have been dismissed or amended, an adjournment being granted to appellant if necessary (see section 14 of Ordinance 4 of 1876). He did not take this course and I do not think defendant suffered any embarrassment or prejudice (see R. *v.* Thomson 4 C. App. Rep., p. 260).

The second point is that while the information avers that the harbouring took place at Koronubu and elsewhere the evidence relates only to harbouring at Rarawai. Both places are within the jurisdiction of the District Commissioner, but, though this does not appear in the evidence, counsel agree that they are 7 or 8 miles apart, and it is certainly remarkable that the discrepancy was not noticed at the hearing. What I have said as to the first point applies to this. Appellant's counsel in face of the evidence given proceeded with his defence and asked neither for a dismissal nor for a postponement, but called evidence to contradict that for the prosecution. Here again I do not think appellant suffered any embarrassment or prejudice. If he had been undefended or if his counsel had asked for an adjournment on the ground of being taken by surprise and this had been refused I should have been prepared to quash the conviction; as it is, it appears to me that there has been no substantial miscarriage of justice and that this is a case in which I should give effect to the proviso which was added to section 3 of the Appeals Ordinance 1903 by Ordinance 14 of 1916.

I therefore dismiss the appeal except as regards the penalty which is the maximum allowed by law. I reduce the fine to £10 and the term of imprisonment to three months.

In the circumstances I order each party to pay his own costs.

[APPELLATE JURISDICTION.]

[ACTION NO. 9, 1920.]

1921.
Jan. 25.

WALKER FOR THE RECEIVER-GENERAL *v.* CHOONILAL AND JADHAVJEE.

Conviction under Ordinance 10 of 1905 for unlawfully importing gunjah—penalty under section 3—fine or imprisonment—enforcement of—form of conviction—Receiver-General proper authority to lay information—cannot delegate such authority—no valid information before the Court—proceedings void *ab initio*.

C. S. DAVSON, C.J. This is an appeal from a conviction under Ordinance 10 of 1905 for unlawfully importing gunjah. Section 2 of the Ordinance makes it unlawful to import gunjah

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and certain other articles without the written consent of the Chief Medical Officer, and section 3 provides that any person so importing any of these articles shall be liable to fine or imprisonment.

There are several grounds of appeal, and I will take first those relating to the conviction, leaving to the end the first ground which relates to the information.

It was contended, in the first place that, as the two accused were tried together on one information, there should not have been two separate convictions. I do not agree; the penalty is imposed on each person convicted and each was liable to a separate penalty; no application for separate trials was made, nor do I see any reason for such a course, but the accused could have been tried separately.

It was further argued that the conviction (the two are in the same terms) is bad because it ordered that the fine should be levied by distress. In considering this point, a question has presented itself to me which was not dealt with at the hearing of the appeal and on which, therefore, I have not had the advantage of hearing counsel. The conviction, of course, must depend on the judgment. Now the judgment was "Fined £100 or 6 months imprisonment." If this judgment is good in form the conviction is not, for it should have been according to Form 14 of the Summary Jurisdiction Ordinance (No. 4 of 1876) instead of, as it is, according to Form 13. The section under which appellants were convicted provides that the convicted person shall be liable to a penalty or to imprisonment. In the Summary Conviction Offences Ordinance (5 of 1876) there are numerous sections imposing a fine and, in default of payment, imprisonment. It appears to me therefore, though I should have been glad to have heard the point argued, that Ordinance 10 of 1905 does not provide imprisonment in default of payment of the fine, but that the punishments are distinct and alternative. In that case the judgment should have been either:—

(*a*) a fine, which could have been levied by distress, or

(*b*) peremptory imprisonment.

If the judgment had been (*a*), the form of the conviction appealed against would have been the correct one, but the term of imprisonment (6 months) is excessive, the limit under section 51 of the Summary Jurisdiction Ordinance being 3 months. If the judgment had been (*b*), Form 15 would have been appropriate.

The conviction, further, orders each defendant to pay £23 13s., and it is not disputed that if this were done, the prosecutor would recover at least some of his expenses twice over, e.g., the cost of the attendance of a witness from Suva was £9 and each defendant was ordered to pay this; these expenses should have been apportioned.

It was further objected that a note had been added to the conviction, after the day of adjudication, to the effect that the sentence was to be cumulative on another sentence passed the same day for another offence under the same Ordinance. I do not consider this an irregularity if the Court so adjudged when sentence was pronounced, though I must point out that the record is silent as to this.

I now come to the evidence. It is contended that the evidence of Mr. Woolcott was irrelevant and inadmissible. With this I am inclined to agree but, seeing what that evidence is, would not quash the conviction on this ground.

Then it is said that there is nothing to show that the parcel in which the gunjah was sent to the analyst reached him intact. The parcel was sealed and it is hard to understand why the analyst was not asked the simple and obvious question "Were the seal and wrappings intact when you received the parcel." ? It happens, fortunately, that the seal itself was produced at the hearing of the appeal and it was then intact so this objection would not hold good, especially as appellants were represented, in the Court below, by counsel who did not cross-examine on the point.

It is objected generally that the conviction is against the weight of evidence. I am of a different opinion. Mr. Scott contended that, as regards Jadavjee at any rate, there was not sufficient evidence, as there must be some overt act proved in connection with the particular shipment; to allow this contention would be to make the Ordinance a dead letter. If the forbidden article is imported, the importer is liable.

As to the ground that the penalty was excessive, each case must be taken on its merits and I do not think the penalty was excessive in the circumstances.

In view of the course I propose to take on the first ground of appeal it was not, strictly, necessary for me to deal with any of these objections, but, having regard to the possibility of further proceedings in this case and the practical certainty of similar prosecutions in the future, I have thought it my duty to state the views of this Court on the points raised.

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The first ground of appeal is a technical one. The information is laid in the name of "Alfred Walker . . . . on behalf of the Acting Receiver-General," and it is contended that the Receiver-General could not delegate his authority to another. Under the Customs Ordinance 1881 (section 124) every prosecution must be in the name of the Receiver-General, and it may be said that this gives him an implied power to authorise another to institute proceedings in his name, but Ordinance 10 of 1905 is not the Customs Ordinance, nor is it to be read with that Ordinance. There are enactments which allow a complaint to be made by one person on behalf of another (e.g., section 3 of Ordinance 5 of 1876), but there is no such enactment in Ordinance 10 of 1905. The information could have been laid by Mr. Walker in his own name, but there is no law giving the Receiver-General a general power to authorise another to take proceedings.

Now, I have the greatest reluctance to quash a conviction on technical grounds where the facts appear to warrant a conviction. I am willing to go and have, in some cases, gone, to considerable length, so far as the law allows, in the direction of disregarding technicalities and amending defects and irregularities, but appellants have their rights and there are limits beyond which I am not prepared to go, my functions being those of a Court of Appeal and not those of a sort of judicial tinker.

I have come to the conclusion that I ought to quash the convictions on the first ground of appeal. Had this objection not been taken at the hearing, I should have been bound to ignore it by section 23 of the Appeals Ordinance 1903, but the objection was taken and over-ruled. The convictions are therefore quashed on the ground that there was no valid information before the Court, and therefore, as contended by appellants' counsel, the proceedings were void *ab initio*. The effect of this will be that fresh proceedings can be taken against the appellants in respect of the alleged offences; for a certificate of dismissal, which would be a bar to further proceedings, could only have been given by the Court below after hearing the evidence, and the appeal succeeds on the ground that there was no information on which evidence could be heard.