IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

Civil Appeal No. 35 of 1959

Between:

ANGAMUTTU AND OTHERS — Appellants

v.

JAI NARAYAN — Respondent

Native Lands Trust Ordinance (Cap. 104)—whether consent of Board to transfer obtained—onus of proof.

The respondent, the registered head lessee of certain Native Land, sought an order for possession against the appellants in the Magistrate's Court. The appellants purported to derive their title from a transfer of a sublease of the land. Section 12 of the Native Lands Trust Ordinance (Cap. 104) provides that such a transfer without the consent of the Native Lands Trust Board shall be null and void. The trial Magistrate granted the respondent the order sought, holding that since the appellants had failed to establish the necessary consent they were trespassers upon the land. The appellants appealed.

Held.—(1) The onus of proof that the consent of the Native Lands Trust Board was obtained rests on the person who asserts he has a right to occupy the Native Land; *R. Chabildas v. C. G. Patel* Civil Appeal No. 8 of 1954 followed.

(2) The appellants had not attempted to show that either the consent of the Board had been obtained under s. 12, or that it was not necessary to obtain it by virtue of the proviso to s. 35 of the Ordinance.

Appeal dismissed.

Case cited: *R. Chabildas v. C. G. Patel* Civil Appeal No. 8 of 1954.

R. D. Patel for the appellants.

K. P. Mishra for the respondent.

HAMMETT, J. [24 March, 1960]—

This is an appeal from the decision of the Magistrate's Court of the First Class sitting at Ba dated 28th November, 1959, whereby the plaintiff obtained an order for possession of a part of the Native Land known as Natawa No. 3 situate in the District of Tavua of the whole of which area of land the plaintiff is the registered lessee, together with a declaration that the defendant appellants are trespassers and an injunction restraining them from trespassing on the land in the future.

Prior to 1932 the respondent was the Registered Head Lessee of the Native Land of which the land in dispute (an area of one and a half square chains more or less) forms a part. The Head Lease was registered in the Register of Native Leases Book No. 38 Folio 298.

On 13th June, 1932, the respondent entered into an Agreement with one Bhanabhai for the sublease to him of the land in dispute for the unexpired period of the Head Lease less one day.

Clause 4 (*c*) of this Agreement reads as follows:—

> " That the landlord will at the time of or before the expiration of this lease abovementioned apply for an extension or a renewal thereof and, if and upon being granted such an extension or renewal the landlord will give to the tenant an extension or renewal of this lease for a further period not exceeding ten years ".

The original Head Lease was not produced in evidence at the trial and there is no evidence of its date of expiry.

On 23rd January, 1941, Bhanabhai assigned the sublease to Thakorbhai by an endorsement on the Agreement.

On 6th November, 1941, the Native Lands Trust Board granted a renewal of Registered Native Lease, Book 38, Folio 228, i.e. the Head Lease for a period of 29 years from 5th December, 1940.

No formal extension of the Agreement for a sublease dated 13th June, 1932, was in fact made, but the sublessee remained in possession.

On 1st May, 1944, Thakorbhai further assigned the sublease to one Lachmi by an endorsement on the Agreement. On that date the respondent endorsed his consent to both this Assignment and the previous Assignment on the Agreement. Lachmi died on 18th January, 1945, and Probate of her Will, was granted to her executor, her husband, Angamuttu on 15th October, 1958. By her Will she left all her property to her two sons Subermani and Appau in equal shares. Angamuttu, Subermani and Appau are the defendant/appellants in this case who remained in occupation of the land after the death of Lachmi.

In the Court below the plaintiff/respondent sued for possession on the ground that the defendant/appellants were occupying the land in dispute either—

(*a*) as tenants holding over on a year to year basis whose tenancy had been determined by Notice to Quit; or

(*b*) as trespassers.

The respondent conceded in the Court below that the notices to quit served were defective and that he could only succeed in this action if he could prove the appellants were trespassers.

The learned trial Magistrate held that since the appellants (or Lachmi through whom they claimed) came into possession of this Native Land in 1944, the consent of the Native Lands Trust Board under section 12 of the Native Lands Trust Ordinance (Cap. 104) was a prerequisite to their holding a valid title.

There is nothing on any of the documents in this case and no evidence has been given to show that the consent of the Director of Lands or of the Native Lands Trust Board was obtained before any of these dealings with the land were carried out.

