

## THE STATE

v.

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ANTHONY FREDERICK STEPHENS

[HIGH COURT, 1998 (Pain J) 6 August]

Criminal Jurisdiction

B *Crime: procedure- amending the information- filing a fresh information- distinction between and principles governing- Criminal Procedure Code (Cap 21) Sections 248 and 274 (2).*

C The State sought leave to file a further amended Information. The High Court explained the distinction between filing a fresh Information and amending an existing Information. While there is no law or practice prohibiting the filing of additional Informations against the same person on the same facts the filing of a fresh Information should not be used to circumvent the leave of the Court required before an Information can be amended.

Cases cited:

- D *Connelly v. Director of Public Prosecutions* [1964] AC 1254  
*R v Croydon Justices ex parte Dean* [1993] 3 All ER 129  
*R v Johal* [1973] QB 475  
*R v Jones* [1918] 1 KB 416  
*R v Lanchy* [1981] 1 All ER 1172  
*R v Munro* [1993] 97 Crim. App. R 183.
- E *R v People & Ors* [1951] 1 KB 53  
*State v Neori Qoli* (Criminal Case No. 7 of 1997)

Interlocutory application in the High Court.

*K. Wilkinson & D.Goundar* for the State  
*K. Vuataki* for the Accused

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**Pain J:**

This trial is about to commence by way of *venire de novo*. The State wishes to file a "Further Amended Information" and this is objected to by the defence.

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The proposed information has been referred to as both a fresh information and an amended information. Its status must first be established. If it is a fresh information the approval of the Court may not be needed. If it is an amended information an order of the Court is necessary.

Section 248 of the Criminal Procedure Code gives the Director of Public Prosecutions power and prescribes the procedure for laying an information. It provides that if the Director is of opinion that the case disclosed on the depositions is one which should be tried before the High Court an information

shall be drawn up, signed and filed. The Section is couched in the singular with reference to "an Information". In most cases a single information will be sufficient. However, the section contains no prohibition against filing more than one information. Indeed that would be necessary in terms of Section 120 of the Criminal Procedure Code if all the offences disclosed in the depositions are not founded on the same facts or form a series of offences of the same or a similar nature. Further the filing of successive informations has been a common and accepted practice in this jurisdiction.

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There is also ample common law authority to support the filing of more than one information in respect of a single committal from the Magistrates' Court. I mention some of the authorities.

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In the R v Jones [1918] 1 KB 416 the Court of Appeal laid down a rule of practice that because of the seriousness of the charge of murder the indictment ought not to contain any other count. The Court said:-

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"The proper course in a case like this to have two indictments so that the second charge may be subsequently tried if the charge of murder fails and it is thought desirable to proceed upon the second charge."

This rule of practice was subsequently disapproved by the House of Lords in Connelly v Director of Public Prosecutions [1964] AC 1254 but the ability of the prosecution to prefer two indictments was confirmed. (See the speeches of Lord Reed at page 1296 and Lord Morris at page 1360).

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Further confirmation that two indictments can co-exist may be found in the Practice Direction reported in (1976) 62 Cr. App. R 251 in which the Lord Chief Justice said:

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"There is no rule of law or practice which prohibits two indictments being in existence at the same time for the same offence against the same person on the same facts."

A more recent case recognising the co-existence of two indictments based on the same facts is the R v Munro (1993) 97 Crim. App. R 183.

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On the basis of these authorities and the law and practice in this country I adhere to the view I previously expressed in the State v Neori Qoli (1997) 43 FLR 195 Case No. 7 of 1997 Decision 11<sup>th</sup> of August 1997) that the Director of Public Prosecutions can file successive informations pursuant to S.248 of the Criminal Procedure Code. However, this should be the exception and not the rule. The Court must also have regard to the requirements of a fair trial, particularly if a second information is filed shortly before the trial on the original information is due to commence. This may result in an adjournment of the trial. In an extreme case the Court would have inherent jurisdiction to stay the second indictment if it constituted an abuse of process (see for instance Connelly v DPP [supra]; R v Croydon Justices ex parte Dean [1993] 3 All

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ER 129 and R v Munro [supra])

A However, S.248 of the Criminal Procedure Code must be read in conjunction with S. 274(2) which gives the Court power to order an amendment of an indictment. It would not be proper for the provisions of S.274(2) to be circumvented by an amendment achieved under the guise of a fresh information. An amendment should be determined under S.274(2).

