

IN THE FIJI COURT OF APPEAL AT SUVA
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0013.97S
(High Court Criminal Case No. HAA0079 of 1997)

BETWEEN: YEUNG SZE WAIL ALICE
 FONG PAK HUNG
 HO KWOK ON

Appellants

AND: THE STATE

Respondent

Coram: The Hon. Sir Mari Kapi, Justice of Appeal
 The Hon. Justice I.R. Thompson, Justice of Appeal
 The Hon. Justice D.L. Tompkins, Justice of Appeal

Hearing: 13 May 1998

Counsel: Mr. M. Raza for the Appellants
 Mr. J. Naigulevu for the Respondent

Date of Judgment: 15 May 1998

JUDGMENT OF THE COURT

The Appellants have appealed from the judgment of Townsley J, delivered on 3 September 1997 in which he allowed an appeal by the Respondent against the sentences imposed on the three Appellants in the Suva magistrates' court.

The Offending

The Appellants, all residents of Hong Kong, arrived in Fiji on 2 August 1997 with forged passports and after obtaining unlawfully issued Fiji immigration permits. They had with them forged credit cards. Two other persons, also of Chinese origin but now from

Australia, joined them three days later. On 6 August 1997, the Appellants together with these other two, using the forged credit cards, obtained from Prouds in Suva perfume to the value of \$115, one gold necklace to the value of \$1,750 and a second gold necklace to the value of \$1,899.99. They then went to Lords shop in Suva where the Appellant Alice endeavoured to obtain a necklace valued at \$2,645, again offering a forged credit card. Management were suspicious and attempted to ring the Bank to confirm the validity of the card, whereupon all five left the shop, returning to Nadi.

On 7 August 1997, all five went to Prouds at Sigatoka. The shopkeeper tipped off the police. The two others fled with some of the fake cards and 2 gold bracelets valued at \$3,649. The three Appellants were arrested. 32 forged credit cards were found in their possession.

In the Magistrates' Court

The Appellants first appeared in the magistrates' court before Chief Magistrate Naqiolevu on 11 August 1997. The Appellant Alice pleaded guilty to four charges and not guilty to a fifth. The other two accused pleaded not guilty to all charges against them. They were remanded until 15 August 1997, and again until 22 August 1997. On that day all

After hearing submissions from counsel representing the Appellants and from the police, the magistrate imposed the following sentences:

YEUNG SZE WAI ALICE

- Count 1: *Uttering forged credit card instrument*
18 months imprisonment suspended for 2 years.
- Count 2: *Obtaining goods value \$115.00 by forged instrument*
2 years imprisonment suspended for 3 years.
- Count 3: *Uttering forged credit card*
18 months imprisonment suspended for 2 years.
- Count 4: *Endeavouring to obtain goods value \$2,645 by forged instrument*
2 years imprisonment suspended for 3 years.

FONG PAK HUNG

- Count 5: *Uttering forged credit card*
18 months imprisonment suspended for 2 years.
- Count 6: *Obtaining goods value \$1,750 by forged instrument*
2 years imprisonment suspended for 3 years.

HO KWOK ON

- Count 7: *Uttering forged credit card*
18 months imprisonment suspended for 2 years.
- Count 8: *Obtaining goods value \$1,899.99 by forged instrument*
2 years imprisonment suspended for 3 years.

ALL RESPONDENTS

- Count 9: *Possession of Unlawfully Issued Immigration Permit*
All to pay \$300 immediately in default 12 months imprisonment. All to leave Fiji immediately. Recommended all escorted to Nadi Airport and placed on first available flight to Hong Kong.

In the High Court

The Respondent appealed to the High Court against the sentences on the grounds that they were too lenient. In his decision the judge recorded the submissions made by the Respondent and by counsel for the Appellant. He correctly stated the principles to be applied before an appeal by the State against leniency of sentence can be upheld. In the passage in his decision to which we later turn, he considered the maximum penalties for the offences to which the Appellants had pleaded guilty. He concluded that the appeal should be allowed. He quashed the sentences and orders imposed and made in the magistrates' court with the exception of the fines of \$300 on each Respondent in default 12 months' imprisonment on Count 9. In lieu he imposed the following sentences.

