IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

AT LAUTOKA

Appellate Jurisdiction

Criminal Appeal No. 39 of 1978

000231

BETWEEN:

SAKEO TUIVAINIKAI Appellant

-and-

R E G I N A M Respondent

Mr. S.M. Koya, Counsel for the Appellant
Mr. M. Jennings, Counsel for the Respondent.

JUDGMENT

The appellant was convicted on one of the two counts of obtaining yagona by falsely representing that a cheque for $3,493.60 was a good and valid order.

The second charge on which the learned magistrate returned no conviction was of obtaining the same yagona by representing that a cheque for $100.00 was a good and valid order.

Each count alleges the date of the offence as 3/9/75.

The magistrate found that the complainant, JONE LUILUI, sold 3000 lbs. of yaqona to the accused on 3.9.75 and received from him $300.00 cash, a cheque for $3,893.60 and one for $100.00. In this respect the magistrate made a slight mistake in stating that both cheques were paid at the same time, whereas the $100.00 cheque was paid on the following day. The reason for this being that the complainant miscalculated the price of his yaqona by $100.00 and he told the appellant this and the latter handed him the $100.00 cheque. Nevertheless both cheques are dated 3.9.75.

They are both drawn in favour of the complainant by the appellant on the A.N.Z. bank of Lautoka, and they show they were paid into the B.N.Z. on 3/9/75. They were both dishonoured when presented on 4.9.75 and again on 13/10/75.

On 13/8/75 the appellant's firm had only $5.37 in credit, and up to 13.10.75 there were no funds in that bank account and the cheques are still dishonoured.

The complainant having accepted the cheques was told by the appellant to present them at his the complainant's Bank in Lautoka and that they would be cashed in Labasa. At the same time, as proof of his financial stability the appellant showed him two cheques in the appellant's favour, one for $3,900.00 and one for a sum /the complainant could not recollect. The complainant said,

"The accused said that once he had deposited these 2 cheques then my cheque, the one he had given me would be honoured."

He said the appellant reassured him that he was going to deposit his two cheques.

At the trial the defence contended that the appellant was simply making a representation as to the future namely that he would pay the two cheques in his favour into his account and then the complainant's cheques would be honoured in Labasa. They argued that the appellant, in effect, was saying that he did not have the present means to pay.

The learned magistrate stated that the complainant had already received the two cheques from the appellant before the latter showed the two cheques existing in his own favour. He concluded therefore that they were not part of a future promise but something calculated to dispel any reservations the complainant may have felt about the two cheques which the appellant had given him.

Ground 1 of the appeal is that the pretence alleged differed from that proved. It alleges that although the magistrate found that the main reason why the complainant accepted the appellant's cheques was the existence of two substantial cheques in the appellant's favour there was no reference to this in the charge. The evidence shows that two cheques did exist in accused's favour so that in itself was not a false representation.

One has to decide what kind of representation is made when a cheque is drawn in favour of a payee and handed to him. In Metropolitan Police Commissioner v. Charles 1976. 3 A.E.R.112 the House of Lords stated at p. 116 f/h that the drawing of a cheque implies two statements about the present (1) that the drawer has an account with that bank (2) that the cheque is a valid order for the payment of that amount (i.e. the present state of affairs is such that, in the ordinary course of events, the cheque will on its future presentment be duly honoured. They also approved the following quotation from Kenny's Outlines of Criminal Law -

"It may be well to point out, however, that it does not imply any representation that the drawer now has money in the bank to the amount drawn for, inasmuch as he may well have authority to

overdraw or may intend to pay in (before the cheque can be presented) sufficient money to meet it."

Persons who are frequently buying and selling have fluctuating current accounts the state of which at any given time depends on whether recent activities have required more withdrawals then deposits or vice versa. A businessman draws cheques in favour of C & D: his credit may be low but he has in his desk drawer several cheques in his favour which he will be paying into his bank. It would be unusual for him to show them to the payees of the cheques he has drawn in order to prove they will be met. His behaviour in drawing the cheques implies that his credit is good for those amounts and in spite of the ebb and flow of his account they will be met when presented. At least that is his honest belief.

No doubt the complainant accepted the appellant's cheques because he revealed that he held two large cheques, but this was doing no more than emphasise the implication that the cheques were good and valid orders and would be met on presentation as pointed out in Charles's case (supra). Although as Kenny said (supra) the drawing of a cheque does not mean that there is necessarily money now in the account to meet it, but that the money, in the ordinary course of affairs, will be there when the cheque is presented at the bank on which it is drawn. The cheque cannot be presented by the payee the instant he received it. It has to be presented in the future, nevertheless the law, as approved in Charles's case (supra) , does not regard the drawing of a cheque as being a future representation. What the drawer is saying is "This cheque is a good and valid order for the amount therein." If he is disposed, as the appellant was, to tender evidence of available assets to meet them he is simply confirming what the law implies, namely that the cheques were in fact good and valid orders.

In my view that there was no need to add in the charge any statement of the appellant to the effect that he falsely represented that his credit was good.

Ground 1 mentions that the yaqona was in the appellant's shop before the cheques were handed over. It had to be somewhere. The complainant a Fijian despatched it from Labasa. He remained at the appellant's cafe with his yaqona until he sold it to the appellant.

It is argued that because the second cheque i.e. the $100 cheque was handed over at a later stage the magistrate erred in treating them as having been handed over on the same day. They both bear the same date 3/9/75 and were both presented on the same date i.e. 4/9/75. I see no merit in the argument that because the second cheque was handed over on 4/9/75 then the charge is somehow defective for alleging that it was handed over on 3/9/75. However, I will refer to the second count later.

