

IN THE COURT OF APPEAL, FIJI ISLANDS  
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0011 OF 2002S  
(High Court Criminal Action No. 095 of 2001S)

BETWEEN:

RAMESH CHAND

*Appellant*

AND:

THE STATE

*Respondent*

Coram:

Tompkins, JA  
Henry, JA  
Penlington, JA

Hearing:

Tuesday, 20<sup>th</sup> and Thursday 22<sup>nd</sup> May 2003, Suva

Counsel:

The Appellant in Person  
Mr. G.H. Allan for the Respondent

Date of Judgment: Friday, 30<sup>th</sup> May, 2003

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JUDGMENT OF THE COURT

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The appellant was charged in the Magistrates' Court with four counts alleging fraud. Two counts, numbered 1 and 3, were not proceeded with. Two went to trial. Count 2 alleged that the appellant between April and July 1995, with intent to defraud, obtained F\$14,606.00 from a Mr Rajen Prasad by falsely pretending that he would obtain an Australian visa for Mr Prasad. Count 4 alleged that the appellant, between July and September 1995, with intent to defraud obtained F\$12,969.00 from a Mr Baran Kumar by

falsely pretending that he would obtain an Australian visa for Mr Baran. He was convicted on both counts and sentenced to two years imprisonment on each count concurrently.

He appealed against conviction and sentence to the High Court. He was represented by counsel. The appeal against conviction was dismissed. The appeal against sentence was allowed in part in that the sentences on both counts were reduced from two years to eighteen months concurrently. He now appeals to this court against conviction and sentence. Such an appeal, being an appeal against the decision of the High Court in its appellate jurisdiction, can, pursuant to s 22 (1) of the Court of Appeal Act (Cap 12), be on a ground of appeal which involves a question of law only.

### Autrefois acquit

The first ground of appeal is that the appellant was acquitted of the same offences by Magistrate Shah on 25 November 1997. This was not a ground of the appeal to the High Court, and was not raised in that court. Hence, it is not referred to in the judgment. Although it is doubtful whether the appellant can advance this ground of appeal under these circumstances, we considered that, if in fact he had been acquitted of the charges, we should consider whether this court should take some action to avoid an injustice. Accordingly, we asked counsel for the State to research the history of the charges and report to the court. To enable this to be done, we adjourned the hearing for two days. We have received a helpful memorandum from Mr Allan.

We do not propose to set out the rather confusing history of the charges in detail. What is apparent is that on 8 August 1997, Magistrate Shah amalgamated three of these counts with the fourth in file 647/96. Then on 14 May 1998, the prosecution asked that all

four charges in file 647/96 be withdrawn under s 201 (2) (b) (ii) of the Criminal Procedure Code (Cap 21) on the basis that there had been an amalgamation of that file with file 1945/97. The application was not opposed by the appellant's counsel and the charges were withdrawn, with the result that the appellant was discharged in respect of those charges. The same four charges then proceeded under file 1945/97.

Section 201 of the Code provides:

201.- (1) The prosecutor may with the consent of the court at any time before a final order is passed in any case under this Part withdraw the complaint.

(2) On any withdrawal as aforesaid –

(a) where the withdrawal is made after the accused person is called upon to make his defence, the court shall acquit the accused;

(b) where the withdrawal is made before the accused person is called upon to make his defence, the court shall subject to the provisions of section 210, in its discretion make one or other of the following orders:-

(i) an order acquitting the accused;

(ii) an order discharging the accused.

(3) An order discharging the accused under paragraph (b)(ii) of subsection (2) shall not operate as a bar to subsequent proceedings against the accused person on account of the same facts.

Although the magistrate, when withdrawing the charges, did not expressly record that the appellant was discharged, that was clearly the intention, since the minute records that the application was made under s 201 (2) (b) (ii), and he then proceeded to deal with the same charges in file 1945/97 on the same day. It follows from subs (3) that the discharge of the appellant in respect of the four charges in file 647/96 does not

bar subsequent proceeding on the same facts, which is what occurred. The magistrates' court could therefore properly proceed with the charges under file 1945/97.

The appellant has been unable to produce and the court has been unable to locate any written record of the appellant being acquitted of the charges in file 647/96 on 25 November 1997.

The appellant's appeal in respect of his conviction on the charges in 1945/97 came before Surman J in chambers on 17 December 2001. According to the judge's minute, counsel for the appellant made the claim that the appellant had been acquitted by Magistrate Shah on 25 November 1997. The minute records that the appeal was adjourned to 18 January 2002, and that the Chief Magistrate was to provide a full report by 11 January 2001.

There is no record of that report before us. The appeal finally came before Surman J for hearing on 25 February 2002. As we have stated, the grounds of the appeal from the magistrates' court to the High Court, dated 30 June 2001 and signed by counsel for the appellant, makes no reference to the claim that he had been acquitted of the charges on 25 November 2002. Nor does the judgment of Surman J. We can only assume that counsel did not press the claim and that the judge was satisfied that it was no longer an issue.

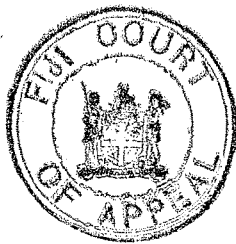
In view of this history, we are satisfied that the ground of appeal of *autrefois acquit*, even if it can properly be considered at this stage, has not been made out.

### Remaining grounds of appeal

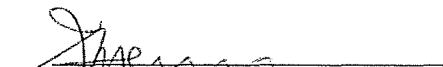
The appellant submitted that the judge (presumably he means the magistrate) erred in convicting for what was future conduct, that the prosecution had failed to prove that there was an intent to defraud and that a statement of intention about future conduct will not amount to a false pretence. These are all matters considered by the judge in the High Court. They are matters of fact. As the right to appeal to this court is in respect of a question of law only, this court has no jurisdiction to entertain these grounds. The appellant advanced no submissions in support of the appeal against sentence.

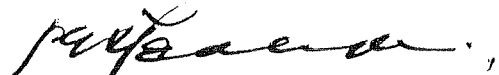
### The result

The appeals against conviction and sentence are dismissed.



  
Tompkins, JA

  
Henry, JA

  
Penlington, JA

### Solicitors:

Appellant in Person  
Office of the Director of Public Prosecutions, Suva for the Respondent