IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)
AT LAUTOKA
Appellate Jurisdiction
Criminal Appeal No. 93 of 1979

Between

RAGHWA NAND & SHIU KARAN — Appellants

-and-

R E G I N A — Respondent

Mr. J.R. Reddy, Counsel for the Appellants
Mr. A. Gates, Counsel for the Respondent

J U D G M E N T

The two appellants were at the time of the offences police officers, and were convicted of two offences, namely on Count 1 of attempting to obtain goods by false pretences contrary to section 342 and 416 of the Penal Code and on Count 4 of Taking Liquor from licensed premises outside permitted hours contrary to section 47 of the Liquor Ordinance. On Count 1 they were both sentenced to 12 months imprisonment, and on Count 4 to a fine of $75 or 3 months imprisonment in lieu. They were acquitted on other counts.

Although grounds of appeal were filed, attacking both convictions and the sentences on both counts counsel for the appellants confined his arguments solely to the conviction and sentence on count 1.

With regard to the convictions on count 1 evidence given by the prosecution witnesses was accepted. But firstly it was questioned whether the prosecution had proved that the appellants had attempted to obtain a half bottle of gin, as alleged in the particulars of the offence.

P.W.5, a special constable who gave evidence for the prosecution said that he was in the Police Landrover with both appellants when they discussed what they were going to do and Accused 2 suggested to Accused 1 that he go into the shop of P.W.1 and say that Sergeant Net Ram wanted a half bottle of gin. P.W.1 in his evidence merely said that Accused 1 came into the shop and said that he had been sent by Sergeant Net Ram to bring liquor. P.W.1 said that Accused 1 did not say what type of Liquor he was to bring. P.W.2, the son of P.W.1 was not present when Accused 1 first went into the shop but when he saw Accused 1 and P.W.1 together in the shop, P.W.1 said in Accused 1's presence "He said Net Ram has sent a message that he is asking for half bottle of liquor." P.W.3 happened to be in the shop when Accused 1 entered and he said that Accused 1 asked for liquor. He said he did not hear a brand mentioned.

Sergeant Net Ram gave evidence for the prosecution and in answer to cross-examination, presumably dealing with a report given to him by P.W.1 said that P.W.1 mentioned gin to him specifically.

So there clearly is some doubt as to whether Accused 1 specifically asked for half bottle of gin for Sergeant Net Ram, the witnesses could well be rather confused, but there was no doubt that Accused 1 had asked for liquor of some sort pretending

that it was for Sergeant Net Ram who was related to P.W.1, and from the evidence of P.W.5 it seems that Accused 1 was at least intending to try to extract half bottle of gin from P.W.1. There is thus no merit in this ground of appeal.

The main ground of appeal veriablly a argued by counsel for the appellants was that on the evidence the offence was not in law possible. The argument relies heavily on a piece of evidence given by P.W.2. Count 1 alleges that the appellants with intent to defraud attempted to obtain a half bottle of gin by falsely pretending that they had been instructed to do so by Sergeant Net Ram. There was certainly an intent to defraud, there was certainly an attempt to obtain half a bottle of gin or at least liquor of some kind, there was no doubt that Accused 1 pretended that he had been asked to obtain the liquor by Sergeant Net Ram, and there was no doubt that this was a false pretence since Sergeant Net Ram had not asked him to do anything of the kind.

The appellants did not get the half bottle of gin or indeed any liquor from P.W. ., but he did give them $5.00, the reason he gave being so that they could buy liquor elsewhere. He and P.W.2 said that they could not sell liquor after hours - or presumably give it to anyone to take off the premises after hours. But P.W.2 said more than this. In his evidence in chief he stated that he told P.W.1 that it was unusual and had not happened before, that P.W.1 should give them the $5 and the next day they would go to see Net Ram and ask if he had received the money. In his cross-examination P.W.2 said

"I was not convinced that Net Ram wanted the liquor. I did not believe Accused 1."

