IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

Criminal Appeal No.2 of 1985

Between:

SINDH PRASAD s/o Ganesh — Appellant

and

REGINAM — Respondent

Mr. G.P. Lala for the Appellant
Miss N. Shameem for the Respondent

J U D G M E N T

On the 16th April 1981, the Suva Rural Local Authority granted to the appellant temporary permission to build punts in a residential area on his premises C.T. 13428 at Nasinu. Among the conditions attached to the permit was that it would expire after two years and the appellant would thereafter move his business to premises situated in the Naitalasese Subdivision.

Although the permit was not renewed the appellant continued to operate his punt building business on the same plot. He was still using the land for this purpose on the 6th February, 1984. On the 25th April the Suva Rural Local Authority laid a complaint against the appellant and he was subsequently charged as follows :

" Statement of Offence
Used or carried out development of land without the permission of the Local Authority; contrary to section 7(1) and 7(7)(a) of the Town Planning Act, Cap. 139.

Particulars of Offence

> Sindh Prasad s/o Ganesh did on or about the 6th day of February, 1984 without first obtaining the permission of the Suva Rural Local Authority under the section 7(1) and 7(7)(a) of the Town Planning Act, Cap. 139; had used or carried out development of land (namely boat building works) at 6½ miles, Nasinu, Suva in the Central Division which is materially different from the purpose for which the land was last being used or issued (i.e. residential) within the Suva Rural Town Planning area during the period before a scheme affecting such area has been finally approved."

At the trial, which concluded on the 6th November, the appellant pleaded not guilty. The essential facts were not disputed. The appellant offered a defence under section 219 of the Criminal Procedure Code that the charge or complaint relating to the offence was not laid within six months from the time when the matter or the complaint arose. This limitation is imposed by the section in respect of offences the maximum punishment for which does not exceed imprisonment for six months or a fine of $100 or both. Section 7 of the Town Planning Act, Cap. 139 prescribes a maximum penalty of a fine of $100 or imprisonment for a period not exceeding 3 months for an offence under the section.

The learned magistrate, Mr. Sheehan, rejected the defence submitted and held that from expiry of the temporary permit the appellant was in breach of section 7 and "continued in breach on a day to day basis as long as he operated .....".

The same issue was raised at the hearing of this appeal. Mr. Lala submitted that the offence was committed when the permit expired in April 1983, and that this was within the knowledge of the Local Authority.

It appears that the appellant had in the meantime applied to the Director of Town and Country Planning for the re-zoning of the area for commercial purposes. When this was rejected on the 27th January, 1984, he appealed to the

Minister against the refusal of the Director to re-zone the area. This move was not successful.

Mr. Lala referred me to Marshall v. Smith (1873) 29 J.P. 36 which was of no assistance. He also cited R. v. Chertsey J.J. (1961) 1 All E.R. 825.

In that case the applicant had been convicted of an offence under section 24(3) of the United Kingdom Town and Country Planning Act, 1947 in respect of the unauthorised use of land as a caravan site. As he continued to use the land in the same manner after his conviction, he was prosecuted again and became liable to a fine for each day upon which the offence continued. The Justices imposed such a fine covering a period of 446 days.

The Queen's Bench Division held that under section 104 of the Magistrates' Courts Act, 1952 which is in similar, but, not in the exact terms, of section 219 of the Criminal Procedure Code, that the Justices could not impose a daily penalty on any day falling more than 6 months prior to the information.

A corresponding provision exists under section 7(7) of Cap. 139 which sets a penalty of up to $20 a day for a contravention following a conviction. Chertsey is not an authority which supports the appellant's case. On the contrary, in the judgment of Widgery J. (as he then was) at 828 he said :

> " We cannot accept counsel for the local planning authority's first contention. In our judgment this continuing offence occurs from day to day as did the infringement of the Factory and Workshop Act, 1901, in Verney v. Mark Fletcher & Sons, Ltd. [1909] 1 K.B. 444, and s. 104 of the Magistrates' Courts Act, 1952, is effective to prevent the magistrates from hearing the information so far as it alleged an offence occurring more than six months before its date. Apart from the fact that that occurrence from day to day is a natural feature of such a continuing offence, it seems to us that counsel for the local planning authority's insistence on the offence being one and indivisible is inconsistent with the local

planning authority's own view - which we accept - that the conviction on Dec. 17, 1958, did not present the applicant with a defence of autre-fois convict when the information of Nov. 13, 1959, was heard. "

The third case referred to by Mr. Lala was Lloyd v. Young & Others (1963) Crim. L.R. 703 which takes the matter no further.

I note that the wording of section 106 of the United Kingdom Magistrates' Courts Act does not conform exactly to that of section 219. The former reads "unless the information was laid, or the complaint made, within six months from the time when the offence was committed, or the matter of complaint arose".

The omission of the reference to the time when the offence was committed in section 219 may in some circumstances give rise to a different interpretation. But, in the present instance, I am satisfied that it can be said that the matter of the charge or complaint arose on each day that the appellant made use of the land for business purposes without permission. I accept Miss Shameem's submission that if it was intended that in the case of a continuing offence the limitation would apply with effect from the time when the infringement commenced, then the legislature would have inserted the word "first" as the penultimate word of the section. It is not the function of the courts to re-write legislation in that fashion.

This appeal is dismissed. As the appeal was devoid of merit, I order that the appellant pay the costs which I assess at $50.

(F.X. Rooney)
JUDGE

Suva,
8th February, 1985