EPELI DUVE and 2 Ors v STATE

PENI NABANIVALU v STATE

HIGH COURT — APPELLATE JURISDICTION

SHAMEEM J

16, 22 May 2002

[2002] FJHC 63

Criminal law — appeals — appeals against conviction and sentence — larceny — lack of counsel prejudiced appellants — change of plea, honest claim of right and mistake of law — Constitution s 28(1)(d) — Penal Code ss 7, 8, 10, 259, 259(2)(a)(iv), 259(4), 262 — Theft Act 1968 s 2(1)(a).

Appellants were convicted and sentenced of larceny. They alleged that they were prejudiced during the proceedings because of lack of counsel and failure to inform them of such right to counsel. They also alleged that the learned magistrate failed to exercise her discretion to allow the Appellants to change their pleas. Appellants then sought appeals against the conviction and sentence.

Held — (1) The learned magistrate did not consider whether the defence had raised possible defences in law. Appellants were prejudiced by lack of legal representation, and by the learned magistrate's failure to explain to them their right to legal representation.

(2) The learned magistrate failed to exercise her discretion to allow a change of plea. Two of the Appellants said that they did not know that they were doing anything wrong. These assertions, together with the raising of the defences by counsel about mens rea, clearly raise an arguable issue as to whether the prosecution could establish a fraudulent intent. This was a case in which the guilty plea ought to have been set aside and substituted with a not guilty plea.

Appeals against conviction allowed. Appeal against sentence dismissed.

Cases referred to

Harris v Harrison [1963] Crim LR 497; *R v Turner (No 2)* (1971) 55 Cr App Rep 336; *State v Surend Singh and Ors* Crim App No HAA079 of 2000, cited.

Michael Iro v Reginam [1966] 12 FLR 104; *R v Bernhard* (1938) 26 Cr App Rep 137; *R v Bournemouth JJ ex p Maguire* [1997] COD 21 DC (cited in Archbold 2002, para 4–187); *R v Thurbon* (1848) 1 Den 387; *Rex v Golathan* [(1915) 84 LJKB 7578]; *S (an infant) v Manchester City Recorder* [1971] AC 481, considered.

R v Drew (1985) 81 Cr App Rep 190, approved.

S. Valenitabua for the Appellants

N. Nand for the Respondent

Judgment

Shameem J. These are two appeals against convictions and sentences in the Magistrates' Court, in respect of the same alleged offence of Larceny contrary to ss 259 and 262 of the Penal Code. The Appellants in Appeal No 28/02 are charged as follows:

Statement of Offence

LARCENY: Contrary to sections 259 and 262 of the Penal Code, Act 17.

Particulars of Offence

EPELI DUVE, MINILOTE VAKAVANUA, SAKIUSA RAICEBE and MILIO VUETIBAU on the 14th day of December, 2001 at Suva in the Central Division, stole $102,000.00 in cash the property of Armourguard Fiji Limited.

The Appellant in Appeal No 29/02 is charged as follows:

Statement of Offence

LARCENY: Contrary to sections 259 and 262 of the Penal Code, Act 17.

Particulars of Offence

PENI NABANIVALU, with others on the 14th day of December 2001 at Suva in the Central Division, stole $102,000.00 in cash the property of Armourguard Fiji Limited.

The two cases were dealt with separately in the Magistrates' Court because the Appellant Peni Nabanivalu was arrested and charged later. However the facts of the case are the same, and the grounds of appeal are the same. As such both appeals have been dealt with together for the purposes of submissions and judgment.