YEUNG SZE WALALICE

Count 1: 3 months' imprisonment
Count 2: 9 months' imprisonment
Count 3: 6 months' imprisonment
Count 4: 18 months' imprisonment

All sentences to be concurrent.

FONG PAK HUNG

Count 5: 12 months' imprisonment
Count 6: 3 years' imprisonment

Both sentences to be concurrent.

HO KWOK ON

Count 7: 12 months' imprisonment

Count 8: 3 years' imprisonment

Both sentences to be concurrent.

The Application for Leave to Appeal

The Appellants applied to this court for leave to appeal out of time. In his decision delivered on 16 January 1998, Tikaram P set out the proposed grounds of appeal against conviction and against sentence in the draft petition. He referred to s.22(1) of the Court of Appeal Act to the effect that on a second appeal a ground of appeal involving a question of law only can be urged against conviction, and that there is an absolute prohibition against an appeal on severity of sentence unless the sentence passed was beyond the competence or jurisdiction of the court, citing *Prem Chand v. R* [1976] 22 FLR 100. He held that as the first five proposed grounds of appeal constituted appeals against severity of sentence, the Court of Appeal will not entertain them. However, he concluded that in respect of grounds seven and eight raising questions of jurisdiction and therefore questions of law, an appeal could properly lie. He granted leave to appeal in respect of those grounds. He directed that the Appellants were to file and serve revised grounds of appeal on questions of law only, not including severity of sentence, within 14 days.

The revised grounds of appeal were:

"THAT in any event the Learned Appellate Judge ought to have noted and entered pleas of not guilty and remitted the case back to the Magistrate's Court to be determined according to law more particularly and in view of the fact that the Appellants had believed that the "credit cards" were genuine at the material time.

THAT further and/or in the alternative the Learned Appellate Judge erred in law and in breach of the Criminal Procedure Code in sentencing the Appellants for the offence of Forgery contrary to section 341 of the Penal Code when they were initially charged with contravening Section 343.

THAT the Learned Trial Judge acted without jurisdiction in sentencing the Appellant in breach of section 300 of the Criminal Procedure Code and the laws relating thereto."

When this appeal was called before Tikaram P. on 21 April 1998 counsel for the Appellants indicated a desire to submit a further ground of appeal. The President acceded to this request, ordering that any application to amend the grounds of appeal by adding a further ground, and the affidavit in support, were to be filed within seven days.

On 12 May 1998, the day before the date upon which these appeals were to be heard, counsel for the Appellants filed a notice of motion seeking leave to add an additional ground of appeal. Counsel could give no acceptable explanation for his failure to file this application within the time fixed by the President. We take this opportunity to emphasise yet again that this court finds the failure of counsel to comply with timetable orders made by this court totally unacceptable. The legal profession in Fiji needs to appreciate that if any of its members continue consistently to ignore timetable orders, as so many have done in the past, this court may need to adopt a far stricter approach than it has formerly, by refusing an application made after the time for doing so, or by taking other appropriate action.

However, in the present case we were satisfied that the additional ground sought to be added was, in effect, a variation of one of the grounds already advanced. The Respondent was not prejudiced. Accordingly we allowed the further ground to be added.

It was:

"The Learned Appellate Judge had erred in law in failing to enter a conviction after substituting the charges and thus could not sentence the Appellants."

The Submissions on Appeal

Counsel for the Appellants abandoned the first ground of appeal, founded on the submission that the pleas in the magistrates' court were equivocal and should not have been accepted by the magistrate as pleas of guilty. As to the third ground of appeal referring to s 300 of the Criminal Procedure Code, we pointed out to counsel that this section is in a part of the Code containing provisions regulating procedure in trials before the High Court. It has no application where the High Court is hearing and deciding an appeal from a magistrates' court.

The remaining two grounds are founded on the submission that the judge in the High Court substituted charges of forgery for the charges of uttering a forged document namely, a credit card, in respect of which the Appellants had pleaded guilty in the magistrates court. He further submitted that, having substituted the charge of forgery, the judge sentenced the Appellants without entering a conviction on that charge.

To consider this submission it is necessary to set out in full the relevant part of the judge's decision:

"Looking at the penalty section for the offence of Uttering a Forged Document, it may be seen that the maximum punishment is the same as that for forging that particular document."

