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**DIRECTOR OF PUBLIC PROSECUTIONS**

v.

**AMENATAVE VABASI**

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[SUPREME COURT, Lautoka Dyke J, 11 April 1980]

Appellate Jurisdiction

*Criminal Law—facts supporting embezzlement conviction—owner or person deprived insufficiently identified—application of Criminal Procedure Code S123(d)—powers of Supreme Court.*

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*D. Williams for Appellant*

*Respondent in person.*

Appeal against acquittal for embezzlement contrary to Section 306 (a)(ii) of the Penal Code. The appellant was charged that being a servant to the Fijian Hotel, he fraudulently embezzled the sum of \$5.

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The respondent, at the prosecution made on unsworn statement in which he said words to the effect "that I wish to adopt the statement I made to the police as my defence and I have no witness to call."

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It appeared that the Magistrate was troubled as to the status of the "Fijian Hotel" He said (dealing with the definition of the "owner" in the Penal Code)

"Fijian Hotel as named is not capable in law of owning properties. Who owns the \$5? I find the accused not guilty and acquit him."

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The learned judge of appeal questioned the statement that the Fijian Hotel was not a legal body though there was no evidence on the point. He said there could well be a legal body registered as "Fijian Hotel".

**The Judge thereafter mentioned several courses which had been open to the magistrate. He suggested that the respondent and all other employees never think of their employer by any other name than the "Fijian Hotel". As to "owner", S.306(a)(ii) referred to money received by the offender "for or in the name" or on account of his master or employer"; the section is more concerned with the identity of the master or employer of the offender than with the ownership of the money. This employer was "Fijian Hotel". He referred also to section 123(d) of the Criminal Procedure Code which reads:**

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"The following provisions shall apply to all charges and information and, notwithstanding any rule of law or practice, a charge or information shall, subject to the

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provisions of this Code, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this Code:—

- A (d) the description or designation in a charge or information of the accused person, or of any other person to whom reference is made therein, shall be such as is reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree, or occupation; and if, owing to the name of the person not being known, or for any other reason, it is impracticable to give such a description or designation, such description or designation shall be given as is reasonably practicable in the circumstances, or such person may be described as 'a person unknown'."
- B

and that "person" includes any body of persons corporate and unincorporated; so that if "Fijian Hotel" was not an accurate description of respondent's employer or the person on whose behalf he received the money it was sufficient to identify it; nor was there any prejudice to the respondent because of the name Fijian Hotel.

- C **Criminal Procedure Code Section 289 (a) gives the right of an appeal against criminal acquittal, provided there is written sanction by the Director of Public Prosecutions. S.300 deals with the very wide powers of the court on appeals.**

- D **Held: There was virtually uncontradicted evidence on oath for the prosecution and on the other hand at least unsworn evidence amounting only to answers by the respondent to questions put to him; material matters were not contradicted.**

The Magistrate had he properly directed his mind to the issue could not have come to any other conclusion than that respondent embezzled the \$5.

- E Appeal upheld.  
Acquittal of respondent set aside.  
The respondent is convicted of the offence charged and sentenced to three months imprisonment (suspended for two years).

DYKE, J.

#### Judgement

- F The respondent was a wine waiter at the Fijian Hotel. He was charged with embezzlement contrary to section 306(a)(ii) of the Penal Code in that he "on the 14th day of September, 1979 at Fijian Hotel Sigatoka in the Western Division, being a servant to the Fijian Hotel, fraudulently embezzled the sum of \$5.00 taken into possession by the said Amenatave Vabasi, on the account of Fijian Hotel". He pleaded not guilty.

- G After hearing the prosecution case the magistrate called upon the respondent to make his defence: what is recorded is as follows:

"Section 201 CPC complied with. Elects to rely on his statement as given to the police. No witnesses."

- H It is not clear whether that means that when put to his election the respondent chose to remain silent so that the court was left with only the prosecution evidence which included the record of an interview the police had with the respondent, or that

the respondent made an unsworn statement in which he said word to the effect that "I wish to adopt the statement I made to the police as may defence, and I have no witnesses to call." I will presume that the latter alternative was more or less correct. A

The record then shows the court presumably asking the prosecutor the following question "How can he be convicted of embezzling money belonging to the Fijian Hotel? The Fijian Hotel is a collection of buildings, it is not a legal entity." Presumably then the prosecutor referred him to section 204(2) of the C.P.C., but not, again presumably, to section 123(d) of the C.P.C.

The magistrate then recorded a short judgment in which he did not consider or evaluate the evidence given by the prosecution at all. He dismissed S.204 (2) of the C.P.C. as irrelevant, which is correct, and then went on—"But Fijian Hotel is not a legal body, either as a person or a corporate identity, or an unincorporate association. The charge is defective from the start." B

He then allied embezzlement to theft and dealt with the definition of "owner" in the Penal Code and concluded—"Fijian Hotel as named is not capable in law of owning property. Who owns the \$5.00? I find accused not guilty and acquit him." C

There are several remarkable issues raised by this judgment.