B It is not uncommon for a new information to be filed for a lesser offence than that in the original information. That presents no difficulty. It is a completely new charge. If the prosecutor elects to proceed on the lesser offence the Court has jurisdiction to hear it. However, it would be advisable for the defence to ensure that some appropriate order is made in respect of the original information.

C In this case the prosecution is not seeking to substitute any different charges. The proposed further information still alleges 12 separate charges of conversion by the accused contrary to S. 279(1)(c)(i) of the Penal Code, for the same 12 amounts, from the same fund alleged to have been given to him for the same purpose and with the 12 amounts applied in the same manner for his own use. The substantive elements of the charges remain exactly the same. The changes,

D which are mainly in the nature of a "tidying-up" of the particulars, have the essential character of amendments. In my view they should be considered under the provisions of S. 274(2) of the Criminal Procedure Code.

Section 274 (2) of the Criminal Procedure Code states:

E "Where, before a trial upon information or at any stage of such trial, it appears to the Court that the information is defective, the Court shall make such order for the amendment of the information as the Court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice. All such amendments shall be made upon such terms

F as to the court shall seem just".

It will be noted that an amendment can be made before trial. However, it can only be made if the Court considers the information to be defective and the amendment can be made without injustice to the accused. The word defective has been given a wide meaning and is not restricted to a charge that is flawed.

G It covers "any alteration in matters of description, and probably in many other respects.... to meet the evidence in the case" (R v Pople & Ors [1951] 1 KB 53).

Counsel for the prosecution submits on the authority of the R v Johal [1973] QB 475 that the proposed amendments are justified to accord with the evidence contained in the depositions and adduced at the first trial.

Counsel for the accused submits on the authority of R v Landy [1981] 1 All

ER 1172 that the amendments should not be made because they limit the particulars of the offence that ought to be given and prejudice the defence.

This trial must proceed with expedition. It is now eight years since the offences were alleged to have been committed. On the 13th of February 1998 a fixture was made for the hearing of the trial on the 20th of July 1998. That gave both parties ample time for preparation. On the day the trial was due to start the prosecution presented a new information containing 12 counts alleging 12 separate offences of conversion of specific amounts. This was in substitution for the original information filed on 11<sup>th</sup> of February 1998 containing 2 "rolled-up" counts of conversion within specified periods. The defence accommodated this substantial change and the trial proceeded. Unfortunately the trial had to be aborted and a *venire de novo* was due to commence before me yesterday. At that very late stage this further amended information was presented. In my view unnecessary amendments proposed at this very late moment should not be allowed to further prolong the start of this trial.

The proposed amendments do not appear to affect the substance of the charges or change the essential elements alleged to constitute the offending. However, counsel for the accused advises the Court that, especially in respect of one of the proposed amendments, the defence will be affected. The basis of the defence in relation to the element of fraud will need to be restructured. Further time for preparation will be needed and at the least an adjournment will be required. In my view, this further delay should be avoided if it can be done without any injustice to the accused.

With these matters in mind I turn to consider the amendments sought by the prosecution.

There are five particular amendments at least two of which apply to all counts. All five apply to count 11 and it is convenient to recite the present and proposed particulars of that count.

PRESENT COUNT 11:

"ANTHONY FREDERICK STEPHENS on 29 July 1991, at Suva in the Central Division, being entrusted jointly with Viti Properties Investment Limited, a company incorporated in Fiji, with a sum of \$AUD500,000 belonging to the Banaban Trust Fund in order that he reinvest the said sum and pay to the Banaban Trust Fund a sum of \$F751,179 on or before 31 July 1991, representing the said principal sum of \$AUS500,000 plus interest monies, fraudulently converted \$AUD1,798.95 to his own use and benefit, namely cheque number 241073 directed to Crest Hotel and drawn on the National Australia Bank Account of SJ Stanton, at Elizabeth and King Streets, Sydney, Australia, Account Number 082-030".

