IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0048 OF 2006
(High Court Criminal Case No. HAA 45 of 2006)

BETWEEN: **AVINESH KUMAR** ***Appellant***

A N D : **THE STATE** ***Respondent***

Coram: **Ward, President**
Eichelbaum, JA
Scott, JA

Hearing: **3 November 2006**

Counsel: **Appellant in person**
D Goundar for respondent

Date of Judgment: **Friday 10 November 2006**

JUDGMENT OF THE COURT

[1[This appellant appeared before the Magistrates Court on 7 March 2006 on a charge of obtaining money by false pretences. He pleaded guilty and was sentenced to 18 months imprisonment.

[2] He appealed to the High Court against sentence on the grounds that the sentence is harsh and excessive and that inadequate allowance had been made for his plea of guilty. The appeal was allowed and the sentence reduced to 12 months.

[3] He sought to appeal against that sentence to this Court. He did not raise any ground that would entitle him to appeal under section 21(1A) of the Court of Appeal Act and the appeal would have been dismissed under section 35 (2). However, the single judge gave him leave to appeal against conviction on the sole ground that the facts stated to the court did not support the charge.

[4] The charge in the Magistrates' Court was obtaining money by false pretences contrary to section 309(a) of the Penal Code. The particulars of offence stated:

> "Avinesh Kumar on the 21st day of February 2006 at Suva in the Central Division, with intent to defraud obtained $15.00 cash from Sakenasa Avukama by falsely pretending to be a Land Transport Authority officer."

[5] The record shows that, following his plea, a prepared statement of facts was read to the court:

> "On 21/2/06 at about 0930 hrs, PW1 was driving taxi, reg no LT1135 and picked Avinesh Kumar (Accused), 23 yrs of Barrack 54, Government Qtrs, Narere. Accused was wearing a reflector jacket and upon reaching Thompson Street, told PW1 that he was a LTA Officer and took $15.00 from him. Accused after taking the money ran away without paying taxi fare and left the reflector jacket in the taxi.
>
> Accused was arrested and DC Deo Narayan conducted Electronic Interview whereby he admitted taking the money from PW1.
>
> Accused charged for false pretence..."

[6] The appellant admitted the facts and also that he had no fewer that 34 previous convictions principally for driving without a licence and unlawful use of a motor vehicle but including some for larceny and larceny by a trick.

[7] In mitigation, the appellant stated he was working as a checker with Sunset Express earning $75.00 per week.

[8] When sentencing him, the magistrate referred to the previous convictions and that the appellant admitted coming out of prison in February 2006 and continued,

"You have systematically and cleverly executed your plan well against an innocent driver."

[9] In the High Court the learned judge simply repeated the statement of facts set out above and proceeded to consider the sentence.

[10] The relevant provisions of section 309(a) of the Penal Code provide that any person who by any false pretence, with intent to defraud, obtains from any other person any money is guilty of a misdemeanour.

[11] It would appear that neither court considered exactly what the false pretence was and how or whether it resulted in the appellant obtaining $15.00. It would not appear that a statement just that the appellant was LTA officer, even if false on its face, can be assumed to induce drivers to hand over money. The facts outlined give no further assistance.

[12] We note that, in the respondent's written submissions to the High Court, the facts include more detail about what was presumably the police view of the facts:

> "Further the court before sentencing him considered the manner in which he executed his plan in order to ***steal*** $15 from the complainant. He pretended to be an LTA officer and wore a reflector type jacket in order to ***steal***. He took the money and did not pay his taxi fare. This type of offence is nothing more than misleading and taking advantage of innocent members of the public. Even though the appellant ***stole*** only $15 and did not pay his taxi fare, the amount can be significant to an ordinary taxi driver." (***our emphasis***)

[13] Even if the High Court had overlooked the lack of any sufficient information about the offence charged, that submission should have alerted it to the problem. It refers, three times, to stealing the $15. Even if the use of a reflective jacket and the claim to be an officer of the LTA was a false pretence as is charged, there is nothing stated anywhere to suggest that was the reason the taxi driver, presumably (although it is never stated), handed over $15. Had this case gone for trial, the prosecution would have had to prove that the suggestion he was an

officer of the LTA was false and that it caused the complainant to hand over the money. As they were essential ingredients of the offence, they should have been included in the statement of facts.

