IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 41 of 1977

Between:

1. VIJAY SINGH alias TIGGER s/o Jalim Singh
2. RAMAN s/o Sanyasi — Appellants

- and -

REGINAM — Respondent

Mr. G.P. Shankar and Mr. A.J. Singh for the appellants.
Mr. M. Jennings for the respondent.

Date of Hearing: 17th November, 1977.
Delivery of Judgment: 25/11/77

JUDGMENT OF THE COURT

Gould V.P.

On the 1st March, 1976, the two appellants were charged before a magistrate of the first class with robbery with violence. The appellants both elected trial in the Magistrate's Court, and after the charge had been read and explained, pleaded not guilty. The charge was in the following terms:

"Statement of Offence

ROBBERY WITH VIOLENCE : Contrary to Section 326(b) of the Penal Code, Cap.11.

Particulars of Offence :

VIJAY SINGH alias TIGGER s/o JALIM SINGH and RAMAN s/o SANYASI, on the 16th day of February, 1976 at Ba, in the Western Division, robbed RAM JAS s/o RAM HARRAKH of twenty dollars in monies and immediately before the time of such robbery did use the personal violence to the said RAM JAS."

After a lamentable delay of nearly fourteen months the appellants were gain before a first class magistrate and were legally represented. On this occasion the prosecution was granted leave to put in as a second count an alternative charge of larceny from the person. This was as follows :

"ALTERNATIVE COUNT

STATEMENT OF OFFENCE

LARCENY FROM PERSON: Contrary to Section 303 of the Penal Code, Cap. 11.

Particulars of Offence

VIJAY SINGH alias TIGGER s/o JALIM SINGH and RAMAN s/o SANYASI, on the 16th day of February, 1976 at Ba in the Western Division, stole $20.00 cash from the person of RAM JAS s/o RAM HARAKH."

This charge was read and explained to the appellants who both pleaded guilty to it. The prosecution then offered no evidence on count 1 which they stated was "withdrawn". In relation to the second count the appellants were not asked, before pleading to it, whether they consented to trial in the Magistrate's Court. The magistrate imposed sentences of imprisonment on the second count but suspended the sentences for two years in each case.

The Director of Public Prosecutions appealed to the Supreme Court against the sentence imposed upon the appellant Vijay Singh on the ground that it was manifestly inadequate. He did not appeal in the case of the appellant Raman, but the learned judge in the Supreme Court directed that Raman should appear and show cause why his sentence should not be reviewed. He was, the learned judge said in his judgment, "in effect joined as a respondent in the appeal.". We do not understand how a person can be a respondent "in effect"; in this case the Director of Public Prosecutions did not make Raman a respondent to his appeal, which was limited to the sentence against Vijay Singh. However, the learned judge had his power of revision which no doubt gave him jurisdiction in Raman's case, to make the order he did. It is not necessary for us to detail the orders which the learned judge made in respect of the sentences as no appeal lies to this court in the circumstances of the case, against severity of sentence.

The only point which has been argued before this court is one which, if it were to be decided in favour of the appellants, would invalidate the sentences passed by the learned judge, as it raises a question of his jurisdiction. It was a matter raised and decided in the Supreme Court as a preliminary point, and the submission is that the proceedings in the Magistrate's Court, resulting in the convictions and sentences of the appellants were a nullity, because

before the appellants were dealt with on the second and alternative count, the magistrate did not obtain their consent to trial in the Magistrate's Court.

The jurisdiction of the Magistrate's Court in relation to the trial of offences under the Penal Code is regulated by section 4(1) of the Criminal Procedure Code (Cap. 14) which reads:

> "Subject to the other provisions of this Code, any offence under the Penal Code may be tried by the Supreme Court, or by any magistrates' court by which such offence is shown in the fifth column of the First Schedule to be triable:
>
> Provided that where so stated in the fifth column of the First Schedule the offence shall not be tried by a magistrates' court unless the consent of the accused to such trial has first been obtained."

Both offences with which we are concerned, robbery with violence and larceny from the person, come within the terms of the proviso and are triable by a magistrate's court of the first class, only with the consent of the accused, first obtained. Prima facie therefore, the magistrate had not obtained the consent of the appellant to be tried by his court on the alternative count, and therefore had no jurisdiction.

In holding to the contrary to the Supreme Court the learned judge said :

> "Once the accused had elected to be tried by the magistrate on his plea of not guilty to robbery he had, in my view accepted that the magistrate would hear all the evidence in relation to that allegation and return a verdict of guilty or not guilty of that offence or of any lesser offence under s.163(1) C.P.C. although it was not set out in the charge sheet. In pleading guilty to the alternative count of larceny from the person he was saying in effect, that although the evidence to be adduced on a trial for robbery would not support the robbery count it would prove the lesser charge which it would have been open to the magistrate to consider under s. 163(1) C.P.C.
>
> On pleading not guilty to robbery the accused put in issue not simply his guilty on the substantive charge but the issue of guilt on any lesser charge coming within the bounds of s. 163(1) C.P.C. which could be supported by the evidence."

Crown counsel before us argued in support of this proposition though a different position had been taken by counsel who appeared in the Supreme Court.

