

A

**ABDUL AZIZ KHAN**

v.

B

**REGINAM**

[SUPREME COURT, 1967 (Hammett J.), 31st March, 14th April]

Appellate Jurisdiction

C

*Criminal law—plea—plea of guilty entered on charge of fraudulent conversion—statement of facts by prosecution—variance between facts so stated and particulars in charge—no unequivocal admission of facts as stated by prosecution—conviction a nullity—Penal Code (Cap. 8) s.305(1) (c) (i)—Criminal Procedure Code (Cap. 9) s.315(1).*

D

The appellant pleaded guilty in the Magistrate's Court to two counts of fraudulently converting to his own use and benefit money said in the particulars of each count to have been entrusted to him "in order that he may apply the amount for the construction of a dwelling house for John Ambrose Smith." The prosecutor's outline of facts included a statement that the money entrusted to the appellant was for the specific purpose of the purchase of materials for the construction of a house under the express terms of a contract to that effect. The appellant said that he applied the money to another building and thought he could build "this building" when he received the money for "the other building."

E

*Held:* 1. There was a material variance between the particulars in the charges and the facts related by the prosecution.

2. The charges should have been amended and a plea to the amended charges taken.

F

3. The appellant had not unequivocally admitted the truth of the facts relied upon by the prosecution and could not be held to have pleaded guilty. The convictions were a nullity.

G

Cases referred to: *R. v. Durham Quarter Sessions Ex parte Virgo* [1952] 2 Q.B.1; [1952] 1 All E.R.466: *Akuila Nacolaiviu v. The Police* (Cr.App.No.57 of 1956 — unreported); *Aporosa Rokovalu v. The Police* (Cr.App.No.12 of 1957 — unreported).

Appeal against convictions of fraudulent conversion in the Magistrate's Court after entry of a plea of guilty.

*K. C. Ramrakha* for the appellant.

*T. U. Tuivaga* for the respondent.

H

HAMMETT J:—[14th April 1967]—

The appellant was convicted by the Magistrate's Court sitting at Suva of the following offences:—

“

*First Count**Statement of Offence*

FRAUDULENT CONVERSION: Contrary to section 305(1) (c)  
(i) of the Penal Code, Cap. 8.

A

*Particulars of Offence*

ABDUL AZIZ KHAN s/o Mushraf Ali, on the 7th day of September, 1966 at Suva in the Central Division, fraudulently converted to his own use and benefit certain property, that is to say, £250 entrusted to him by John Ambrose Smith, for him, the said Abdul Aziz Khan s/o Mushraf Ali, in order that he may apply the amount for the construction of a dwelling house for John Ambrose Smith.

B

*Second Count**Statement of Offence*

FRAUDULENT CONVERSION: Contrary to section 305(1) (c)  
(i) of the Penal Code, Cap. 8.

C

*Particulars of Offence*

ABDUL AZIZ KHAN s/o Mushraf Ali, on the 14th day of September, 1966 at Suva in the Central Division, fraudulently converted to his own use and benefit certain property, that is to say, £43 entrusted to him by John Ambrose Smith, for him, the said Abdul Aziz Khan s/o Mushraf Ali, in order that he may apply the amount for the construction of a dwelling house for John Ambrose Smith.”

D

The record of proceedings shows that after the charge was read and explained to him, he elected summary trial and pleaded guilty to each count.

E

After the prosecution had related the facts and the appellant had given his version, the learned trial Magistrate convicted him and imposed sentences of 12 months and 3 months imprisonment respectively.

F

The appellant now appeals against conviction and sentence on the following grounds:—

“1. That having regard to what your Petitioner said to the court, the learned trial magistrate should in fact have entered a plea of not guilty instead of guilty inasmuch as your Petitioner did not admit that he acted fraudulently in using the said monies.

G

2. That in any event, the sentence is harsh and excessive.”

Learned Counsel for the appellant concedes that the provisions of section 315 (1) of the Criminal Procedure Code preclude any appeal against conviction by an accused person who has pleaded guilty. He submits, however, that what the appellant said in the Court below did not amount to an unequivocal plea of guilty. He contends that the appellant clearly indicated he denied he had any intention to defraud and said that he was not acting fraudulently in his use of the monies handed him by the complainant.

H

A The appellant submits that in these circumstances the conviction was a nullity and should be set aside on the authority of *R. v. Durham Quarter Sessions Ex parte Virgo* [1952] 1 All E.R. 466 which was followed by this Court in *Akuila Nacolaiviu v. The Police*, Criminal Appeal No. 57 of 1956 and *Aporosa Rokovalu v. The Police*, Criminal Appeal No. 12 of 1957.

B I have examined the record in this case with care. It is clear that in the Court below the First Count against the appellant complained that he had converted to his own use £250 which he had been given by a Mr. Smith for the appellant "to apply the amount for the construction of a dwelling house for John Ambrose Smith." The gravamen of the charge was that the money had been given the appellant for the construction of a house.

C The record shows that immediately after the appellant pleaded guilty he said :—

" I used this money for another building and thought I could build this building when I received money for the other building."

Later at the hearing he elaborated this in a form which his Counsel submitted negated any intent to defraud.

D The prosecutor then outlined the facts to the Court below but these differed on a material point from the particulars averred in the charge. He said that the £250 was paid by Mr. Smith to the appellant, not to apply the money generally to the construction of a house for Mr. Smith but for the specific purpose of the purchase of the materials for the construction of that house under the express terms of a contract to that effect.

E But that was not as was averred in the particulars of either Count in the charge. In my view this was a most material variance between what was averred in the particulars of offence in the charge and the facts related by the prosecution in support of the charge. It seems to me that there may be a world of difference between a man being given money for the general purpose of building a house and a man being given money for the express and specific purpose of purchasing materials for the construction of a house.

F As soon as it became apparent in the Court below that the particulars of the charge were at variance with the facts alleged in support of it, the charge should have been amended and the accused's plea to the amended charge taken. I can by no means be certain that if this had been done the appellant would have again pleaded guilty, for his version of the facts in the Court below did not agree with those related by the prosecution.

G The appellant did not unequivocally admit the truth of the facts relied upon by the prosecutor in support of the charge on either Count. In these circumstances he cannot properly be held to have pleaded guilty to either of them. It follows, on the authority of the cases cited before me, that the convictions in this case were a nullity.

H I do, therefore, order that the convictions and sentences passed in the Court below be set aside. I direct that the case be remitted to the Court below, that pleas of not guilty be entered and that he be tried on the present charges, subject, of course, to any amendments thereof which may be ordered.

*Appeal allowed.*