Section 12 of the Native Lands Trust Ordinance (Cap. 104), which came into effect on 7th June, 1940, lays down that every transfer of or dealing with Native Land held under a Native Lease after the passing of that Ordinance without the consent of the Native Lands Trust Board shall be null and void.

The learned trial Magistrate went on to consider on whom rests the onus of proof of proving the consent of the Native Lands Trust Board in these cases.

This point was decided by Sir Ragnar Hyne, C.J., in the case of *R. Chabildas v. C. G. Patel* (Civil Appeal No. 8 of 1954) when he ruled, as quoted by the learned trial Magistrate:—

> " Once the plaintiffs set up their own title, the Native Lease, it was for defendant to show that he had a valid right to the premises he occupied and to do this it would be necessary to show, *inter alia*, that he had the consent of the Native Lands Trust Board."

I have examined the judgment in that case and I do, with respect, entirely agree with that decision.

The onus of proof that the consent of the Native Lands Trust Board was obtained rests on the person who asserts he has a right to occupy the Native Land concerned.

The learned trial Magistrate then held that since the defendants in this case had done nothing to discharge that onus of proof they had not shown the Court any right to be on the land.

The defendants have appealed on the following grounds:—

1. That the learned Magistrate, A. J. Fisher, Esquire, who delivered the said judgment erred in holding:—
   (*a*) That the tenancy agreement was void.
   (*b*) That the terms of the New Lease Regd. No. 7165 governed the rights of the parties.
2. That the learned Magistrate erred in not holding:—
   (*a*) That the tenancy agreement was governed by the terms of the Old Lease.
   (*b*) That the Old Lease was not proved and therefore the plaintiff had not proved his case.
   (*c*) That it was not established that Native Lands Trust Board Ordinance (Cap. 104) s. 12 applied to the case.
   (*d*) That it was not proved that tenancy had expired or had been validly terminated.

I have carefully considered all that has been argued on behalf of the appellants. The fact remains, however, that they claim to be entitled to occupy this Native Land through a person whose alleged title arose after the Native Lands Trust Ordinance came into effect in 1940. The onus of proof lay on the defendant/appellants therefore to shew either that the consent of the Native Lands Trust Board to their occupying the land had been obtained under section 12 or that it was not necessary to obtain it by virtue of the proviso to section 35 of that Ordinance. This the defendant/appellants made no attempt to do.

This was the position whether their alleged rights were derived from either what was called " the old lease " or " the new lease " in this case.

In these circumstances the learned trial Magistrate was correct in holding that they were not tenants but trespassers. The appeal must be dismissed.

OTTO LOUIS WENDT *v.* REGINAM

[FIJI COURT OF APPEAL AT SUVA (Sir George Finlay, Acting President, C. F. C. Macaskie and C. J. Hammett, JJ/A), May 21, 1960]

CRIMINAL APPEAL NO. 18 OF 1959

(Appeal from Her Britannic Majesty's High Commissioner's Court at Nuku'alofa, Tonga—A. G. Lowe, Chief Judicial Commissioner.)

Larceny Act 1916—whether club treasurer a clerk or servant within s. 17—degree of control—how far receipt of " ownership " of property necessary for conviction of fraudulent conversion under s. 20 (1) (iv) (*b*)—Pacific Order in Council 1893—power to impose imprisonment with hard labour—not affected by English Statute abolishing this punishment.

The appellant was convicted of fraudulent conversion under section 20 (1) (iv) (*b*) of the Larceny Act 1916. He was sentenced to imprisonment for three years with hard labour. He appealed against conviction and sentence.

In respect of the appeal against conviction, it was contended firstly that the appellant was in law and fact a clerk or servant and therefore liable to conviction not under section 20 (1) (iv) (*b*) but under section 17 of the Larceny Act 1916. The appellant had received the moneys, for the fraudulent conversion of which he was convicted, as Treasurer of the Tonga Club. The office of Treasurer was an elective office for which the appellant was qualified by membership of the Club and of the Management Committee. He was paid an annual honorarium of £30.

The second ground of the appeal against conviction was that in a charge under section 20 (1) (iv) (*b*) of the Larceny Act 1916 it was necessary to establish that the defendant received the ownership of the property which he was charged with having fraudulently converted.

In respect of the appeal against sentence it was argued *inter alia* that in so far as imprisonment with hard labour had been abolished in England, the Chief Judicial Commissioner had no power to impose a sentence of hard labour in the present case.