The authorities quoted on behalf of the appellants are not particularly helpful and we agree with the learned judge in the Supreme Court that R. v. Kettering Justices, ex parte Patmore [1968] 3All E.R. 167, a leading English case on the subject is not of any real assistance. The Privy Council judgment in Attorney-General for Fiji v. Hari Pratap (1970) (P.C. Ap. No. 10 of 1969) though extremely helpful on the question of the alteration and amendment of charges, does

not deal with the consent of the accused to be tried, as a separate issue. When alternative counts were put in, in that case, and after some delay were read and explained to the accused, their right of election was explained at the same time

The answer to the present problem in our opinion is to be found in the relevant provisions of the Criminal Procedure Code. Section 4 refers to the trial of "offences", a term not defined by the Code, though it is in the Penal Code (Cap. 11) section 2. It is "an act, attempt or omission punishable by law" which is not particularly helpful in the present circumstances. It is clear however from section 121(2) of the Criminal Procedure Code, that when more than one "offence" is charged (in one charge or information) a description of such offence must be set out in a separate paragraph called a count. Each count therefore embodies a different offence and in relation to each offence the consent of the accused must be obtained, so section 4 indicates, where the First Schedule requires it.

The question now is whether other provisions of the Criminal Procedure Code should be regarded as making an inroad on this <u>prima facie</u> definite requirement. Section 163(1) has been relied upon and we will return to it. But the position seems to be in clearer perspective if considered in relation to other sections which authorise specific alternative convictions of offences with which the accused

was not charged. For instance section 174 provides that when a person is charged with any offence mentioned in Chapter 32 of the Penal Code he may be found not guilty of that offence but guilty of any other offence mentioned in the Chapter. These offences include burglary, housebreaking, sacrilege, possession of housebreaking implements and all are triable by a Magistrate's Court, only with the consent of the accused. Yet the only consent actually given would have been to the charge as originally framed.

Another example is section 171 which provides that when a person is charged with an offence under section 171 of the Penal Code and the court is of opinion that he is not guilty of that offence but guilty of an offence against section 149 or 150 of the Penal Code he may be convicted of the latter though not charged with it. Section 171 of the Penal Code is concerned with incest, s. 149 and 150 with unlawful carnal knowledge of girls of certain ages. In all cases the jurisdiction of the Magistrate's Court hinges on the consent of the accused to trial there. Examples may be multiplied, but the point is sufficiently illustrated by those already given.

Then there is the general section 163 referred to above. It reads :

"163. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

The learned judge was of the opinion that the alternative charge of larceny from the person fell within the scope of section 163(1) and that had the appellants been tried upon the original charge it was open to the court to have convicted them of larceny from the person as a minor offence. An offence carrying a maximum punishment of fourteen years imprisonment can only with difficulty be regarded as a minor offence but the term is to be construed in relation to the original more serious offence charged. Section 163(1) may be an attempt to reproduce the common law rule that a prisoner may be convicted of a less aggravated felony than the one charged provided the indictment contains words apt to include both offences : R. v. O'Brien (1911) 6 Cr. App. R. 108. The meaning of section 163, or its equivalent in various territories, has been the subject of a great deal of argument but we are prepared to accept that the alternative offence in the present case fell within the section.

The sections of the Criminal Procedure Code we have looked at can be said to provide instances where a Magistrate's Court may enter a conviction upon a charge to the trial of which in a Magistrate's Court the accused has not specifically consented. In such cases the legislature has authorised the court to act upon a consent given to some charge based on the same facts - not necessarily a more serious one, as it might be a matter of opinion, which section in Chapter 32 of the Penal Code created the more serious offence. Originally such a position would only be contemplated as arising after trial but the 1969 Criminal Procedure Code (Amendment) Ordinance passed the following new section :

> "198A. Where a person is charged with any offence and can lawfully be convicted on such charge of some other offence not included in the charge, he may plead not guilty of the offence charges, but guilty of such other offence.".

That is really what happened in the present case, except that the alternative count was prepared first, no doubt to enable the appellants to plead to it. We would indicate that the word "lawfully" in section 198A plainly refers to the situations we have been discussing and not to the presence or absence of a consent. Where an accused person having consented to trial on offence A may after trial be convicted of offence B without further consent the legislature has by section 198A enabled the same result to be achieved by a plea of guilty.

The point of distinction that is at once apparent is that in all the cases where the courts have been given these powers to convict of other offences, the other offences have not been charged; the phraseology everywhere is "although he was not charged with it". If the charge has been made, whether expressed to be in the alternative or otherwise, why should not the normal procedure be carried out. The answer is that it should: there is no reason to the contrary. But that is not quite the same question as whether the proceedings are necessarily a nullity if the question is not put to the accused a second time. In our opinion the better view is that where the plea of guilty is made under the authority of section 198A the proceedings are not a nullity unless a miscarriage of justice has resulted. It is only reasonable to interpret a plea of guilty to the alternative offence as an acknowledgement that the original consent to trial endured. The plea under section 198A would necessarily entail that the offence pleaded to be reduced to written words at some stage and it can hardly matter if this is done by the prosecution in advance to enable the plea to be taken.

The procedure has not occasioned any miscarriage of justice in the present case and the appeal is dismissed. We think it well to add a cautionary note. The use of the word "alternative" as applied to a count in a

charge is no guarantee that the charge so described is a true alternative in the sense that an accused could have been convicted of it even if it had not been reduced to a count. Such matters may result in devious and unnecessary arguments on points of law. The obvious and sensible approach is to ensure that no plea of guilty is accepted in the Magistrate's Court without the question of consent to trial (where appropriate) being put beyond doubt.

(Sgd.) T. Gould
Vice President

" C.C. Marsack
Judge of Appeal

" T. Henry
Judge of Appeal

SUVA,
November, 1977.