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PROPOSED AMENDED COUNT:

A           “ANTHONY FREDERICK STEPHENS On or about 26 July  
1991, at Suva in the Central Division, being entrusted jointly  
 with Viti Properties Investment Limited, a company incorporated  
 in Fiji, with a sum of \$AUD500,000 belonging to the Banaban  
 Trust Fund in order that he reinvest the said sum and repay  
 B           to the Banaban Trust Fund a sum of principal and interest on or  
 before 31 July 1991, fraudulently converted \$AUD1,798.95 to  
 his own use and benefit, namely cheque number 241073 directed  
 to Crest Hotel and drawn on the National Australia Bank account  
 of SJ Stanton, at Elizabeth and King Streets Branch, Sydney,  
 Australia, Account Number 000-4660”.

(Changes underlined)

C           The proposed amendments are:

- (1) Insertion of the words “on or about” before the date of  
 the alleged offence.

D           These words were not considered necessary in the present indictment. Counsel  
 advises that he has checked the dates in each count with the documents and  
 (subject to 3 proposed changes) they are correct. This is not a case where the  
 date is essential to the validity of the charge. In the circumstances this  
 unnecessary amendment is refused in respect of all counts.

- E           (2) Amendment of the date from 29th July 1991 to 26th July  
 1991.

F           This is a correction to accord with the actual date of the  
 alleged conversion as shown on the documents. It is  
 preferable that the correct date should be stated to avoid  
 confusion for the assessors. This amendment does not alter  
 the substance of the charge and will not result in injustice  
 to the accused. The proposed amendments of the dates  
 of the alleged offences in counts 2, 3 and 11 are allowed

- (3) The alteration of the word “pay” to “repay”.

G           This is merely a matter of semantics. In a strict sense  
 “repay” is probably appropriate for the principal and  
 “pay” for the interest. However the word “pay” is adequate  
 for both. This unnecessary amendment is refused in respect  
 of all counts.

- (4) The words “pay to the Banaban Trust Fund a sum of  
 \$751,179..... representing the said principal sum of  
 \$AUS500,000 plus interest moneys” to be deleted and

substituted by "pay to the Banaban Trust Fund a sum of principal and interest".

The figure of \$751,179 is the amount undertaken to be paid to the Banaban Trust by the accused in terms of an undated Pay Order.

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In a letter to the Banaban Trust dated 20th May 1991 the accused referred to a payment of \$840,380. The State submits that because of this conflict the actual figure should not be stated.

This is the amendment that counsel for the accused says affects the presentation of the defence.

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In my view the terms of the investment including the repayment with interest should be stated with specificity if this is possible. The Deed entered into by the parties referred to the Pay Order as the means of securing payment to the Board. There is no evidence that the Board ever agreed to the further figure mentioned in the accused's letter. The discrepancy has not been resolved by evidence. Even if the evidence at the earlier trial could be taken into account (which is doubtful) the Chairman of the Board said that the Board expected and had demanded payment in terms of the Bank Order. Finally, if the figure of \$840,380 is the sum agreed to be paid the amount presently alleged in the charges is within that sum and the charge would not be vitiated.

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At this stage I do not consider that an amendment is necessary. There are numerous conflicts within the documents. Oral evidence is needed to resolve these matters. If the prosecution considers that the charges require amendment to accord with the evidence ultimately given, that can be considered by an application at the appropriate time.

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This proposed amendment in respect of all counts is refused.

- (5) The bank account number of 082-030 to be amended to 000-4660

Unfortunately the number quoted in the information is the branch number of the bank. This is apparent from a perusal of the banks statements contained in the depositions. The defence has no objection to a change to the correct number of 000-4660.

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Accordingly this amendment is allowed in respect of counts 1, 5, 6, 7, 8, 9, 10, 11 and 12.

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*(Application partly allowed.)*