

A

## REGINA

v.

B

## MOSESE VARASIKETE TUISAWAU

[SUPREME COURT, 1969 (Knox-Mawer Ag. C.J.), 17th March, 3rd April]

## Criminal Jurisdiction

C

*Bills of sale—failure to set forth true consideration—bill of sale fraudulent and void—effect upon security over chattels—Bills of Sale Ordinance (Cap. 193-1955) s.7—Bills of Sale Ordinance 1879—Bills of Sale Act 1878 (41 & 42 Vict., c.31) (Imp.)—Bills of Sale Act (1878) Amendment Act 1882 (45 & 46 Vict., c.43) (Imp.).*

*Criminal law—false pretence—representation that vehicle unencumbered on sale—existence of bill of sale—consideration not truly stated—bill of sale void as security over chattels—representation not incorrect—Criminal Procedure Code (Cap. 14) s.223—Penal Code (Cap. 8-1955) s.335 (a).*

D

The respondent was charged with obtaining money by false pretences in that on the sale of his motor vehicle he falsely represented that the vehicle was unencumbered and not subject to any bill of sale. The respondent had in fact executed a bill of sale, under which moneys were still owing, over the vehicle at the time of its acquisition in favour of the Accountant-General of Fiji. In the document, the consideration was stated to be "now paid to the mortgagor by the mortgagee" whereas in fact it was paid some days later by the mortgagee direct to the original vendor. At the Preliminary Inquiry into the false pretences charge the magistrate held that the consideration in the bill of sale was not truly stated, that the bill of sale was therefor void, and that the respondent's representation that the vehicle was unencumbered was accordingly not false; he discharged the respondent. The Attorney-General applied to the Supreme Court for a warrant for the arrest and committal for trial of the respondent under section 223 of the Criminal Procedure Code.

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*Held:* 1. The effect of failing to set forth the true consideration in a bill of sale is that it is deemed "fraudulent and void" by virtue of section 7 of the Bills of Sale Ordinance, with the result that the right of the grantee to take action against the chattels comprised therein is invalidated.

G

Dictum of Marsack J.A. in *Faiz Mohammed Khan Sherani v. Latchman* (1968) 14 F.L.R. 31, applied.

2. The vehicle in question was therefore in fact the unencumbered property of the respondent at the relevant time and the representation made by him to that effect was not incorrect. The application would be dismissed.

H

Other cases referred to:

*Criddle v. Scott* (1895) 59 J.P. 119; 11 T.L.R. 222 D.C.; *R. v. Deller* (1952) 36 Cr.App.R. 184; *Polsky v. S. & A. Services Ltd.* [1951] 1 All E.R. 185; 211 L.T.Jo. 28, aff'd. [1951] 1 All E.R. 1062n; 101 L.Jo. 286; *Badal v. Bhagoti Prasad* (1941) 3 F.L.R. 296; *Spindler, re, Ex parte Rolph*

(1881) 19 Ch.D. 98; 45 L.T. 482: *Baldeo v. Nur Mohammed* Civil Appeal No. 7 of 1961 (unreported): *National Provincial Bank Ltd. v. Gaunt* [1942] 2 All E.R. 112; *Fenton v. Blythe* (1890) 25 Q.B.D. 417; 63 L.T. 534; *R. v. Aspinall* (1876) 2 Q.B.D. 48; 36 L.T. 297.

Application by the Attorney-General under section 223 of the Criminal Procedure Code for a warrant for arrest and committal for trial following on the discharge of the respondent after a Preliminary Inquiry.

*Justin Lewis* Q.C., Attorney-General, and *M.J.C. Saunders* for the applicant.

*S. M. Koya* and *K. C. Ramrakha* for the respondent.

The facts sufficiently appear from the judgment.

KNOX-MAWER Ag. C.J.: [3rd April 1969]—

This is an application by the Attorney-General under section 223 of the Criminal Procedure Code for a warrant for the arrest and committal for trial of the respondent.

The respondent appeared before the Magistrates' Court of the First Class, Suva, charged with the following offences:—

#### FIRST COUNT

##### *Statement of Offence*

OBTAINING MONEY BY FALSE PRETENCES: Contrary to section 335(a) of the Penal Code.

