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IN THE SUPREME COURT OF FIJI
Criminal Jurisdiction
Criminal Case No. 13 of 1985.

R E G I N A

v.

JAYANT KUMAR f/n Chotubhai

For Crown : Miss N. Shameem
For Accused : Mr. Hasmukh Patel

O R D E R

Case referred to (1) Griffiths v. The Queen (1) (1977)
137 C.L.R. 293

(Orally)

The accused is charged with receiving a carton of powdered milk worth \$45.60, knowing the same to have been stolen. He has pleaded guilty unequivocally and agreed with a statement of facts. The Court accordingly found him guilty on his own plea.

Although receiving is a serious offence, nonetheless, in view of the value of the goods involved, I consider the present offence to be relatively trivial. In view of that aspect alone I had considered the operation of the provisions of section 44 of the Penal Code. The relevant part of that section reads as follows:

"44. - (1) Where a court by or before which a person is found guilty of an offence, not being an offence for which a fixed sentence is prescribed by law, is of opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment and that a probation order under the Probation of Offenders Act is not

appropriate, the court may, with or without proceeding to conviction, make an order discharging him absolutely, or, if the court thinks fit, discharging him subject to the condition that he commits no offence during such period, not exceeding twelve months from the date of the order, and subject to such other conditions, if any, including the payment of costs or compensation, or the restitution of goods or the payment of money in lieu of goods, as may be specified in such order.

(2) Before making an order discharging a person subject to the conditions referred to in subsection (1), the court shall explain to the offender in ordinary language that if during the period of conditional discharge he commits another offence or fails to comply with such conditions, if any, which may have been imposed he will be liable to be sentenced for the original offence.

(3) Where an order discharging an offender is made under the provisions of this section the court may order him to pay the whole, or any part, of the costs of and incidental to the prosecution, and of any compensation adjudged.

(4) An order made under the provisions of this section when the court does not proceed to conviction shall, for the purpose of revesting or restoring stolen property and of enabling the court to make an order under the provisions of section 162 and 165 of the Criminal Procedure Code, have the like effect as a conviction."

The learned Crown Counsel Miss Shameem submits that the section operates whether or not the accused has pleaded guilty in the matter. The learned Counsel for the defence Mr. Patel concurs in that submission. Section 657 A of the Criminal Code of Queensland, which contains provisions similar to those of section 44, in part reads as follows:

3.

"657A(1) Where a person charged before a Court or Justices has been found guilty of or has pleaded that he is guilty of an offence punishable by that Court...."

That wording might seem to suggest that there is a difference between the situation where a person has been "found guilty" and has "pleaded that he is guilty". It seems to me however that whether or not an accused pleads guilty, he ultimately must be "found guilty", if the court is satisfied as to his guilt, before section 44 can operate. Secondly, if I were to apply the alternative interpretation, it would mean that section 44 has no application to a person who has pleaded guilty and has thus attracted the leniency of the court. I am satisfied that the legislature could not possibly have intended the latter construction, that the Queensland provisions must be distinguished, and that section 44 applies to an accused person whether or not he has pleaded guilty.

It will be seen that the provisions of section 44 operate only where the court has considered "the circumstances including the nature of the offence and the character of the offender". The section also provides however that the provisions operate "with or without (the court) proceeding to conviction". My difficulty is that I do not see how I can consider the accused's character without first formally convicting him: the accused's character and previous convictions, if any, are relevant only to punishment, and punishment may only be considered by the court when the accused's guilt is formally determined on conviction. My difficulty in the matter may be said to be one of formality, but then there is the added difficulty that the nature per se of the offence might not necessarily, as it does in the present case, bring to mind the provisions of section 44, in which case a conviction might be recorded before such provisions would ever arise for consideration.

4.

Much the same provisions as those in section 44 are to be found, as I have said, in section 657 A of the Criminal Code of Queensland and also, for example, in section 36 of the Penal Code of Kenya (1948 Ed.), section 318 of the Criminal Procedure Code of Uganda (1951 Ed.) and also I believe in the Penal Code of the Solomon Islands. In the case of the East African provisions I observe that the relevant part thereof reads that "the Court may, without proceeding to conviction, make an order dismissing the charge". I foresee difficulties in that provision.

The Queensland provisions were considered by the High Court of Australia in the case of Griffiths v. The Queen (1), where the difficulties in the operation thereof were outlined in particular by Barwick C.J. at pp 300/303. On a very brief reading of the report however, the particular difficulty facing this court does not seem to have been traversed. I recall that that difficulty was removed by particular provisions in the Penal Code of Zambia, a copy whereof is not available to me. Doing the best I can in the matter, I recall that those provisions operated only upon conviction, but that where an order of discharge was made, absolutely or conditionally, the conviction as such ranked as a conviction only for the purposes of


- (i) ancillary orders,
- (ii) an appeal, or
- (iii) imposing punishment where the condition ordered by the court was subsequently breached.

As to the present case, though I have found the accused guilty I have not proceeded to conviction. He has pleaded guilty. He is a first offender. The offence as I have said, is relatively trivial. I have considered the operation of the provisions of section 44 and have complied with subsection (2) thereof.

5.

I consider that it is inexpedient to inflict punishment and further that a probation order is not appropriate. Having regard to all the circumstances, I order that the accused be discharged subject to the condition that he commits no offence during the period of twelve months from the date of this order.

Delivered in Open Court at Suva this 9th day of May, 1985.



B. P. CULLINAN
JUDGE