IN THE FIJI COURT OF APPEAL

Criminal Appeal No. 46 of 1986

Between: NAUSORI TOWN COUNCIL Appellant

- A N D -

PUSHPA CHAND Respondent

Sohan Singh for Appellant
Mrs. I.V. Helu Mocelutu

Date of Hearing: 23rd October 1986

Delivery of Judgment: 31st October, 1986

JUDGMENT OF THE COURT

O'Regan J.A.

On 26th April 1985 the Appellant instituted a private prosecution against the respondent for a breach of Regulation 13(4) of the Public Health Building Regulation (Cap. 111) which provides as follows:

> "No person or persons shall use or occupy or be permitted to use or occupy any building or portion of a building unless a Certificate of completion and permit to occupy has been issued in respect thereof or written permission for such occupation shall have been given by the local authority".

She was initially charged with "occupying a building without a certificate of completion and permit to occupy contrary to Regulation 13(4) of Section 3 of Public Health (Building) Regulations Cap 111 and Section 142 of Public Health Act (Cap 111)". The particulars of the offence recorded in the charge sheet alleged that she "did on or

about the 22nd day of April 1985 at Dilkusha, Nausori in the Central Division, occupy her dwelling house situated on Lot 1 CT. 21243 DP 2695 without first obtaining a certificate of completion and permit to occupy from Nausori Town Council".

When the hearing of the charge commenced on 14th August 1985 in the Magistrate's Court at Nausori Counsel for the appellant without opposition from Counsel for the respondent, filed an amended charge alleging an offence of "using and/or occupying a building------" with the rest of the charge being in terms identical with those in the original charge.

In a reserved judgment delivered on 8th November 1985, Mr. L.S. Perera, Resident Magistrate found the appellant "guilty of the charge". In the Supreme Court and in this Court Miss Helu-Mocelutu contended that the amended charge preferred against the appellant was bad for duplicity. In her submission, the amended information, as drafted, encompassed three separate offences namely (i) to use (ii) to occupy and (iii) to use and occupy the dwelling house. No such submission was advanced by counsel for the appellant (Not Miss Helu-Mocelutu) before the learned magistrate.

No offence of using and occupying----is created by Regulation 13(4) and accordingly there was no warrant for the inclusion of the word and in the amended information. Accordingly, the third possible offence which counsel submitted was encompassed by the amended charge, could not lie. The question however, remains as to whether the charge states one or two separate offences.

Strictly speaking, as Dr. Glanville Williams points out in an article "The Court System and the Duplicity Rule" - 1966 Criminal L.R. 255 the term "duplicity" only applies

where the matter said to create the different offences is joined by the conjunction "and". Where the conjunction "or" is used the objection, correctly speaking, is on the ground of uncertainty. In essence, however, the foundation of the objection is the same in both instances. But whilst it is easy to explain the purpose of the rule, there is, as has been said on many occasions, often considerable difficulty in ruling as a matter of construction whether a particular criminal section contains more than one offence - see, for instance Ministry of Transport V. Burnett Motors Ltd (1980) 1 N.Z.L.R. 51 per Richmond P at p. 55 - 56 and Ebert v. Transport Department (1967) N.Z.L.R. 459 at p. 462 where McCarthy J, in delivering the judgment of the Court of Appeal, said:

> "The cases on the rule are legion, but a study of them does little to assist one approaching a section which is not close in textual relationship with those considered in the judgments. We agree with Haslam J. that no broad test providing a general guide emerges from the cases. In each instance it is a matter of divining the intention of the legislature by construing the statute".

Observations to the same effect were made in R. v. Clow (1963) 2 All E.R. 216.

Before construing the regulation we note that by S.2 of the Interpretation Act (Cap 7) the word "occupy" has assigned to it the meaning "use". It follows that if the case had proceeded on the original information which alleged occupying only the information would have encompassed both use and occupation. And such an information would not have been bad for uncertainty or duplicity. See Ministry of Transport v. Burnett Motors Ltd. (Supra) at p. 56 line 50 to page 57 line 11.

As "occupy" in Regulation 13(4), by virtue of the Interpretation Act includes "use", we are of the view that the words "or use" in the regulation are otiose and should be disregarded. The general rule, of course, is that every word in a statute is to be given a meaning and a construction which would leave without effect any part of its language, is normally rejected. But there are exceptions. See Wynn v. Skegness Urban District Council (1967) 1 WLR 52 at p. 54.

The draftsman of the regulation obviously overlooked the meanings of "occupy" assigned by S.2 of the Interpretation Act. In the Wynn v. Skegness Urban District Council case (supra) Ungoed-Thomas J said:

> ".....it is preferable to accept a word as otiose, which is a minor criticism of statutory drafting, rather than to run counter to the meaning.....spelt out in another subsection of this very section".

In our view like considerations apply in the present case. We think it better to treat the words "use or" as otiose rather perpetuate the confusion and difficulty (of which the present case is an instance) occasioned by the tautological insertion of those words in the regulation.

It accordingly follows that the regulation must be read as creating one offence only - the offence "no person or persons shall occupy------". And the words "using and/or-----" appearing in the amended information treated as of no effect.

The appeal is allowed.

If we had taken a contrary view, we would have felt obliged to apply the proviso. No objection to the form of the information was made in the Magistrates' Court and there is no record of any request by the defendant to the

informant for particulars.

The record does not bear any signs of the appellant having been embarrassed or prejudiced in the conduct of her case before the learned magistrate because of the form of the information. Even if she had succeeded on the point taken we would have held that there had been no miscarriage of justice. See Thompson (1913) 9 Cr. App. R.252.

There will be no order for costs.

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