[14] When framing charges, the prosecution should ensure that sufficient particulars are given to demonstrate clearly the allegation of wrongful conduct. In a charge of this nature, the pretence and the fact it was false must be set out together with the fact that it was the cause of the money being handed over.

[15] It is part of the duty of the courts always to be vigilant that a plea of guilty by an unrepresented accused is only accepted if it is a clear, complete and unequivocal admission of the offence charged. In this case, the record of the magistrates' court shows the appellant admitted the facts read out from the summary set out above. As they do not reveal any offence of obtaining money be false pretences, admission of those facts cannot be taken as an admission of the offence charged. Therefore, before convicting the appellant, the magistrate should have ensured the appellant understood the charge he was facing and that he accepted it was the offence to which he intended to plead guilty.

[16] In the High Court, the appeal was solely against sentence. In those circumstances it is easy to overlook the details of the charge but it should not have happened. The result was that two separate courts had sentenced on a plea of guilty to a charge the basis of which had never been disclosed.

[17] An appellate court will not usually hear an appeal against conviction following a plea of guilty unless there is evidence on the record that the plea was equivocal. This is such a case. The record shows that the appellant admitted the facts set out above and the magistrate presumably (because it is not recorded) convicted him of the offence charged even though the facts he had admitted did not amount to such an offence.

[18] Section 22 of the Court of Appeal Act provides for appeals from the High Court in its appellate jurisdiction and Mr Goundar reminds the Court that such an appeal against conviction only lies on a ground which involves a question of law only. An equivocal plea does not raise a question of law only and so it does not give a right of appeal under section 22; *Vilikesa Dobui v The State* Cr App AAU 2/99, 17 August 1999.

[19] In the present case, however, the matter goes further than an equivocal plea. What has happened is that the court has reached a conclusion about the offence charged which could not be drawn from the facts presented to it. It is an inference it was not entitled to make. In *Edwards v Bairstow* [1956] AC 14, an appeal from a determination of the Commissioners for the General Purposes of Income Tax, Lord Radcliffe stated at 36:

> *"When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the misconception. So there, too, there has been an error in point of law."*

[20] That passage was approved by this Court in *Surend Kant Sharma v Dorsami* [1985] Civ. App No 64 of 1985.

[21] We are satisfied that, on the facts found, which were solely those in the statement of facts, the court could not have determined that the appellant was guilty of the offence charged and such a finding was an error of law.

[22] Section 22 (3) of the Act provides:

> *"(3) On any appeal brought under the provisions of this section, the Court of Appeal may, if it thinks that the decision of the Magistrates' Court or of the High Court should be set aside or varied on the ground of a wrong decision of any question of law, make any order which the Magistrates' Court or the High Court could have made, or may remit the case together with its judgment or order thereon, to the Magistrates' Court or to the High Court for determination, whether or not by way of trial de novo or re-hearing, with such directions as the Court of Appeal may think necessary."*

[23] The question of law in the present case was not the subject of a ground of appeal in the High Court but Section 22 (3) allows this Court to set aside a wrong decision on any question of law *on any appeal*. That was the view of this Court in *Osea Palagi v R* [1985] Cr. App. 72 of 1984, 22 March 1985 when it also considered an issue which had not been raised in the High Court:

> *"An appeal pursuant to Section 22 of the Court of Appeal Act such as the present, is prima-facie an appeal against the decision of the [High] Court but in our opinion Section 22 (3) provides the necessary extended jurisdiction to deal with the present situation. ... We see that as a provision giving this Court jurisdiction to go behind the [High] Court decision appealed from and consider the conduct of the case in the Magistrates' Court. We stress however that it is a jurisdiction which would be exercised only in the most exceptional circumstances. We see this as such a case, and are satisfied that there was a very real danger that a miscarriage of justice resulted."*

[24] We allow the appeal and quash the conviction.

[25] The appellant was sentenced by the magistrate to eighteen months imprisonment. That sentence was reduced to twelve months by the High Court. The appellant told this Court that his release date was next year. He is serving no other sentence and tells the Court that his release date is based on the original sentence because the prison authorities have no copy of the High Court judgment on appeal. We ordered that he should be supplied with a copy for the authorities before he left the Court after the hearing.

[26] The sentence runs from 7 March 2006. With the normal remission, he will have just completed it. In the circumstances we make no order for a retrial.

The appeal is allowed.

Ward, President

Eichelbaum, JA

Scott, JA

Solicitors:

Appellant in person
Office of the Director of the Public Prosecutions, Suva for the Respondent