In the first place who said that the Fijian Hotel was not a legal body? The respondent certainly didn't say so, there was no evidence at all on the point. There could well be a legal body registered as "Fijian Hotel." Was the Magistrate speaking from his own personal knowledge and therefore not limiting himself to the evidence before him? D

But then even assuming that the magistrate was right and the charge was defective from the start as he said, why did he not dismiss the charge immediately (or at least find the respondent had no case to answer), or have it corrected or even correct it himself? He could have corrected it or had it corrected at any time, or called additional evidence on the point if he wished to clarify it for himself. It is not conducive to the proper administration of justice to knowingly allow a prosecution to proceed with a technical fault in the charge which could easily be corrected and then to acquit because of that fault. It is not as if anybody could be misled by the reference to Fijian Hotel—even if it is not a legal body. I would think that it is probable that the use of some other name would be more confusing. I am sure that the respondent and all employees never think of their employer by any other name than "Fijian Hotel" E F

Another point arising from the judgement is that the magistrate was somewhat confused when he proceeded to consider the definition of "owner" in relation to embezzlement. Section 306(a) (ii) does not refer to the ownership of money. It refers to money received by the offender "for or in the name or on the account of his master or employer". So the section is more concerned with the identity of the master or employer of the offender than with the ownership of the money. Who was the respondent's employer? I'm sure he himself would say he was employed by the Fijian Hotel, and since from all the evidence given it seemed to be accepted that he had received \$5 from a customer for a plate of sandwiches I'm sure he would also say that he received the money on behalf of his employer the Fijian Hotel. G

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But I think the best answer to the query by the magistrate as to the correctness of the charge is to be found in section 123(d) of the C.P.C. It is a pity that he was not referred to that section, although on the other hand I think that it is a section that all magistrates should be familiar with. Section 123 as a whole provides rules for the framing of charges and any charge framed in accordance with the section shall not be open to objection. Paragraph (d) deals with the description of persons referred to in charges and provides—

A “the description or designation in a charge or information of the accused person, or of any other person to whom reference is made therein, shall be such as is reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree, or occupation; and if, owing to the name of the person not being known, or for any other reason, it is impracticable to give such a description or designation, such description or designation shall be given as is reasonably practicable in the circumstances, or such person may be described as “a person unknown”.

B “Person” of course includes any body of persons corporate or unincorporate. If “Fijian Hotel” is not an accurate description of the respondent’s employer and the person on whose behalf he received the money, it is without doubt such as is reasonably sufficient to identify him. I’m sure everybody knows exactly who is meant even though they may not know the actual name of the body of persons or association that owns the hotel. There could not be any prejudice to the respondent because of the use of the name Fijian Hotel.

C The judgment does not give or suggest any other reason for acquitting the respondent, so that when I reject what the magistrate has said as a valid reason for acquitting the respondent what powers can be exercised by this Court to put the matter right? The C.P.C. (Section 289(a)) specifically gives a right of appeal against an acquittal, provided there is written sanction by the D.P.P.—which written sanction is on the file. Section 300 deals with the powers of this Court on appeals and the relevant portion is as follows—

D “the Supreme Court may thereupon confirm, reverse or vary the decision of the magistrate’s court, or may remit the matter with the opinion of the Supreme Court thereon to the magistrate’s court, or may order a new trial, or may order trial by a court of competent jurisdiction, or may make such other order in the matter as to it may seem just, and may by such order exercise any power which the magistrate’s court might have exercised:

Provided that—

E “(a) the Supreme Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred:

F “(b) the Supreme Court shall not order a new trial in any appeal against an order of acquittal.”

G So that, save with the exception that I cannot order retrial, I can exercise any of the powers of the Supreme Court in respect of any other appeal as may be appropriate. I could remit the case to the magistrate’s court with my opinion thereon. But it seems most undesirable to return the case to a magistrate who already seems to have made up his mind, albeit on erroneous grounds, and if it possible I think it would be

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far more satisfactory to dispose of the case here and now. I can certainly set aside the acquittal of the respondent on the grounds that the reasons given by the magistrate, are erroneous, but could I substitute a conviction for the acquittal (which would seem to follow naturally from setting aside the acquittal). The magistrate certainly has not helped matters by not dealing properly with the evidence given before him and in most cases it would be impossible to come to any decision without a proper evaluation of the witnesses called and the evidence they gave.

But in this case the appeal court seems to me to be in just as good a position as the magistrate's court to decide the case. There is virtually uncontradicted evidence on oath given for the prosecution on the one hand and on the other hand at least unsworn evidence amounting only to answers by the respondent to questions put to him by the police, answers contradicted by prosecution witnesses on some important points. It was not in dispute that the respondent was a wine waiter, who although it was not his job to do so, took an order for sandwiches from the kitchen and took \$5.00 from a tourist. He got the sandwiches from the kitchen and took \$5.00 from the tourist in payment. It was beyond dispute that the respondent received the \$5.00 not from himself but on behalf of his employer (whether named Fijian Hotel or some other name). It was not disputed that the respondent did not take the money to the cashier as he should have done and the money never reached the respondent's employer.

The respondent's answer to questions put to him by the police was that he had taken the money to the cook. The cook gave evidence denying receiving any money from the respondent, or that the respondent had shown him the money and then left the money on the table. There was also uncontradicted evidence that when the respondent was confronted with the fact of the missing \$5.00 he offered to repay the money by 50 cents per week. I do not think there can be any serious question of the prosecution witnesses being untruthful witnesses. It can be inferred that if there had been any doubt about this the magistrate would have referred to it in his judgement and would have acquitted the respondent on this ground and not on the ground that his employer was not properly described. And I do not think that there can be any doubt that the magistrate, if he had properly directed his mind to the issue and not side tracked himself, or indeed that any court, could come to any other conclusion but that the respondent had embezzled the \$5.00 that he had received on behalf of his employers.

**In the circumstances therefore I set aside the acquittal of the respondent and I convict him on the offence charge contrary to section 306(a) (ii) of the Penal Code. As to sentence, theft (or embezzlement) from one's employer must be a serious offence. The amount is small but the principle is important. A short prison sentence is called for but in all the circumstances I think it should be suspended.**

**Three months imprisonment suspended for 2 years on conditions. Respondent to pay \$5.00 compensation to employer or one week imprisonment in lieu. Respondent also to pay \$20.00 prosecution costs or two weeks imprisonment in lieu. One week to pay.**

*Appeal allowed.*