IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. 8(B) OF 1992
(High Court Criminal Case No. 4 of 1992)

BETWEEN:

TOMASI KUBUNAVANUA	APPELLANT
-and-	
S T A T E	RESPONDENT

Mr. Anu Patel for the Appellant
Mr. Ian Wikramanayake for the Respondent

Date of Hearing : 30th April, 1993
Date of Delivery of Judgment : 5th May, 1993

JUDGMENT OF THE COURT

On 17 August 1988 P.C. Manik Chand, who was attached to the Crime Branch at the Lautoka Police Station, placed in the exhibits room at the Police Station a television screen and video deck which he had seized under search warrant. The exhibits room was kept locked and articles placed in it or taken from it were required to be recorded in a register. P.C. Manik Chand entered these exhibits in the register. It seems that there may have been errors in the serial numbers as recorded by him, but for the purposes of this appeal nothing turns on that as the appellant himself in evidence sufficiently acknowledged the identity of the exhibits.

Sometime in January or February 1991, the appellant, who was the officer in charge of the Lautoka Police Station and a policeman of about 25 years' experience, removed the screen and

video deck from the exhibits room and took them to his home. The officer who at that time had the key to the exhibits room and was responsible for its security was P.C. Paulo Lilicama. The appellant had asked P.C. Lilicama for these exhibits and it was he who made them available to the appellant. The appellant kept them at his home and used them until on 30 July 1991 he was informed by Assistant Superintendent Naicker that he intended the following day to check the contents of the exhibits room. The appellant then, later that day, took the screen and video deck from his home and replaced them in the exhibits room.

These facts were for all practical purposes uncontested.

The appellant was charged upon an indictment containing alternative counts, namely theft and abuse of office. He was acquitted of theft but convicted on the alternative count and sentenced to 9 months' imprisonment suspended for 18 months. He has appealed against both his conviction and sentence, but at the hearing the appeal against sentence was not pursued.

The count on which the appellant was convicted was expressed as follows:

> *"TOMASI KUBUNAVANUA being a Public Servant to wit Deputy Superintendent of Police, Lautoka Police Station did between January, 1991 and July 30th, 1991 at Lautoka in the Western Division, in abuse of his office arbitrarily took an exhibit in a pending criminal case to his home for a period of five months to the prejudice of the other officers of the Lautoka Police Station."*

Section 111 of the Penal Code Cap.17 under which the charge was laid provides:

> *"Any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another, is guilty of a misdemeanour."*

It is to be noted that the particulars of offence did not follow precisely the words of the statute and omitted the word "rights" and "authority". We think the word "arbitary" indicated nothing more than the exercise of one's own free will, but as this word was never in issue in the case it is unnecessary for us to say any more than that.

It is undoubted, however, that the case proceeded throughout on the basis that one of the ingredients of the offence which the prosecution was required to prove was that the arbitrary act of the appellant had prejudiced the rights of other officers. This is the way in which the Judge put the case to the assessors in his summing up and it was the way in which both counsel approached the matter. While we think that the indictment was lacking in not having used the word "rights" we do not regard this as fatal and we are content to consider the appeal on the assumption that it was there.

The submission which was made on the appellant's behalf at the trial was, assuming the other ingredients of the offence to

have been established, there was no evidence that the rights of any other officer of the Lautoka Police Station had been prejudiced by what the appellant did.

The first question for consideration is whether there needed to be specific evidence of prejudice to some officer's rights, or whether this was something capable of being determined by necessary inference from the facts. We have no doubt that it is the latter, although in the present case either approach produces the same conclusion.

The real question is whether the act of the appellant in removing the screen and video deck was an act which prejudiced the rights of any other officer of the Lautoka Police Station. On behalf of the appellant it was argued that the Judge erred in not giving the assessors sufficient guidance by defining the word "rights". It is true that the Judge did not attempt to do so, and we have some sympathy for that omission. In all probability it can be said that the word requires no attempt at precise definition. We do not consider it is used in s.111 as a term of art, and certainly we feel unable to give it, as contended by Mr. Patel for the appellant, the restricted meaning of a legal right. Quite simply, there is nothing mysterious about the word and we have no doubt the assessors will have been well able to understand how it should be construed.

Applying these comments to the facts of the present case we consider the word "rights" when used in s.111 has a meaning wide enough to cover the entitlement of police officers in the position of P.C. Chand and P.C. Lilicama, with the responsibilities imposed on them, not to be exposed to criticism, contumely or adverse official action by reason of the wrongful acts of a superior officer. We expressly refrain from giving the expression a meaning which might be sought to be applied to any other set of facts.

It follows from what we have said that what the appellant did was prejudicial to the rights of other officers. In the case of P.C. Chand, it was his responsibility, having seized the screen and video deck for production in Court on a criminal charge to ensure that those exhibits were carefully preserved and kept available for production whenever the prosecution was ready to proceed or the exhibits were otherwise required. It was for this reason that they were entered in a register and placed in a locked room. If, when they were required for production it was found that they were missing, or had been damaged in some way while in the possession of the appellant, then the person immediately accountable would have been P.C. Chand. It can properly be said that he had the right not to be exposed to the risk of that occurring by the wrongful act of the appellant in removing them.

Similarly, and perhaps more particularly, P.C. Lilicama, who held the key to the exhibits room and was accordingly

responsible for preserving the safety of the contents, was placed in a position of extreme prejudice. He must have been aware that the appellant had no right to remove the exhibits, but as the appellant was his commanding officer his reluctance to raise a protest can be understood. Again, if the exhibits had been damaged, destroyed or stolen while in the appellant's possession that reluctance would not have excused him from disciplinary action. His "rights" were that he was entitled not to be placed in that situation.

Notwithstanding the brevity of the summing up on this topic, we think there can be little doubt that this was the way in which the assessors interpreted the charge, and that such an interpretation was a proper one and was open to them on the evidence. Indeed, this was the inference they were bound to draw.

Accordingly, we are satisfied that the appellant was properly convicted and the appeal must be dismissed.

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Mr. Justice Michael M. Helsham
President Fiji Court of Appeal

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Sir ~~Moti~~ Tikaram
~~Resident~~ Judge of Appeal

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Sir Peter Quilliam
Judge of Appeal