



.....  
VICE PRESIDENT



.....  
JUDGE OF APPEAL



.....  
JUDGE OF APPEAL