The Appellants were first brought to court, in Appeal No 28/02, on 21st January 2002. In respect of Appeal No 29/02, the Appellant was brought to court on 1st February 2002. The Appellants in 28/02 were not told of their Constitutional right to a lawyer. In 29/02, the learned magistrate has recorded "Accused admits it freely, does not need to seek legal advice"; which implies that he was told of his right to a lawyer. They all pleaded guilty after the charge was read and explained. They said they understood it. The facts as outlined by the prosecution are comprehensive. They are that a van belonging to the Armourguard Fiji Ltd was transferring cash to the automatic teller machines of the Colonial Bank on 14th December 2001. While taking a turn from Usher Street into Harris Road, the driver of the van noticed that the back door of the van was open. In Lami the Armourguard staff realised that one bag, containing $102,000 was missing. They reported the matter to the police. The Appellants live in Ba. During the Christmas period, they spent money lavishly. In particular the Second Appellant and Fourth Appellant bought a motor vehicle each, using some of the cash. They were questioned on 17th January 2002, by the police and they each admitted taking the money. They said that they had hired Peni Nabanivalu's van (the Appellant on Appeal No 29/02) to sell mangoes in Suva. As they were walking along Harris Road on the 14th of December 2001, the Third Appellant saw the money bag lying on the road. He picked it up and showed it to the others. They then shared the money and threw the bag and the cannisters (in which the money had been found) into the bushes in Lami. They each spent it on cars, building materials and as gifts to relatives. The Appellants were then arrested and charged with the offence of Larceny.

The Appellants agreed with these facts. Three of the Appellants admitted previous convictions, and all Appellants mitigated. The 1st Appellant said, inter alia that it didn't occur to us it was illegal. The Fourth Appellant said: "We decided to share not realising that it was illegal to do what we did".

The matter was adjourned to 4th February 2002 for sentencing. On that date, counsel appeared for the Appellants. The case was then further adjourned to 12th February 2002, when counsel asked to further address the court "in mitigation".

He then submitted on behalf of all Appellants, that the facts had failed to disclose the offence of larceny. He said that the Appellants admitted taking the money but denied having an intention to defraud. He said (at 23):

They believed that no law would cover them and that they would be arrested. They are all villagers. No indication of who the money belonged to. No indication that the money

came from Armourguard. After they arrived at Ba none of them heard about the news of missing money. By the time Police came to them, they'd spent the money. At point of time of finding they believed there was no law binding them.

He then submitted that s 259(4) of the Penal Code provided that the offence was committed where the accused believes at the time of finding that the owner can be discovered by taking reasonable steps. He said that the Appellants had been mistaken about the facts and that they did not know who the owner was. He said that they did not act fraudulently or dishonestly because they honestly believed that they had the right to keep the money.

He submitted that because no larceny had been disclosed by the facts "all five accused should be acquitted of the offence".

Sentence was delivered on 26th February 2002. Counsel's submissions were dealt with thus (at 30):

I must state at the outset, that for at least three of the accuseds namely Peni Nabanivalu, Epeli Duve and Sakiusa Raicebe, section 10 of the Penal Code as to mistake of fact under an honest and reasonable belief that no law would cover them as put forward by Counsel cannot be accepted.

Further Peni Nabanivalu an Assistant Pastor, in mitigation admitted he was using his words 'Broken the law and done wrong against God'. He was driving the van on their way to Ba and picked up the bag which contained the money that they shared amongst themselves. He admitted his weakness for giving in to temptation. This was similar to what Milio Vuetibau also said in mitigation in person.

The learned magistrate then proceeded to sentence the Appellants. Peni Nabanivalu, Epeli Duve and Sakiusa Raicebe were each sentenced to 5 years' imprisonment. Milio Vuetibau was sentenced to 3 years' imprisonment. Minilote Vakavanua was sentenced to 2-and-a-half years' imprisonment.

