IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

A T L A U T O K A

Criminal Jurisdiction

Criminal Case No. 17 of 1981

R E G I N A

v.

1. PADMA NADAR NAIR s/o Rao Nutty Nair
2. MOHAMMED ISHAQ f/n Abdul Gafoor

COUNTS 1 & 4: Forgery: Contrary to Section 371(2) of the Criminal Procedure Code.

COUNTS 2 & 5: Uttering Forged Document Contrary to Sections 37 and 371(2)(a) of the Penal Code.

COUNTS 3 & 6: Receiving Money on Forged Document: Contrary to Section 381 (a) of the Penal Code.

Accused persons present on bail
Mr. S. M. Koya and Mr. Iqbal Khan, Counsel for the accused persons
Mr. K. Tuleva and Mr. E. V. Tavaiqia, Counsel for the Prosecution

R U L I N G

The two accused were, after proceedings under Section 255 of the Criminal Procedure Code committed for trial before the Supreme Court on six counts of forgery, uttering and receiving money on a forged document. On 23rd June, 1981 an information containing the six counts was laid against them in the Supreme Court by the Director of Public Prosecutions. On 7th September, 1981 they appeared before the Supreme Court and pleaded not guilty to the charges. On 13th October, 1981 the case was called on for hearing, the accused, his counsel and the assessors were present, but counsel for the prosecution was absent. He could not be contacted and after about an hour's delay, without any information forthcoming, the charges against both accused were dismissed.

The Director of Public Prosecutions, on the 29th October, 1981, filed a fresh information containing the same six counts and the case has been called on for this criminal session. Counsel for the accused now argues that the information is bad since it was laid without fresh committal proceedings. In support of his argument he relies heavily on the reported cases of R. v Thompson, R. v Clein [1975] 2 AER 1028, decisions of the Court of Appeal, Criminal Division.

In Fiji, although there is provision in the Criminal Procedure Code for the non-appearance of a complainant at a hearing in a Magistrate's Court, there is no similar provision for hearings in the Supreme Court and no provision for the non-appearance of the prosecutor either in a Magistrate's Court or in the Supreme Court. "But Section 262 provides that the practice in its criminal jurisdiction by the Supreme Court shall be assimilated as nearly as circumstances will admit to the practice of the criminal courts in the United Kingdom." However the matter in the United Kingdom is not merely a question of practice being affected by statutory provisions not applicable in Fiji. There is for instance Section 2(2)(b) of the Administration of Justice (Miscellaneous Provisions) Act 1933 which provides -

> "Subject as hereinafter provided no bill if indictment charging any person with an indictable offence shall be preferred unless either -
>
> (a) the person charged has been committed for trial for the offence: or
>
> (b) the bill is preferred by the direction of the Court of Appeal or by the direction or with the consent of a judge of the High Court ..."

There is no similar provision in Fiji and the only relevant provision is Section 224 of the Criminal Procedure Code which provides -

> "Whenever any charge has been brought against any person of an offence not triable by a Magistrate's Court or as to which the Magistrate is of the opinion that it ought to be tried by the Supreme Court or where an application in that behalf has been made by a public prosecutor a preliminary enquiry shall be held according to the provisions hereinafter contained, by a Magistrate's Court locally or otherwise competent."

It will be seen that there is nothing in this provision to suggest there shall only be one information laid for one committal, and the preliminary inquiry is after all simply or mainly concerned to ensure that there is a case to go to the Supreme Court, and to allow the defence to know the extent of the prosecution's case. And the order in the previous hearing was that the charges, i.e. the information, be dismissed not that the whole proceedings be dismissed. There is surprisingly little authority on the point, the case of R. v Thompson R. v Clein seemingly being the only one coming near to covering the point. James, L.J. said in allowing the appeals that he based his decision on the principle that it is only once that an indictment can be preferred on basis of one committal. Unfortunately there was no indication where that "principle", if such it was, came from and there were other issues in the

case which were relevant. Also that principle does not seem to have applied where a noble prosequi has been entered followed by another indictment, for instance in the case of Poole v. The Queen /1961/ AC223, although that is a Kenya case. And in the case of Griffiths, Cernik and Fearn v. R. /1980/ 72 C.L.R. 307 where a judge purported to strike out indictments and enter verdicts of 'Not Guilty' without ever arraigning the accused or taking pleas, it was held that this was a nullity ab initio. There was no discussion, no suggestion of second committal proceedings. New indictments were filed but these were done with the leave of the judge so that in accordance with Section 2(2)(b) above quoted there would have been no need to have held a preliminary inquiry in any case so that there is no assistance to be found here.

Poole's case was based on the interpretation of Section 82 of the Kenya Criminal Procedure Code and the construction put upon that section by the Judicial Committee so to that extent it did not follow English law. It is possible that in a similar case in Fiji the interpretation of Section 71 of our Criminal Procedure Code would lead to a similar result but for the present case in the absence of any relevant provision in Fiji law the English law and practice so far as it can be made to apply must be followed. The situation is unsatisfactory - no clear guidelines can be found in textbooks or precedents.

But in so far as the Thompson and Cloin case is concerned it does contain a principle, wherever it came from, which I can see no way of avoiding, and I must follow it. It follows that in the absence of new committal proceedings to present information based on the original committal is wrongly laid and it is quashed.

Lautoka,
30th March, 1982

(C. O. L. Dyke)
Judge