IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

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CRIMINAL APPEAL NO. 17 OF 1991
(High Court Criminal Appeals Nos. 50, 51 and 52 of 1991)

BETWEEN:

RAMESH CHAND (s/o Mahesh Prasad) — Appellant

and

THE STATE — Respondent

Mr M. Raza for the Appellant
Ms N. Shameem for the Respondent

Date of Hearing: 24th March, 1992
Delivery of Judgment: 25th March, 1992

JUDGMENT OF THE COURT

On 11th September, 1990 the Appellant was convicted by the Chief Magistrate at Suva of 4 counts of obtaining money by false pretences contrary to Section 309(a) of the Penal Code, Cap. 17, in Criminal Case No. 1583/89.

On 11th April, 1991 he was given an effective sentence of 4 years' imprisonment. On 24th April, 1991 he appealed to the High Court both against conviction and sentence. His grounds of appeal in so far as relevant to the present appeal are as follows:

"i) THAT the Learned Trial Magistrate erred in Law in convicting and sentencing the accused on his guilty plea when:

(a) the alleged pretences outlined in the facts submitted by the alleged pretences outlined in the

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facts submitted by the Prosecution refer to and is a future promise which does not constitute a false pretence in accordance with Section 308 of the Penal Code Cap 17.

(b) the facts outlined contained no material averments that the alleged offences were committed with the pre-requisite intention to defraud the complainant under the provisions of Section 309 of the Penal Code, Cap 17.

THAT in the circumstances the plea of guilty of the Appellant was a nullity."

The appeal was heard by Jesuratnam J. who consolidated 2 other similar appeals by the same Appellant (i.e. Appeal Nos. 51 and 52 with Appeal No. 50 of 1991) and delivered a joint reserved judgment on 13th June, 1991. He dismissed the appeal against convictions but reduced the total sentence from 8 years to 4 years.

In his judgment dealing with the appeal against convictions the learned judge stated as follows:

" The authorities are quite clear on the ingredients that have to be proved in a case of obtaining money by false pretences with intent to defraud under Section 309(a) of the Penal Code. In all these cases it has to be assumed that the prosecution was ready to prove each and every ingredient beyond reasonable doubt.

However the pleas of guilty tendered by the appellant rendered such proof unnecessary. Mr Raza, who appeared for the appellant, rightly conceded that he had no complaint against the charges as such. His argument is that the factors which were brought to light after the pleas were tendered threw doubts on the validity of the pleas of guilt.

The original ground of appeal was that the alleged pretences outlined in the facts referred to a future promise and that no material was disclosed in order to prove intention to defraud. I do not agree. The facts outlined by the prosecution in all three cases contained material which substantiated the ingredients of the offence. It was stated that he made promises of obtaining visas and backed up his credentials by stating that he knew well-known and influential personalities like the Chief Justice, the Army Commander and Australian Embassy Officials. He thereby obtained money. Later he dodged the complainants or failed to meet them and so on.

In some cases the appellant had given specific dates on which the visas would be delivered but did not turn up to meet the complainants as scheduled. In short he did not keep his promise in any of the cases. In all these cases the appellant admitted the facts as outlined. There were no reservations. And it is significant that counsel represented the appellant on all these occasions.

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In my view the facts outlined contained sufficient material which covered every ingredient of the offences. The facts outlined are a precis or summary of the case. It contained the gist of the case and gave all the essential information and details.

The added ground of appeal was that during mitigation counsel made certain statements which challenged the basis of the guilty pleas and rendered them equivocal. I find that counsel did use certain phrases which suggested that there was no false pretence on the part of the appellant and that the cases disclosed civil and not criminal liability.

It is not unusual - and sometimes it cannot be helped - for counsel to use words and phrases which may impinge on the constituents of a particular ingredient. But it seems to me that such words and phrases are used not so much to attack the pleas or convictions but to deflect attention from the gravity of the crimes and smoothen them in order to secure as light a punishment as possible. If it were otherwise there was nothing to have prevented counsel even at that stage from specifically and openly moving for a change of pleas instead of indulging in equivocation himself. Again it is significant that in all 3 cases it was counsel who pleaded in mitigation and not the lay appellant. I do not think that there is any substance in any of the arguments against conviction. The authorities cited by Mr. Raza are not in point. I therefore dismiss the appeals against convictions." (See pages 9 to 11 of the Record.)

The appeal before us is a second appeal and therefore by virtue of Section 22(1) of the Court of Appeal Act it can only be brought on a question of law. The severity of sentence per se is not a question of law and the learned counsel for the Appellant has therefore rightly abandoned the part of the appeal that relates to sentence.