The grounds of appeal are as follows:

(1) That the learned magistrate was wrong in law in failing to advice the Appellants to obtain the services of a lawyer before allowing the Appellants to take a guilty plea in the court below;

(2) That the learned magistrate was wrong in fact and in law in failing to address in her judgment the submission in mitigation on matters of law relative to larceny presented by the Appellants' counsel in the court below;

(3) That the learned magistrate was wrong in fact and in law in sentencing the Appellants as detailed in paragraph 2 above, whether jointly and/or severally, considering the facts of the case as more correctly presented in mitigation by the Appellants' counsel;

(4) That the learned magistrate was wrong in law and in fact in failing to properly consider the facts of the case as presented by the Appellants' counsel and the applicable law relative to finders;

(5) That the learned magistrate was wrong in law in failing to take into consideration and/or rejecting the Appellants' submission by their counsel on mistake of fact;

(6) That the learned magistrate was wrong in law in considering the previous convictions Epeli Duve, Milio Vuetibau and Peni Nabanivalu to determine the said Appellants' sentences.

The grounds of appeal can be addressed in three categories: breach of s 28 of the Constitution, failure to set aside the guilty pleas and to proceed to trial, and appeal against sentence.

Section 28(1)(d) of the Constitution

With the exception of the Appellant Peni Nabanivalu, none of the Appellants was told of their right to a lawyer before the charges were read to them. Section 28(1)(d) of the Constitution provides that:

> *Every person charged with an offence has the right … to defend himself or herself in person or to be represented, at his or her own expense, by a legal practitioner of his or her choice or, if the interests of justice so require, to be given the services of a legal practitioner under a scheme for legal aid.*

As I have said before, on the basis of authorities from jurisdictions which have the same Constitutional or legislative provision, the duty to inform accused persons of this right, rests on the court before which the accused are first brought. The right must be explained to them before the charges are read to them. A waiver of the right will not be lightly implied, and any specific waiver must be recorded before the court can proceed to take the pleas: (*State v Surend Singh and Others* Crim App No HAA079 of 2000.)

When the court proceeds without counsel, a heavy duty rests on it to ensure that the accused are not prejudiced by lack of legal representation. The more serious the charge, and more difficult or complicated the defence, the heavier the duty is upon the court to ensure lack of prejudice.

The State does not dispute that in App No 28/02, there was a breach of this right. The right was not explained to the Accused, and there was no competent waiver. However the State submits that there was no prejudice because the Appellants agreed with the facts which disclosed the offence.

Counsel for the Appellant however submits that the facts failed to disclose the defences available to the Appellants, and that they were thereby prejudiced. In *MIchael Iro v Reginam* [1966] 12 FLR 104, the Court of Appeal considered a decision of a High Court judge to set aside a plea of guilty to entry and rape, and to substitute it with a not guilty plea on the ground that the plea was ambiguous. The accused had put forward excuses for his conduct which constituted possible defences. Holding that the trial judge had acted in the best interests of the accused, the court said:

> *In our view there is a duty cast on the trial judge in cases where the accused person is unrepresented to exercise the greatest vigilance with the object of ensuring that before a plea of guilty is accepted the accused person should fully comprehend exactly what that plea of guilty involves. As was said by Lord Reading CJ in Rex v Golathan [(1915) 84 LJKB 7578] "It is a well-known principle that a man is not to be taken to have admitted that he has committed an offence unless he pleads guilty in plain, unambiguous terms".*

Of course the question of prejudice as a result of a breach of s 28(1)(d) of the Constitution, is different from the question of ambiguity of the plea. Nevertheless, a possible ambiguity of the plea, or the failure of the magistrate to ensure that the accused persons were explained the implications of their pleas, are factors relevant to the question of prejudice.

Turning therefore to the record, I find that the only references made by the Accused themselves, to a possible excuse for their conduct, were in relation to a "defence" of a mistake of law. This is not a defence under s 7 of the Penal Code which provides:

> *Ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence unless knowledge of the law by the offender is expressly declared to be an element of the offence.*

At the stage of mitigation in person, the learned magistrate did not have any grounds therefore, to set aside the pleas of guilty and substitute them with pleas of not guilty. However their "excuses" ought to have led to further inquiry as to their state of mind when the offence was committed.

When counsel appeared, he developed the theme further. He said that the Appellants had not acted fraudulently and had acted in the exercise of an honest claim of right. He further said that the Appellants believed they could not find the owners with reasonable diligence.