##### *Particulars of Offence*

MOSESE VARASIKETE TUISAWAU on the 15th day of January, 1968, at Suva in the Central Division being the registered owner of a motor vehicle (registered No. R464), with intent to defraud, obtain from FREDERICK DEVRAJ ACHARI s/o Muttusami Achari as a deposit upon an intended sale of the said motor vehicle a valuable security, namely a cheque No. 300398 dated the 16th of January, 1968, drawn in the sum of ten pounds by the said FREDERICK DEVRAJ ACHARI s/o Muttusami Achari upon his account with the Bank of New Zealand, Suva, by falsely pretending, pursuant to a continuing false pretence made on the 15th of January, 1968, that the said motor vehicles was not then subject to any Bill of Sale but was, in effect, the unencumbered property of the said MOSESE VARASIKETE TUISAWAU, whereas in fact the said motor vehicle was then subject to a subsisting Bill of Sale executed by MOSESE VARASIKETE TUISAWAU in favour of the Accountant-General for Her Majesty's Government of Fiji then securing the sum of Seven Hundred and Eleven Pounds Nine Shillings (£711. 9. 0).

#### SECOND COUNT

##### *Statement of Offence*

OBTAINING MONEY BY FALSE PRETENCES: Contrary to section 335(a) of the Penal Code, Cap. 8.

##### *Particulars of Offence*

MOSESE VARASIKETE TUISAWAU on the 17th day of January, 1968, at Suva in the Central Division being the registered owner of

A a motor vehicle (registered No. R464), with intent to defraud, obtained from FREDERICK DEVRAJ ACHARI s/o Muttusami Achari as the agreed balance of the purchase price of the said motor vehicle the sum of four hundred and nine pounds ten shillings (£409. 10. 0), by falsely pretending, pursuant to a continuing false pretence made on the 15th of January, 1968, that the said motor vehicle was not then subject to any Bill of Sale but was, in effect, the unencumbered property of the said MOSESE VARASIKETE TUISAWAU whereas B in fact the said motor vehicle was then subject to a subsisting Bill of Sale executed by MOSESE VARASIKETE TUISAWAU in favour of the Accountant-General for Her Majesty's Government of Fiji then securing the sum of seven hundred and eleven pounds nine shillings (£711. 9. 0).

C He elected trial in the Supreme Court and the learned Magistrate proceeded to hold a Preliminary Inquiry. At the close of the prosecution case, learned Defence Counsel submitted that upon the evidence there was insufficient grounds for committing the respondent for trial.

In his Ruling upon this submission the learned Magistrate summarised the prosecution evidence as follows:—

D "Sometime in October, 1966, the accused saw Mr. Taylor (P.W. 1), sales manager of the Motor Department of Morris Hedstrom Ltd. and told him that he wished to purchase a new Ford Cortina Motor Car and that he was a civil servant and intended to apply to Government for a loan to enable him to purchase such a car. Mr. Taylor then informed him that the total cost of such a car would come to £891. 4. 3.

E Subsequently the accused applied to Government for a loan to enable him to purchase such a car from Morris Hedstrom Ltd. This application was approved on 13th October, 1966. Mr Prescott said in evidence that the application for the loan concerned a proposed purchase of a new Ford Cortina Car by the accused from Morris Hedstrom Ltd.

F A memorandum (Ex. C) approving the grant of a loan was sent by Mr. Prescott for the Accountant-General of the Government of Fiji to the Chief Secretary on 14th October, 1966, after Mr. Prescott had given his approval to the loan.

G This memorandum states the terms on which the loan to the accused was to be made and says that the loan of £894. 15. 0 to enable accused to purchase such a car was approved and that the payment of the advance would be made direct to the suppliers, Morris Hedstrom Ltd. on receipt of evidence of registration of the Bill of Sale securing such advance, the suppliers invoice duly certified by the accused and the Policy of Insurance in respect of the car. The memorandum also mentions the rate of interest and rate of re-payment of the loan.

H On the date the loan was approved namely 14th October, 1966, the accused executed Bill of Sale (Ex. E) in favour of the Accountant-General of the Government of Fiji over a Ford Cortina Car Reg. No. R464 securing the sum of £894. 15. 0.

Having ascertained from the Treasury that the loan had been approved Morris Hedstrom Ltd. delivered the car to the accused on the follow-

ing day namely 15th October, 1966, and had the car transfer registered in accused's name at the Licensing Office of the Department of Transport & Civil Aviation on this date.

Subsequently this Bill of Sale was registered on the 20th October, 1966. On the same date, namely 20th October, 1966, after Mr. Prescott of the Accountant-General's Department had satisfied himself that the conditions precedent to the making of the loan had been satisfied had a cheque (Ex. A) for £894.15.0 drawn directly in favour of Morris Hedstrom Ltd. to pay them for the car purchased by the accused. This cheque is dated 20th October, 1966, and is marked "car advance — Ratu M. Varasikete" and was received by Mr. Taylor for Morris Hedstrom Ltd. and deposited in this firm's bank account on 21st October, 1966.