Held.—(1) There was in the circumstances of this case a complete absence of that element of control essential to a clerk or servant relationship between the appellant and the Club: following *R. v. Tyree* (1865) 1 L. R. Crown Cases Reserved Vol. 1 p. 177, the appellant would appear to have been an accountable officer but not a servant.

(2) Ownership in the colloquial sense is not an essential condition for a conviction of fraudulent conversion under section 20 (1) (iv) (*b*) of the Larceny Act 1916; the subsection extends at least to moneys paid over subject to a liability to account, where the person liable to account is free, as in this case, to change the form of the moneys he receives.

(3) The power to impose a sentence of hard labour being specifically prescribed by the Pacific Order in Council 1893, is not therefore affected by the English Statute which has abolished this form of punishment in England. (The sentence imposed was, however, reduced upon other grounds).

Appeal against conviction dismissed ; sentence varied.

Cases cited:—

Regina v. Murphy 4 Cox C.C. 101; *The Queen v. Tyree* (1865) 1 L.R. Crown Cases Reserved, Vol. 1; *Leslie Pilkington* (1958) 42 C.A.R., 233,

M. Tikaram for the appellant.

T. Rice for the respondent.

The appellant was convicted in the High Commissioner's Court at Nuku'alofa on the 25th September, 1959, of fraudulently converting to his own use the sum of £802 5s. 2d. received by him for or on account of the Tonga Club. He was sentenced to imprisonment for three years with hard labour.

He appeals against both conviction and sentence.—The appellant abandoned two grounds of appeal—that in which he alleged that the verdict was unreasonable and could not be supported having regard to the evidence and that in which he alleged that there was no evidence of fraudulent intention sufficient to support a charge of fraudulent conversion. In the result he confined his appeal, so far as the conviction was concerned, to purely technical grounds.

The first of these was that the Judge was in error in holding that the appellant was not a clerk or servant within the meaning of section 17 of the Larceny Act 1916. Phrased affirmatively the submission was that the appellant was, in law and in fact, a clerk or servant and that he was, in consequence, liable to conviction not under section 20 (1) (iv) (*b*) under which he was, in fact convicted, but under section 17.

A collateral ground of appeal alleged was that on the evidence adduced by the prosecution the case did not fall within the ambit of section 20 (1) (iv) (*b*).

Having regard to the historical development of the law on the subject and to authority, it is unquestionable that, if the appellant was a clerk or servant of the Tonga Club, then the charge should not have been under section 20 (1) (iv) (*b*) but under section 17 of the Act or, possibly, under some other provision of the Act relating to larceny. There is no need to consider the latter contingency.

This definition of the legal position thus given invites consideration of the fundamental question whether the appellant was a clerk or servant of the Tonga Club. The Club is an unincorporated body governed by Rules which provide for the position of a Treasurer but contain no directions as to his functions or duties save as to the point of time at which he is to render his annual account. He was paid an annual honorarium of £30. He received, either from the Secretary of the Club or from its Stewards, sums of money from time to time which he was to hold on the Club's account. It was in respect of the money thus paid over to him that the deficiency of £802 5s. 2d. occurred.

In the light of the evidence it is obvious that no measure of control was exercised by anyone over the appellant in the performance of his duties. He could keep accounts in such form as he pleased: He could do such work as his office entailed when and where he pleased: he could retain the moneys paid over to him in specie if he so wished or he could pay them in whole or part if he wished into the Government Treasury, that being the only Bank, apparently, in Tonga. He could at his election discharge the financial obligations of the Club out of the actual cash he received. He was, in fact, the person who on his own initiative opened a deposit account for

the Club at the Government Treasury. What evolves from it all is that he was not required to retain the moneys paid to him in the form in which he received it but could disburse it in the payment of accounts, deposit it in the Treasury or substitute other moneys for it, as circumstances might require.

His obligation was to account for and have available an aggregate sum equal at any point of time to the amounts he had received less proper disbursements on the Club's account.

In the circumstances, there was a complete absence of that element of control which is essential to a clerk or servant relationship between him and the Club. Not only so but any conception of employment is to some extent negatived by the fact that his was an elective office for which he was qualified by virtue of his membership of the Club and by his membership as Treasurer of the Management Committee whose function it was to manage the Club's affairs. This latter feature if he were an employee put him in a very real sense in the position of being both master and servant—an impossible state of affairs. When every other circumstance negatives such a character the mere receipt of an honorarium can scarcely convert him into an employee of any type. The circumstances are clearly distinguishable from those involved in *Regina v. Murphy* 4 Cox C.C. 101. They were closely approximate to, if they do not quite coincide with, those dealt with in *The Queen v. Tyree* I Law Reports, Crown Cases Reserved, 1865, Vol 1. In the language of the judgment of that case the appellant would appear to have been an accountable officer but not a servant.