Section 8 of the Penal Code provides:

> *A person is not criminally responsible in respect of an offence relating to property, if the act done or omitted to be done by him with respect of the property was done in the exercise of an honest claim of right and without intention to defraud.*

Section 259 of the Penal Code defines theft as follows:

> *(1) A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof:*
>
> *Provided that a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, if, being a bailee or part owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner.*
>
> *(2) (a) The expression "takes" includes obtaining the possession —*
>
> (i) *By any trick;*
>
> (ii) *By intimidation;*
>
> (iii) *Under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained; or*
>
> (iv) ***By finding, where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps.*** (My emphasis)

The test for larceny by finding is a subjective test, applied after the court has heard evidence about what the accused himself or herself believed, in relation to the possible identity of the owner. Similarly, the test for whether an honest claim of right exists, under s 8 of the Penal Code, is a subjective one.

Although the law on theft in England has changed considerably since the passing of the Theft Act 1968, the law on the defence of an honest claim of right, and of stealing by finding has not changed. Section 2(1)(a) of the 1968 Act (UK) provides:

> *A person's appropriation of property belonging to another is not to be regarded as dishonest — … (c) … if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.*

The question for the trial court is whether the accused believed he had the right to keep the property, and in the case of a defence of an honest claim of right, whether he had the right to deprive the other person of the property (*R v Bernhard* (1938) 26 Cr App Rep 137; *Harris v Harrison* [1963] Crim LR 497) This is so, even if the belief is unreasonable, or is based on a misunderstanding of the law (*R v Turner (No 2)* (1971) 55 Cr App Rep 336). In *Bernhard* (above) the following passage in Stephens's **History of the Criminal Law of England** was cited with approval:

> *Fraud is inconsistent with a claim of right made in good faith to do the act complained of. A man who takes possession of property which he really believes to be his own does not take it fraudulently, however unfounded his claim may be. This, if not the only, is*

nearly the only case in which ignorance of the law affects the legal character of acts done under its influence. (See also Archbold 2002 21.28.)

In *Reg v William Thurbon* (1848) 1 Den 387, the defendant found a bank note on the highway. He kept it for his own use, even after he found out who the owner was. He was convicted. On appeal it was held that if he did not have a dishonest intention at the time of appropriation, and believed he could not find the owner at that time, he could not be convicted of larceny.

Counsel therefore raised two legitimate defence, neither of which were simple or uncomplicated. It is safe to assume that lay persons cannot be expected to have a working knowledge of the scope of s 259(2)(a)(iv) or s 8 of the Penal Code. The Appellants' reference to not knowing that their acts were illegal when they mitigated in person, have a different meaning when one reads counsel's submissions when he appeared for the Appellants. He submits on appeal, that if he had been present when the pleas were first taken, he would have advised his clients to enter pleas of not guilty and to await trial. Obviously, his request for an acquittal was made in error. If the plea is ambiguous or is equivocal, then the magistrate must set it aside and proceed to trial on a not guilty plea. An accused person cannot be acquitted after a guilty plea. The prosecution must be given a chance to lead evidence and the accused must be given a chance to cross-examine. Whether or not the Appellants' defences are accepted, that is whether they honestly believed they could keep the money and that the owners could not be found, will be a matter for the trial court to consider, after hearing all the evidence.

In this case, the learned magistrate did not consider whether the defence had raised possible defences in law. She did not consider whether she should set aside the pleas of guilty and substitute pleas of not guilty. She did not consider whether, because the Appellants were unrepresented when their pleas were taken, they were fully aware that they had possible defences but failed to refer to them properly because they were unrepresented.

Because of her failure to exercise her discretion on these matters, I consider that the Appellants were prejudiced by lack of representation, and by the learned magistrate's failure to explain to them their right to legal representation. This ground of appeal succeeds.

Change of plea

There is considerable overlap between this ground and the first ground. The main thrust of counsel's submissions, is that the pleas of guilty were equivocal and should have been set aside when it became apparent that the Appellants had defences in law.

