RATU EPELI NAILATIBAU *v.* THE POLICE

[Appellate Jurisdiction (Vaughan, C.J.) April 12th, 1950]

Fraudulent conversion—intent to defraud—non-compliance with s. 205 of the Criminal Procedure Code.

On 1st April, 1949, the appellant, who held the post of Buli, Naceva, was handed the sum of £103/8/6 by a meeting of villagers which was the meeting's contribution to a building fund.

Later the appellant confessed he had spent £47/8/6 from the fund, in accordance with Fijian custom, as he was in difficulties.

The accused was convicted of the offence of fraudulent conversion by the Chief Magistrate, Lautoka.

At no time did the accused admit fraudulent intention and had in fact repaid the money.

HELD.—(1) The mere fact of conversion without a claim of right, raises a presumption of fraudulent intent.

(2) In the particular circumstances of the case, the fact that the Magistrate had failed to warn the accused under the provisions of section 205 of the Criminal Procedure Code was a fatal defect.

A. I. N. Deoki for the appellant.

W. G. Bryce, Acting Solicitor-General, for the respondent.

VAUGHAN, C.J.—Since the appellant admitted using this money for his own purposes, or for purposes other than those for which he was entrusted with it, a most important matter for the Magistrate's consideration was whether he did so with fraudulent intent. I agree with Mr. Bryce's submission on the Law that the mere fact of conversion without claim of right raises a presumption of fraudulent intent. But that presumption can be rebutted by the surrounding circumstances or by the accused's own evidence. It was of the greatest importance, therefore, that the appellant should have been afforded the opportunity, which the law says must be given him, at the close of the prosecution case to give evidence or to make a statement if he so wishes. The relevant portion of section 205 of the Criminal Procedure Code on this matter is as follows:—

> "At the close of the evidence in support of the charge, if it appears to the Court that a case is made out against the accused person sufficiently to require him to make a defence, the Court shall again explain the substance of the charge to the accused and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock. . . ."

This provision was not complied with: immediately upon the close of the prosecution case, Counsel for the appellant rose and informed the Court that he did not propose to call any evidence, whereupon the learned Magistrate proceeded to hear arguments and give judgment. It

may well be that some confusion was caused by the fact that the appellant had been allowed to make a statement on oath before his plea of " not guilty " was entered and that statement was still on the record: this made it all the more important for the Magistrate to explain the position to the appellant, as required by section 205, at the close of the prosecution case.

The learned Magistrate himself appears to have been under the impression that the appellant did not wish to give evidence, and to have disregarded the statement made at the beginning of the trial because he says in his judgment that " the defendant has not given evidence in this Court ". This defect in the trial I regard as fatal to the conviction because, in effect, and of course inadvertently, the appellant was deprived of a right expressly given to him by law, as a result of which his case may well have been prejudiced.

To the question as to whether I should order a re-trial, a course suggested to me without much conviction by the Acting Solicitor-General, the following facts are relevant. It appears from the evidence before me on the record of the lower Court that in March, 1949, after the appellant had admitted taking the money, he was given to understand by his superior officers that if he repaid the money, that is the £47/8/6 and the £20 loan, he would not be prosecuted. In pursuance of this arrangement, £11 a month was deducted from his salary as Buli for some five or six months, and on 24th September the appellant paid the last instalment of £3/13/6 in cash to Inspector Wendt in Suva. In November he was prosecuted for the fraudulent conversion of the £47/8/6, convicted and sentenced to a year's imprisonment. In default of any explanation, which has not been forthcoming, and apart from the question as to the propriety or otherwise of the undertaking, on which I forebear to comment, the prosecution of the appellant in these circumstances appears to fall little short of an act of injustice and to make it impossible for me to order him to be re-tried.

The appeal is allowed and the conviction quashed.