IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)
A T L A U T O K A
Appellate Jurisdiction
Criminal Appeal No.20 of 1984

BETWEEN : RAM NARAYAN s/o Ram Charan — Appellant

A N D : NADI RURAL LOCAL AUTHORITY — Respondent

Mr. S.R. Shankar, Counsel for the Appellant
Mr. M. Raza, Counsel for the Respondent

J U D G M E N T

The appellant was convicted in the Magistrate's Court, Nadi, of the offence of developing land, contrary to section 7(1) and 7(7)(a) of the Town Planning Act (Cap.139) - in that

> "on the 9th day of August, 1983 he erected a dwelling house measuring approximately 30 feet x 36 feet without the permission of the Nadi Rural Local Authority, during a period before a scheme effecting such an area had not been finally approved".

The first ground of appeal argued, although it was not set out in the grounds of appeal, was that this being a private prosecution, i.e. a prosecution by someone other than the police or a public prosecutor, it had been initiated in an incorrect manner. Defence counsel's argument was that the complaint should have been sworn and that Form 1 of the Second Schedule to the Criminal Procedure Code should not have been used.

Form 1 is merely a complaint form which states that the Secretary to the Nadi Rural Local Authority had laid a complaint before the magistrate, setting out the gist of the complaint. The Form is signed by the Secretary and then signed by the magistrate. The Form refers to the complaint being taken (or sworn) before the magistrate. This seems to be completely within the terms of Section 78 of the Criminal Procedure Code. And the complaint was followed by a summons to the appellant

setting out the statement and particulars of the offence.

No where in Section 78 does it say that the complaint has to be sworn, and Mr. Shankar was unable to produce before me any authority for his proposition that it should be sworn.

By what section 79(1) says is that after receiving the complaint and signing the charge the magistrate may issue either a summons or a warrant to compel the attendance of the accused person!

> "Provided that a warrant shall not be issued in the first instance unless the complaint has been made upon oath either by the complainant or by a witness".

In this case a warrant was not issued in the first place and this ground of appeal fails.

The second ground of appeal was that the learned magistrate erred both in law and in fact in holding that there was a different use of the land by reinstating the building to its original dimension by the appellant.

The latter part of this ground ignores the evidence given and accepted by the magistrate that the building was not of the original dimensions, nor of the same building materials.

However the main thrust of defence counsel's argument was based on the definition of "development" contained in Section 2 of the Town Planning Act, which reads as follows -

> "development" in relation to any land means any building operations or rebuilding operations, including the making of an alteration, addition or structural repair to any building, the formation, laying out or material widening of a street or a means of vehicular access thereto, and any use of the land or any building, either wholly or in part, which is materially different from the purpose for which the land or building was last being used!"

There follow provisos which do not concern us here.

Mr. Shankar argues that the words "which is materially different from the purpose for which the land or building was last being used" should apply to the whole of the definition, including the opening words

"any building operations or rebuilding operations", and should not be confined to the words "any use of the land or any building".

That is quite clearly incorrect. The repetition of the words "land" and "building" is an obvious indication that only the latter part of the definition is affected. And even more obvious is the fact that the words "which is materially different from" are written in the singular whereas the words "building operations" and "rebuilding operations", are written in the plural, so that if the final words were intended to apply to them they should also have been written in the plural.

Quite clearly therefore the rebuilding operations undertaken by the appellant amounted to development for which under Section 7 of the Act the permission of the local authority was required. So this ground of appeal fails.

The appellant admitted that he was rebuilding a house blown down during hurricane Oscar, changing the shape of the building and using different materials, and he admitted that he was doing this without any written permission. However he stated that he was acting on a purported statement by the Chairman of the Nadi Rural Authority over the radio, repeated in the press, that persons whose houses were blown down during the hurricane could rebuild them using any type of construction. The text of the alleged broadcast, and the alleged press announcement was not produced, and the prosecution witnesses seemed ignorant of the announcements, but it was quite clear from their evidence that there was some relaxation of the regulations to meet the situation caused by hurricane Oscar. There were rather vague statements that it was alright if the rebuilding was on the same site, using the same dimensions and the same materials. It seems that there was a lot of rebuilding after Oscar and some people had been prosecuted and others had not. Clearly some rebuilding was not objected to, some was objected to.

But that seems to be a very imprecise situation, something must have been said, some guidelines must have been given, but what exactly were they?

There was no evidence as to when Oscar occurred, and how soon after it the appellant was rebuilding. That might have been relevant. So the situation seems to be that the appellant's house was blown down during Oscar. He set about rebuilding it without seeking permission, though there seems to have been some implied or verbal permission over the radio and in the press given to people affected by Oscar to rebuild their homes.

This seems to be a rather natural reaction, that people should be encouraged to help themselves in such times of natural disasters. What could be more natural than rebuilding a roof over their heads?

If there was to be a restriction on the implied permission to rebuild what were the precise terms?

If the original house was clearly not capable of withstanding hurricane damage does it not make sense to rebuild in a way more likely to survive in similar circumstances.

In his judgment the learned magistrate said

> "The court does not believe the accused when he relates that he felt authorised to erect such building without permission in view of radio and press information regarding repair and relaxation of bureaucratic requests following Oscar"

That statement is rather difficult to accept as it stands. Why did the court not believe him? There was certainly relaxation of the regulations and it must be presumed that there were statements over the radio and in the press on the question of rebuilding. Without knowing exactly what these statements were how could the magistrate be satisfied beyond a reasonable doubt whether or not the appellant believed them?

And if the appellant, as a result of those statements honestly believed that he could rebuild his house and rebuild it more or less as

he wished, surely the defence of mistake as provided for in Section 10 of the Penal Code was open to him. It certainly seems that the mere rebuilding of the house as it was before would not have attracted prosecution even though it would still have amounted to "development" according to the definition of that word. Why should the appellant have known that he should only rebuild the house exactly as it was before? There must be room for reasonable doubt on this point and the appellant was entitled to the benefit of the defence afforded by Section 10 of the Penal Code.

On this ground therefore the conviction and sentence are set aside and the appellant is acquitted. The fine and costs if paid are to be refunded.

DATED AT LAUTOKA THIS 5TH DAY OF SEPTEMBER, 1984.

(G O L Dyke)
Judge