The appeal against conviction reads as follows:

"[a] APPEAL AGAINST CONVICTION

1 That the Appellate Court erred in Law and in fact in upholding the conviction of the Honourable Magistrate's Court on the following grounds:

[i] That the plea was clearly an equivocal plea when Counsel for Appellant said in mitigation that there been the intention of the Court representing the Appellant.

That accordingly the benefit of doubt ought to have been given to a plea of not guilty entered."

Apart from the words 'That the plea was clearly an equivocal plea when Counsel for Appellant said in mitigation', the balance

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of the above ground of appeal is incomprehensible. Such slipshod approach cannot be condoned.

We, however, have before us 'Additional Grounds of Appeal' filed on 29th May, 1991. These read as follows:

> "That the plea was an equivocal plea when in mitigation Counsel for the Accused said that there was:
>
> [a] No false pretence
>
> [b] That it was a civil matter"

We note that in the Magistrate's Court the Appellant was represented by Mr S. Fa, that the grounds of appeal to the High Court were filed by Messrs Bulewa Inoke Vuataki, and that Mr M. Raza argued the appeal before Jesuratnam J. Mr Raza has been acting for the Appellant since then.

The Trial Court Record is quite clear that the Appellant understood the charges and unequivocally pleaded guilty to each count on 20/8/90. After the facts were outlined by the prosecution on 11/9/90, he again unequivocally admitted them in the presence of his counsel. From a perusal of the Record it is also clear to us that the Appellant had changed his earlier plea from 'Not Guilty' to 'Guilty' on the advice of his counsel although on 11/9/90 Mr Fa was not present in Court when he pleaded guilty. The case was adjourned to 11/9/90 for "facts and mitigation".

On 11/9/90, Mr S. Fa's request for an adjournment to enable him to prepare his submission in mitigation was granted and when the matter came up on 28th September, 1990 Mr S. Fa did not ask for a change of plea but proceeded to make submission in mitigation.

Here is what he said:

> " Main thrust of our mitigation is on one point i.e. they gave money willingly to accused and they are business people. Stressed that the complainants knew that visa racketting and giving money illegally is not

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permitted. If they want to recover they can do so civilly. Accused is entrepreneur. People gave money willingly. They did not get their vsa.

Complainants took their chances in giving money. Wish to stress that they can recover by due process of law. Charges are obtaining money by false pretence there should be (a) false pretence by accused but accused did not do any such thing. They gave money willingly. Although we plead guilty.

Fault also on other side for giving money. Reserve right to add more at later stage." (See p.40 of the Record.)

This appeal is not about the Appellant's own plea of 'Guilty' being equivocal (because he did not qualify it in any way), it is not about his admission of facts being ambiguous (it was unequivocal), it is not about the charges being defective (they were not as each count clearly contained particulars of the false representation and an averment of an intent to defraud), it is not about prosecution facts not covering the ingredients of the offences charged, nor is it about the Chief Magistrate's refusal to alter the pleas to 'Not Guilty' (because no such application was made). This appeal is based essentially on the contention that the trial Chief Magistrate erred in law in not, of his own motion, setting aside the convictions (which he had already entered on an earlier date) and entering a plea of 'Not Guilty'. This submission is based on the contention that what the defence counsel said in mitigation, i.e. there was no false pretence and the matter was a civil one, made the Appellant's plea unequivocal. Mr Raza therefore argues that the High Court erred in not allowing the appeal against convictions. We cannot accept this submission as it flies in the face of all the facts outlined by the prosecution and unequivocally admitted by the Appellant.

The facts on each count show that the complainants gave their monies to the Appellant because he falsely led them to believe that he was in a position to obtain for them permanent residence visas in Australia. It was this false pretence which led the complainants to part with their monies. No visas were obtained. In fact the Appellant was never in a position to obtain them.

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Criminal acts can give rise to civil litigation. Once criminality is established it is immaterial whether the complainants can or cannot sue the Appellant in civil Court for the recovery of their monies.

In our view what Mr Fa was really attempting to do was to mitigate the seriousness of the offence involved or to use Jesuratnam's J.'s words, "deflect attention from the gravity of the crimes" in order to get a lighter sentence for his client.

For the reasons given by Jesuratnam J., the appeal to the High Court against convictions were, in our opinion, rightly dismissed by him.

This further appeal to this Court has been brought without any merit and we have no hesitation in dismissing it.

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Justice Michael Helsham
President, Fiji Court of Appeal

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Sir Moti Tikaram
Justice of Appeal

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Justice Arnold Amet
Justice of Appeal