Because of this, counsel for the appellants argued, if the half bottle gin had been handed over the appellants could not have been convicted of the offence of obtaining by false pretences. Since the false pretence was not believed it would not have been responsible for the gin being handed over. Therefore, the argument continued, the argument continued, the appellants could not be convicted of attempting to commit an offence that was not in law possible for them to have committed. This same point came up in two cases, namely R v Hensler 11 Cox, 270, and in R v Arthur Dennison Light 11 CAR 111 when it was decided that a conviction for attempting to obtain by false pretences would lie even though the selected victim did not believe the false pretences. Neither of these cases has been overruled nor specifically brought into question in any subsequent case so far as I am aware. I have not been referred to any such case.

However counsel for the appellants relies strongly on the New Zealand case of R v Donnelly (1970) NZLR 980. This was not a case on all fours with the present case, it was not an attempt to obtain b false pretences, but Turner, J in that case purported to lay down as a guide line six classes of cases where persons setting out to commit a crime may fall short of the complete commission of the crime. Whether the six classes of cases is intended to be a complete and an exhaustive list is open to question. It was in general approved by the House of Lords in Haughton v Smith (1973) 3AER 1109 although Lord Hailsham qualified his approval somewhat. Whilst

expressing the hope that the contents of the extract from the judgment of Turner J would never be subjected to too much analysis Lord Hailsham regarded it as "a convenient exposition and illustration of classes of cases which can arise."

The sixth class of cases, and it is on this class that counsel for the appellants bases his argument, is stated as follows:

> " He (i.e. the person setting out to commit a crime) may without interruption efficiently do every act which he set out to do but may be saved from criminal liability by the fact that what he has done, contrary to his own belief at the time, does not after all amount in law to a crime."

With respect to counsel for the appellants I find it rather difficult to bring a case of attempting to obtain by false pretences within the sixth class of cases. And I find it even more difficult to believe that "a convenient exposition and illustration of classes of cases" could expressly or impliedly overrule a line of cases as long established as those of Hensler and Arthur Dennison Light. None of the recent and somewhat confusing cases dealing with attempt to commit crimes referred to in the September 1979 Criminal Law Review at page 586 in the course of commentary on Attorney General's References Nos. 1 and 2 of 1979, touch on the offence of attempt to obtain by false pretences.

In any case in Fiji "attempt" is defined in Section 415 of the Penal Code in the following terms:-

" When a person, intending to commit an offence, begins to put his intention to execution by means adapted to its fulfilment, and manifests his intention by some overtact,but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."

It seems to me that the facts of this case come squarely within this definition. The appellants made false representations for the purposes of inducing P.W.1 to hand over liquor. Clearly there was an intent to defraud, clearly what they had in mind was a crime. Whether they would have succeeded because they were not believed is immaterial. They had put their intention into execution by means adapted to its fulfilment.

The appeal against conviction is therefore dismissed.

With regard to the appeal against sentences on count 1, it is to be noted that the maximum sentence for the offence is imprisonment for 2 years. The appellants were each sentenced to 12 months imprisonment, which is unquestionably

high for the offence they committed. They are first offenders, this was a very foolish enterprise by the two appellants who seem to have acted more or less on the spur of the moment because they wanted to have liquor to drink. However they were police officers, they undoubtedly exploited their membership of the police force together with their quite improper use of Sergeant Net Ram's name to influence and perhaps overawe the shopkeepers concerned. Clearly even if the shopkeepers had their suspicions of the appellants, they felt obliged to go along with the appellants' demands. The appellants have tended to bring the good name of the police force into disrepute. They undoubtedly deserve custodial sentences and the only question is the length of the sentences of imprisonment. I was urged to take into account the fact that the appellants would be, or have been dismissed from the force, but I don't think too much should be made of that. That is not necessarily a punishment. The appellants have shown that they are not worthy to be police officers, and the force cannot possibly afford to tolerate members who bring the force into disrepute.

I will set aside the sentences passed on Count 1 and in lieu I will sentence each accused to 6 months imprisonment.

LAUTOKA,
20th June, 1980.

(Sgd.) G.O.L. Dyke
JUDGE