Reference to the penalty sections for Forgery s.355 through to s.341 of the Penal Code shows 14 years imprisonment as the maximum for forgery of certain documents (other than wills, deeds or currency which carry life) but nowhere included among them is a credit card.

Section 355(2)(a) mentions "any valuable security or assignment thereof or endorsement thereon or where the valuable security is a bill of exchange, any acceptance thereof".

The State wanted to rely upon this subsection and submitted that a credit card fell within the definition of a "valuable security".

"Valuable security" is defined in s.4 of the Penal Code to include writings evidencing title to stock annuities, funds etc, any security for the payment of money or any authority for the payment of money or for the delivery or transfer of goods or chattels, any receipt for the payment of money or the delivery of any chattel, or any document of title to land or goods.

I am of the view that a credit card is not among the documents described nor is it capable in its very essence of being described as a "valuable security".

It is interesting that the Forgery section creating the offence envisages the "valuable security" as being capable of assignment or endorsement in the hands of the holder. This may be the key to its nature. A credit card is not transferable and is owned by the issuing bank. It is more akin to a token.

In any event, if there is doubt about the definition, it is in accordance with authority to construe it in favour of the liberty of the subject.

I accordingly, class the credit cards in this case under s.341 of the Penal Code which covers forgery of documents not made a felony under the earlier sections.

In this section the offence is a misdemeanour, punishable under s.47 of the Penal Code with 2 years' imprisonment or a fine or both.

Of course the offences of Obtaining or Endeavouring to Obtain Goods by virtue of a forged instrument are punishable by 14 years' imprisonment."

Having regard to this passage in the decision, counsel's written submission, and counsel's oral submissions at the hearing before us, it is apparent that counsel for the Appellant has misunderstood the course the judge in the High Court followed.

The charge of uttering was laid under s.343(1) of the Penal Code Cap.17 which provides:

"343-(1) Any person who knowingly and fraudulently utters any forged document, seal or die is guilty of any offence of the like degree (whether felony or misdemeanour) and is liable for the same punishment as if he himself had forged the document, seal or die."

What the judge was doing in the passage to which we have referred is ascertaining what are the appropriate maximum sentences for the offences to which the Appellants had pleaded guilty. In the case of the charges of uttering, it was necessary to determine what was "any offence of the like degree" in order to decide whether the offences of uttering to which the Appellants had pleaded guilty should be regarded as a felony or a misdemeanour. The State had submitted that the offence of the like degree should be regarded as an offence against s.335(2)(a) involving the forgery of "any valuable security or assignment thereof or endorsement thereon". This offence is a felony. However, the judge, in our view rightly, rejected this submission by the State, holding that a credit card is not a document that can be described as a "valuable security".

He then considered s.341, the section creating the offence of forgery. Subsection (1) provides that forgery of any document which is not made a felony under the Penal Code or any other Act, if committed with intent to defraud, is a misdemeanour. The judge held, again in our view rightly, that this was the offence of the like degree to that to which the Appellants had pleaded guilty. Hence they should be sentenced in respect of the offences of uttering as for a misdemeanour, in respect of which, pursuant to s.47 of the Penal Code, the maximum sentence is imprisonment for a term not exceeding two years or a fine or both. He then proceeded to impose sentences for the uttering offences well within that maximum.


What is apparent from this analysis is that the judge did not, as counsel for the Appellants submitted, substitute one charge for another. What he did do was adopt the correct procedure to determine what was an offence of the like degree, to enable him to decide whether, in respect of the uttering charges, the Appellants should be sentenced on the basis of a felony or a misdemeanour. He was also correct in his conclusion that in respect of the charges of demanding property on forged documents pursuant to s.345 of the Penal Code, the Appellants should be sentenced on the basis of a felony for which the maximum penalty as provided in the section is imprisonment for 14 years.


For these reasons, we conclude that the judge in the High Court, when allowing the appeals by the Respondent and imposing the sentences he did, acted in all respects within his jurisdiction.

The Decision

The appeals of each Appellant are dismissed.


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Sir Mari Kapi
Justice of Appeal


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Justice I.R. Thompson
Justice of Appeal


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Justice D.L. Tompkins
Justice of Appeal

Solicitors:

Messrs. Mehboob Raza & Associates for the Appellants
Office of the Director of Public Prosecutions for the Respondent