KITIONE GAUNAVINAKA

v.

THE STATE

[COURT OF APPEAL, 1995 (Ward, Dillon, Savage JJ.A) 26 May]

Criminal Jurisdiction

Crime-procedure-committal for trial-Accused unrepresented-no preliminary enquiry held-committal a nullity-Criminal Procedure Code (Cap 21) Section 255 proviso.

The CPC does not allow an unrepresented accused to be committed for trial in the High Court by way of "paper committal" under Part VIII of the Code.

Cases cited:

Faiz Mohammed v. R (1963) 9 F.L.R 98
R v Gee & Ors [1936] 2 All ER 89
R v Morais [1988] 3 All ER 161
R v Phillips & Ors [1938] 3 All ER 674

Appeal against conviction and sentence in the High Court.

Appellant in Person
C. Hook for the Respondent

JUDGMENT OF THE COURT

The appellant was charged in the High Court with 3 counts of larceny by a servant; 6 counts of obtaining money by false pretences and 1 count of fraudulent falsification of accounts. He was tried before a judge and three assessors. The presiding Judge adopted the majority decisions of the assessors and found the appellant not guilty on 6 of the 10 counts with which he was charged and agreed with the decisions of the assessors to find the appellant guilty on the 4 remaining counts.

The appellant now appeals against those four convictions and the custodial sentences imposed of 3 years imprisonment on 3 of the offences of obtaining money by false pretences and 1 years imprisonment on a further offence of obtaining money by false pretences; all the terms to be served concurrently - an effective sentence of 3 years imprisonment.

Background

The appellant was previously employed by the Westpac Banking Corporation.

He commenced duties with that Bank on the 1st August 1984 and resigned in December 1989. In 1987 he worked in Westpac International Business area and was, when he resigned on the 4th December 1989, relieving Foreign Exchange Support Officer whose main duty was to verify daily all the foreign Exchange deal transactions over FJD 5000 from printouts of computers against vouchers received. It was said he was fully trained and competent in all areas of international business and knew how the various systems worked.

Angeline Lalit Ram was the accountant in charge of the administration and day to day operation of the Banks foreign currency accounts where the appellant worked. She described him as a very competent officer, who excelled in every branch of the Bank's activities. It was she who had trained the appellant in all fields of the Banks foreign business. She had also recommended him as an outstanding reconciler of the Mirror Account which was an integral component of the foreign exchange operations. As a result of that recommendation he received commendation and a monetary present as well.

Following the appellants resignation in December 1989 he was extradited from Australia and arrested at Nadi Airport on the 7 June 1990. He was then tried convicted and sentenced as stated earlier.

He now appeals against both convictions and sentence.

Preliminary Point of Law

The appellant was unrepresented at his trial and is unrepresented before us on his appeal to-day. Mr Hook appearing for the State has raised a preliminary point of law, which if sound is favourable to the appellant, upon which he has addressed us. In so doing he has acted in accordance with the best traditions of the criminal bar and the court is grateful to him. He very properly directed our attention to the record which discloses that the appellant was committed to the High Court for trial on the 16th August 1990. At the committal hearing the accused was present but was not represented by Counsel. As a result the proviso to S.255 of the Criminal Procedure Code (Cap 21) applied and a preliminary inquiry pursuant to the provisions of S.224 of the Criminal Procedure Code was necessary. It appears from the record that no such inquiry was held and that the mandatory provisions requiring a hearing prior to committal were not complied with. In effect the learned Magistrate did not hold a preliminary inquiry as he was required to do since the appellant was unrepresented by Counsel but committed him to the High Court for trial on the papers which is a course that may be followed only if the accused person is represented.

We are of the view that this was a fundamental flaw in the proceedings. It would appear from the record that the Magistrate did not explain the procedure

to be adopted to the appellant nor his rights nor follow any of the other required steps. In our view there was no lawful committal and thus no lawful information in terms of S.248 of the Criminal Procedure Code put before the High Court. In R v Morais [1988] 3 All ER 161 Lord Lane CJ said in relation to the Bill of Indictment that was presented and which had not complied with the statutory procedural requirements at p.165:

> "Therefore .... there was no valid indictment, there was no valid trial, no valid verdict and no valid sentence".

In our view it is clear that the appellant was not validly tried; in effect the trial was a nullity. It follows that the convictions entered against the accused are not valid and must be quashed. Consequently there was no lawful sentence imposed upon the appellant and he must be discharged from custody.

The view we have reached has been reinforced in our minds by a consideration of a number of other cases where there were defective committals. See R v Gee & Ors [1936] 2 All ER 89 and R v Phillips & Ors [1938] 3 All ER 674.

In these circumstances the question arises as to what should now follow in this case, The precise position in relation to the original information appears to us to be somewhat uncertain. But no doubt some steps must be taken in relation to them. In our view, in the light of all the circumstances, to which we refer in a moment it would be contrary to the best interests of justice for the proceedings to be continued against the appellant from the point at which they went wrong. In our view the appropriate course to be followed would be either that the prosecution apply to withdraw the information in terms of S.201 of the Criminal Procedure Code or invite the Director of Public Prosecutions to enter a nolle prosequi.

Our reasons for expressing this view are as follows:-

> These offences were alleged to have occurred in January and March 1990. The appellant was extradited from Australia and arrested in Fiji on the 7th June 1990. He was committed for trial on the 16th August 1990. However his trial did not commence until the 20th June 1994 - some 4 years later. Admittedly he was on bail during that time. Nevertheless the stress associated with a quite inordinate delay in the appellant having his case heard is a factor we believe should be taken into account.
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> The appellant was charged on 10 counts; he was found guilty on 4. He was sentenced to 3 years imprisonment on each of 3 charges and 1 year imprisonment on the 4th charge, the terms to be concurrent - that is an effective sentence of 3 years imprisonment.

Following his arrest on the 7th June 1990 the appellant was not granted bail until the 11th June 1990 a period of 5 days in custody. The assessors returned their opinions on the 4th July 1994 and the appellant was sentenced to 3 years imprisonment on the 5th July 1994. Taking into account the statutory remission available for good behaviour the appellant could expect to be released on the 4th July 1996. In other words he has almost served 1 year of an effective 2 year term; and he has had these criminal charges against him pending for 5 years.

We are of the view that a new trial after this length of time in these circumstances and after the term of imprisonment already served by the appellant would be harsh and oppressive.

In this context we refer in passing to the case of Faiz Mohammed v R (1963) 9 F.L.R 98 where a trial in the Magistrates' Court was declared a nullity and the conviction and sentence set aside because the proceedings had not been consented to as required by the Statute. On the question of a retrial the learned Judge Knox-Mawer Ag. P.J., stated:

> "Having regard to the earlier delays in this matter and to the fact that the appellant has already served a term of imprisonment this Court will not order a venire de novo in this case."

That view accords with our own opinion for the reasons we have already stated.

The order of the Court is therefore that the convictions are quashed and the appellant is discharged.

(Appeal allowed, conviction quashed.)