Thereafter the accused had this car until 17th January, 1968, on which date it was sold and transferred by the accused to Mr. Jonattan Achari in, very briefly, the following circumstances:

The accused advertised this car for sale in the "Fiji Times" and as a result it was sold by him to F. Achari (P.W. 14) acting as agent for his brother Jonattan Achari for the price of £425. 0. 0.

During the course of negotiations between the accused and Mr. F. Achari, the accused, when asked by Mr. F. Achari on 15th January, 1968, whether the car was subject to any Bill of Sale, replied, in effect, that the car was not subject to any Bill of Sale.

In fact, however, at the time of such representation and at the time of the sale and at all material times there was in existence Bill of Sale Ex. E.

Mr. Achari initially paid a deposit of £10 to the accused on 15th January, 1968, and the balance of £415. 0. 0 was paid and the car registration transferred to Mr. J. Achari on 17th January, 1968.

Mr. F. Achari says that at all material times he relied on the accused's representation to him that the car was not subject to any Bill of Sale and paid him the purchase price of the car relying on such representation.

Subsequently, at the end of January or early February, 1968, the Accountant-General having apparently learned of the sale of the car seized the car from Mr. F. Achari under the powers of seizure and sale contained in Bill of Sale Ex. E."

Learned Defence Counsel contended that this Bill of Sale, Exhibit E, was void for a number of reasons. The learned Magistrate adverted to these several arguments, but for the purposes of this judgment I shall concern myself solely with the argument (successful in the Court below) that the Bill of Sale is void because the consideration is incorrectly stated therein.

Now Exhibit E purports to set forth the consideration for which it was given as follows:—

"NOW THIS INDENTURE WITNESSETH that in consideration of the premises and of the sum of Eight hundred and Ninetyfour pounds and fifteen shillings (£894. 15. -) (hereinafter called the principal sum) now paid to the mortgagor by the mortgagee (the receipt whereof the mortgagor doth hereby acknowledge) .....

A and it is apparent from the prosecution evidence, as summarised above, that this is not a true statement of the consideration for which this Bill of Sale was given. Thus in *Criddle v. Scott* (1895) 59 J.P. 119, 11 T.L.R. 222 D.C., a bill of sale was executed in which it was stated to be given to secure £30 now paid. The money was in fact not paid till three days after, when the bill of sale was registered. It was held that the consideration was not truly stated, and that the bill of sale was bad.

B Section 7 of the Fiji Bills of Sale Ordinance provides :—

“7. Every bill of sale to which this Ordinance applies shall be duly attested, and shall be registered, within seven days after the making or giving thereof if made or given in Suva, or within twenty-one days if made or given in any other part of Fiji than the city of Suva, and shall set forth the consideration for which such bill of sale was given; otherwise such bill of sale shall be deemed fraudulent and void : . . . . .”

C Having regard to this provision the learned Magistrate held that since the Bill of Sale was void the representation made by the respondent, upon which Mr. Achari relied, could not be said to have been false. The cases upon which the learned Magistrate placed particular reliance in this connection were *Charles Avon Deller*, Cr. App. R. Vol. 36 p.184; *Polsky v. S. and A. Services Ltd.* [1951] 1 All E.R. 185; *Badal v. Bhagoti Prasad*, F.L.R. Vol. 3 p.296 and *Ex parte Rolph in re Spindler* 19 Ch. D. (1881) p.98. In the result the Magistrate concluded that there were insufficient grounds upon the evidence for committing the accused for trial and discharged him.

D In this application the learned Attorney-General disputes the Magistrate's ruling upon the following grounds :—

- E
- (a) that there was sufficient evidence to put the said Mosese Varasikete Tuisawau on his trial before the Supreme Court;
  - (b) that the said magistrates' court erred and/or misdirected itself in law in discharging the said Mosese Varasikete Tuisawau;
  - F (c) that the said magistrates' court failed to consider the judgment of the Fiji Court of Appeal in the case of *Faiz Mohammed Khan Sherani and Latchman and Others*, being Civil Appeal numbered 35 of 1967.

G In a lucid address the learned Attorney-General has reviewed the cases cited in the Court below and also referred me to a number of other authorities, English and Commonwealth, all of which I have studied. As indicated in the third ground set out above, the Attorney-General places particular reliance upon the judgment of the Fiji Court of Appeal in *Faiz Mohammed Khan Sherani and Latchman and Others* (1968) 14 F.L.R. 31.