Ground 1 fails.

Ground 2, as Mr. Koya who drafted it has said, merely repeats ground 1. But he did add that the complainant said he trusted the appellant because he said he was a preacher. Mr. Koya says that a false claim to being a preacher should be included in the charge. In mitigation the appellant said that he is a preacher. It seems that even if this operated on the complainant's mind it was not a false pretence.

Ground 2 fails.

Ground 3 repeats the reference to the dates of the cheques and says that the magistrate erred in stating that both cheques were drawn and handed over on the same day. Mr. Koya said these were separate charges and should have been considered separately and since both cheques were considered together this was a material irregularity.

As I have said both cheques bear the same date; they were paid in on the same day; they were both dishonoured on the same two occasions. They were part of the same transaction viz. payment for the same yaqona, to the same vendor and made on the same occasion (by which I do not mean at the same precise moment in time) i.e. in time to be paid in together as soon as the complainant's bank was open ie. on 4/9/75 to enable him to do this. No evidence led in relation to Count II could have prejudiced any issue in Count 1 relating to the larger cheque. As I have said I will refer to this later.

Ground 3 fails.

It is necessary to make a precis of Ground IV which alleges that the accused made it clear at the time that he did not have funds to meet the cheques on 3/9/75 but made a promise that when the cheques were presented they would be honoured. Mr. Koya relied on a statement in R v. Dent, 1955 .A.E.R. 806 at the foot of

p. 809.

> "a promise to do a thing in future may involve a false pretence that the promissor has the power to do that thing."

He argued that the appellant made it clear that he had not the "power" to meet his cheques on 3rd September when he made them out. There is nothing in the record which shows that the accused actually made such a statement, but even if such a statement could be implied he was also confirming when he revealed the two large cheques which purportedly favoured him, that his credit at that time was good and that in the ordinary course of business the appellant's cheques would be honoured. This is exactly what the House of Lords said was implied in the handing over of a cheque in Charles's case (supra). In saying that the cheques would be honoured in Labasa the appellant was saying the very thing which is implied when a cheque is made out and handed over, as approved at p.116 d/e of Charles's case (supra).

> "_____it does not imply any representation that the drawer now has money in this bank _____inasmuch as he may intend to pay in (before the cheque can be presented) sufficient money to meet it."

The accused's references, in relation to the cheques in his possession, were representations as to the present namely that his credit was in fact good, not that he hoped it would be good in the future. It is the same kind of representation which is implied when one draws a cheque. It was a representation that the first and largest cheque was a good and valid order. When the second cheque was handed over the mere handing of it to the complainant conveyed the same representation as to a current state of affairs namely of good standing with the bank and an ability to meet the cheque when presented in the ordinary course of business. It is also noteworthy that there was no post-dating of the cheques; the appellant dated them for 3/9/75 the date on which the transaction was entered into.

Any cheque handed over during a transaction can seldom be instantly presented for payment. Very often it cannot be paid into the payee's account until the following day or if a

week-end and bank holidays intervene the delay may extend to four or five days. This is well known to all persons with bank accounts. If the appellant's arguments were accepted it would mean that worthless cheques are not evidence of false pretences because a cheque only implies a hope that it will be met in the future. In fact it is a present statement that the cheque is good, that there is a current state of affairs in the drawer's business which will ensure that like any other valid cheque it will be honoured. The drawer does not hope that it will become a good and valid order at some future date but states that it now is a good and valid order.

Ground 4 fails.

Ground 5 alleges that the appellant had a belief that the cheques would be met on presentation. The prosecution evidence points to the fact that he had no such belief. P.W. 5 the accountant at the appellant's bank shows that on 13/8/75 the appellant's account had only $5.37 to its credit and this was still the extent of appellant's credit on 3.9.75 when he made out the cheques. When the cheques were represented on 13.10.75 nothing had been paid in. The appellant was bound to be aware of the state of his own account yet he had stated his present ability and intention to place his account in a state whereby it would meet the cheques in the ordinary way. This of course is, as I have said, the representation which is made when a cheque is drawn. The appellant's conduct was such that the magistrate was entitled to draw the conclusion that he never had any such belief and had no intention to meet the cheques. To date the cheques remain dishonoured.

Ground 6, was accidently also numbered as ground 5. This is a rebulous kind of ground which suggests that the appellant had no control over the drawers of the two cheques which he possessed and which would have supported his credit when paid in. It implies that these cheques may have been dishonoured, thereby placing at naught the appellant's good intentions.

If this were the case, then P.W.5, the sub-accountant from the appellant's bank could have been asked in cross-examination if such cheques had been paid in by accused and subsequently dishonoured.

There is no substance in this ground.

With regard to the second count it is apparent that the complainant had parted with the goods on receiving the first cheque. Therefore the accused did not obtain the wagons by pretending the second cheque was good and valid. He was merely purporting to pay the $100.00 balance of a debt which he had incurred by means of a worthless cheque. This of course does not constitute false pretences. The magistrate should not have left the 2nd count on the file but should have found the appellant not guilty on that count.

There is no point in sending the appellant back to the magistrate. I accordingly find the appellant Not Guilty on count II and direct the magistrate to amend his own record to reveal that this Court has taken that course.

As far as Count I is concerned the appeal is dismissed.

LAUTOKA,
21st July, 1978.

(Sgd.) J.T. WILLIAMS,
JUDGE.

Messrs Koya & Co., for the Appellant
Director of Public Prosecution for the Respondent

Date of Hearing: 5th July, 1978.