The ground of appeal in which it is alleged that the Chief Judicial Commissioner was in error in holding that the appellant was not a clerk or servant therefore fails.

It follows that the case is not excluded from section 20 (1) (iv) (*b*) of the Larceny Act 1916 because the appellant was a clerk or servant. It is contended, however, that that subsection nevertheless does not apply because it is submitted that it is essential to the application of that subsection that it should be established that the person charged received the ownership of the property which he is charged with having fraudulently converted. For this proposition Counsel for the appellant relied upon the statement to that effect which appears in the final paragraph at p. 1265 of *Russell on Crime* 11th Edition. It is noteworthy that the learned author of that treatise expresses no more than a conclusion of his own achieved by a process of deduction and phrases it in the form of a submission unsupported by precise authority. The statement has, of course, the support of Kenny's *Outlines of Criminal Law*, 17th Edition, p. 316, para. 328, where the statement appears:—

> " The only kind of situation therefore which will fit the words of subsection 1 (iv) is one in which ownership was given since there is no available intermediate position between legal possession and ownership."

Consideration suggests, however, that the term " ownership " as employed by the learned text book writers does not mean absolute and unqualified ownership which is the colloquial meaning of the word. It may well be that it only extends to that form of ownership, if ownership it be, in which a person entrusted is not required to retain the thing entrusted in the precise form in which he receives it so that where moneys are paid over and received there is no obligation to retain the specific notes or coins received. Only

that interpretation will satisfy such authorities as *Leslie Pilkington* (1958) 42 C.A.R., 233. In that case, an estate agent was convicted of fraudulent conversion of sums of money received by him for or on behalf of purchasers of houses. In some instances the money is described in the judgment of the learned Lord Chief Justice as having been received by Pilkington, as a stake holder, on the hypothetical suggestion that the persons paying the money said they were willing to negotiate and would pay over the money in order to show that they were serious negotiators. In one particular instance the money was paid over, not only subject to a stipulation for a contract but also subject to a condition that the appellant would secure a mortgage. In respect of the money so paid in each instance the judgment declares:—

> " It was paid to the appellant to hold in his hands till it was found out whether the transaction could go through either by a contract or a contract plus a mortgage being signed."

The appeal against conviction for fraudulent conversion was dismissed.

It is obvious, of course, that if ownership in the colloquial sense was an essential condition to a conviction for fraudulent conversion, the appeal in *Pilkington* would have had to be allowed. We conclude, therefore, that the subsection extends at least to moneys paid over subject to a liability to account where the person liable to account is free to change the form of the moneys he receives. Indeed, there seems in principle no reason why the subsection should not extend to all circumstances coming within its ambit as are not excluded by interpretation because specifically dealt with elsewhere in the Ordinance. Such a view may or may not involve ownership in any sense.

We think, therefore, that there is no substance in the appellant's contention that the facts proved by the prosecution did not establish a case of fraudulent conversion. That disposes of the appeal against conviction and, in that respect, the appeal is dismissed.

As to the appeal against sentence the Court having regard to all the circumstances, and they are many and diverse, and to the opinions expressed by the assessors as permitted under Article 98 of the Pacific Order in Council, thinks that a sentence of three years imprisonment with hard labour is unduly severe. It does not subscribe to the suggestion by the appellant's Counsel that the Chief Judicial Commissioner could not impose a sentence of imprisonment with hard labour. A sentence in that form is specifically authorized by the Pacific Order in Council and the authority of the Order in Council in that respect is not affected by the abolition of sentences of hard labour by the English Statute. English Law for the purposes of the Order in Council defines the crimes coming within the ambit of the Order in Council but it is the Order in Council itself which prescribes the punishment. Jurisdiction to impose a sentence of hard labour for fraudulent conversion will, we apprehend, remain until the Order in Council is amended. However, the Court is of the opinion that the more merciful, if not the wiser view, is that the sentence in this case should not be expressed as a sentence with hard labour. The sentence of three years imprisonment with hard labour is quashed and a sentence of two years imprisonment to take effect from the date of the imposition of the original sentence is substituted.