H Before adverting to that case I must refer to an earlier decision of the Fiji Court of Appeal in *Baldeo v. Nur Mohammed*, Civil Appeal No. 7 of 1961. The appellant in this earlier case was the plaintiff in an action before the Supreme Court wherein he claimed as the administrator of one Ram Dei the sum due and owing by the defendant/respondent to the said Ram Dei under a Bill of Sale. The Bill had been executed on 7th January, 1955, but registration had not been renewed within the statutory



period thereafter. When the suit came on for hearing the preliminary point was taken that the non-renewal of the registration had rendered the instrument void under section 7 of the Bills of Sale Ordinance. In the course of the argument the plaintiff/appellant applied to amend his Statement of Claim. The learned trial Judge held that he could not consider this application because to do so would offend against the principle laid down in *National Provincial Bank Ltd. v. Gaunt* [1942] 2 All E.R. 112 where it was held that an amendment of a statement of claim should not be permitted if it resulted in preventing the defendant from raising the Statute of Limitations as a defence. The suit having been dismissed, the three Judges of the Fiji Court of Appeal who heard the appeal against this dismissal were Marsack J.A., Trainor J.A. and myself. In their judgments my learned brothers held that the judgment dismissing the plaintiff/appellant's claim should be set aside and the case remitted to the Court below for the trial Judge to review the question of granting leave to amend. In a short judgment I stated that I was in accord with my brother Judges and concurred with them in this order. I considered that the decision in *National Provincial Bank Ltd. v. Gaunt* did not preclude the learned trial Judge from entertaining the plaintiff/appellant's application to amend his Statement of Claim, and I said so in my judgment.

I shall not detail what was otherwise said by my learned brothers in *Baldeo v. Nur Mohammed* because in *Faiz Mohammed Khan Sherani v. Latchman and Others* the Fiji Court of Appeal (which included Mr. Justice Marsack) has expressed different conclusions. The *ratio decidendi* of this later case is that the phrase "fraudulent and void" in section 7 of the Bills of Sale Ordinance must be interpreted in such a sense that the non-renewal of the registration of a Bill of Sale leaves unaffected the covenant to repay contained therein. So far as a contrary opinion was indicated in *Baldeo v. Nur Mohammed* the Court of Appeal has now departed from it.

A most learned judgment was delivered by Sir Francis Adams in *Faiz Mohammed Khan Sherani v. Latchman and Others*. Apart from the authorities cited by Adams J.A. in the course of this judgment, I have read with interest the additional citation from *Fenton v. Blythe* (1890) 25 Q.B.D. 417 to which Mr. Koya has referred me. I observe further that the English Act of 1878 is intituled "An Act to consolidate and amend the Law for preventing Frauds upon Creditors by secret Bills of Sale of Personal Chattels", whereas the Fiji Ordinance of 1879 (the progenitor of our present one) is intituled "An Ordinance to amend the law as to Bills of Sale" (c.p. the English Act of 1882). It may be argued that the Fiji Ordinance was thus intituled because it had a wider purpose than the English Act of 1878. The English legislation, it must be remembered, was adapted for a territory, almost the entire population of which comprised simple and illiterate people, and their protection constituted a foremost consideration in the minds of those concerned with the drafting and enactment of such local legislation.

Moreover, in his concurring judgment in *Faiz Mohammed Khan Sherani v. Latchman and Others*, Marsack J.A. has stated:—

"Of the three possible interpretations suggested by Sir Francis Adams my own inclination is to prefer the second, namely that what is in-

A validated by the failure of the grantee to re-register is the right of the grantee, on default by the grantor, to take action against the chattels over which the security has been given."

B This interpretation may be applied to the present case, a failure to set forth the true consideration having the same consequence as a failure to register, both being requirements under section 7 which, if not fulfilled, cause the Bill of Sale to be deemed "fraudulent and void". Thus the failure to set forth the true consideration means that the motor vehicle was indeed the unencumbered property of the respondent at the time when he represented as much to Mr. Achari. It was essentially upon the respondent's representation to this effect that Mr. Achari relied in giving to the respondent the £10 and the £409.10.0 which are the subject matter of the offences charged.

C As was said in *The Queen v. Aspinall* (1876-77) 2 Q.B.D. 48 at p.57 :—

D "To support a charge of obtaining money, etc., by false pretences, it is necessary to shew, and, therefore, to allege, that the prisoner, with a wicked or criminal mind, stated something which, if true, would be an existing fact; that he did so with intent to procure the possession of money, etc.; that he knew his statement was — that is to say, that so far as his mind was concerned he intended that his statement should be — false; that by the statement he did so act on the mind of the prosecutor as that he did thereby obtain money, etc.; that the statement was in fact untrue, in the sense of being incorrect. And both the last allegations are necessary facts of the charge; for although the accused had a criminal intent and believed that his statement was false, yet if in fact either the prosecutor was not thereby persuaded, or by chance the statement was not incorrect, the charge is not supported, the crime is not committed."

E For the reasons given above, the material representation was here not incorrect, and the crime or crimes charged were not, therefore, committed. It follows that this application must be dismissed, and I order accordingly.

*Application dismissed.*