IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

A T L A U T O K A

Criminal Jurisdiction

Criminal Case No. 10 of 1981

R E G I N A

v.

OSEA TURAGA GAVIDI
EVERETT RILEY

FRAUDULENT CONVERSION: Contrary to Section 311(1)(c)(i) of the Penal Code, Cap. 11

Accused persons present on bail
Mr. S. M. Koya and Mr. J. Khan, Counsel for the first accused
Mr. J. R. Reddy, Counsel for the second accused
Mr. D. Fatiaki, Counsel for the Prosecution
Messrs. E. Rasuwe & R. Nand, Court/Interpreters

R U L I N G

The two accused persons were brought before the Magistrate's Court on four counts of fraudulent conversion, three of which involved them jointly and the fourth involving the second accused only. The magistrate proceeded to hold a preliminary inquiry with the object of committing them to the Supreme Court for trial. After hearing the Crown evidence there were submissions by counsel for each of the accused that there was no evidence on which to commit the accused, and after hearing counsel for the Crown the magistrate adjourned for a ruling. After the adjournment the magistrate received all the evidence and came to the conclusion that he could not commit either of the accused on the four counts laid against them. But he then said that he was proceeding to determine whether or not there was evidence of fraudulent conversion. What he meant presumably was that he would consider whether there was some other charge on which he could commit. After further consideration of the evidence the magistrate then discharged counts 2, 3 and 4, but instead of discharging count 1 proceeded himself to amend it and then committed both accused on this amended charge.

There is no power in the Criminal Procedure Code for a magistrate to amend a charge in committal proceedings, if he feels he cannot commit on the charge before him he should discharge it. But the proviso

to Section 231 provides

> "Provides always that nothing contained in this section shall prevent the court from either forthwith, or after such adjourrment of the injury as may seem expedient in the interests of justice, proceeding to investigate any other charge upon which the accused person may have been summoned or otherwise brought before it, or which in the course of the charge so dismissed as aforesaid, it may appear that the accused person has committed."

This makes it clear that a magistrate should not merely, at the end of the prosecution evidence, commit on a charge of his own choosing. He may substitute a charge for the one brought by the prosecution, where he considers this necessary, but where he does so, then he must formulate the new charge and proceed to investigate it, that is defence and Crown should be given the opportunity of meeting the new situation. The Crown evidence need not change, and there would probably be no point in repeating it, but the defence might well wish to recall witnesses for further cross-examination, or to call evidence of its own or to make fresh submissions. The procedure adopted by the magistrate was unfortunately incorrect, it was not that provided in the Criminal Procedure Code. I cannot see that the accused have been necessarily prejudiced in any way by what the magistrate did, and I bear in mind that counsel for all parties were present in the Magistrate's Court and apparently raised no objection to what the magistrate did. But the accused are entitled to object to their improper committal and I cannot find any power in the Supreme Court to condone or overlook such a defect. I have considered Section 342 of the Criminal Procedure Code, for instance but I do not think that that section helps. This is rather an anomalous situation, because if the magistrate had merely discharged all four counts the Crown could still have come to the Supreme Court under Section 232 to ask for the accused to be committed on the evidence already adduced and on such charge as the evidence revealed. And if the magistrate had adopted the correct procedure in convicting the accused, even on an incorrect charge, the Director of Public Prosecution could have laid any information which was justified by the evidence produced at the Preliminary Inquiry. There are several ways in which a different charge to the one with which committal proceedings commenced and proceeded could properly be laid in the Supreme Court, and it may be that the present application will only delay ultimate proceedings and may not be in anyone's interest, but I don't think that can be helped.

It was also argued on behalf of the first accused that the information as laid was bad in law in that it is vague and uncertain. I think there is merit in this argument. The information with some variation follows the charge drafted by the magistrate and not the original count 1. The original Count 1 specified a sum of $18,536.31 as having been fraudulently converted, but for some reason the magistrate altered this to read that the total sum entrusted to the two accused "or some part of it" had been fraudulently converted. This is somewhat strange because there was no question of the whole of the sum being fraudulently converted. The information as laid merely reads that "some part" of the total sum entrusted was converted. Somehow the magistrate and presumably counsel have accepted that because the charge was a "general deficiency" charge this form was permissible. I do not agree and the vagueness of the information is contrary to the general rule of preciseness in formulating charges and contrary to Section 122(j). The "general deficiency" exception to the normal practice allows a number of separate incidents of conversion over a period of time, to be lumped together in one count when it is impossible to separate them, but the aggregate sum converted should nevertheless be stipulated.

The nett result of this application therefore is that the objection to the information is upheld and the information is quashed. I need hardly add that this is not of course an acquittal, it merely means that if the Crown so wishes, committal proceedings may be recommended.

Lautoka
4th March, 1982

(C. O. L. Dyke)
Judge