In *S (an infant) v Recorder of Manchester* [1971] AC 481, a 16-year-old defendant pleaded guilty to attempted rape. He was unrepresented, but on the next hearing date, appeared with counsel who asked the court to withdraw the guilty plea on the ground of the defendant's mental condition. The magistrate refused to allow the plea to be changed. On appeal, it was held that a court of summary jurisdiction had powers to allow a change of plea at any time before sentence, MacDermott LJ saying at 493:

Every experienced judge knows that, even in uncontested matters, the truth has a habit of emerging in bits and pieces, and that the legal ingredients of the offence charged may not be fully understood by the accused. Pleas of guilty of stealing where there has been no intention to deprive the owner permanently, or of receiving where there has been no guilty knowledge at the time of receipt are but notorious examples of what has happened

and can still happen through this sort of ignorance or misunderstanding which, be it noted, may not proclaim itself when the plea is made. The risk of this is certainly not rare enough to be left out of account. Legal aid may reduce it, but it would be rash to assume that it will eliminate such mistakes entirely; and it must also be remembered in this connection that quite a number of modern statutory offences are sufficiently complex in their make-up to confuse both the lay and the learned. Once made, a mistaken plea may be properly accepted and the mistake may never stand revealed. But if, as can happen, the truth comes to light during the second stage of the proceedings, when the question of what to do with the accused is under consideration, why should it not be acted upon and a changed plea of not guilty allowed where the interests of justice so require?

The bases on which the discretion might be exercised are not limited to whether or not the plea was unequivocal, although that is certainly relevant. In *Drew v R* (1985) 81 Cr App Rep 190 the following principles were approved. First, the court may allow a change of plea at any time before sentence. Second, that the discretion exists even where the plea of guilty was unequivocal. Third, that the discretion must be exercised judicially. Fourth, that failure to exercise that discretion amounts to a material irregularity.

In this case, the learned magistrate failed to exercise her discretion to allow a change of plea. Although counsel had not specifically asked her to so exercise her discretion, it is apparent from mitigation that the Appellants claimed they had defences on the facts. Although lack of legal representation at the time the plea is taken, does not inevitably lead to a vacating of the plea when counsel later appears, the question of whether the accused might have benefited from legal advice before pleading guilty to an offence in respect of which he might have a defence is a relevant factor is the exercise of this discretion. It was held in *R v Bournmouth JJ ex p Maguire* (1997) COD 21 DC (cited in Archbold 2002 para 4–187) that an application for change of plea should be allowed if the court is satisfied that it is arguable that the prosecution case would not be able to establish all the essential ingredients of the offence.

State counsel submitted that the facts disclosed all the ingredients of the offence, and that the Appellants made statements in mitigation from which the magistrate was entitled to draw inferences of guilty knowledge. However, I see from the court record that two of the Appellants said that they did not know that they were doing anything wrong. These assertions, together with the raising of the defences by counsel about mens rea, clearly raise an arguable issue as to whether the prosecution could establish a fraudulent intent. This was a case in which the guilty plea ought to have been set aside and substituted with a not guilty plea.

The learned magistrate erred in failing to exercise her discretion in this way, or at all. For this reason also, this appeal succeeds.

Sentence

The appeal against conviction succeeds. There is no need to consider appeal against sentence.

Conclusion

The appeals against convictions by all Appellants succeeds on the grounds that they were prejudiced by absence of counsel and (in respect of App No 28/02) by failure to inform them of the right to counsel. It succeeds also on the ground that the learned magistrate failed to exercise her discretion to allow the Appellants to change their pleas. The pleas of guilty and the convictions are set aside. The case

is remitted to the Magistrates' Court to proceed to trial before another magistrate on the basis of not guilty pleas. The defences raised by counsel in mitigation may then be raised in the course of a trial.

Appeals against conviction allowed. Appeal against sentence dismissed.