A **NAROTTAM KANJI UMARIA**

v.

REGINAM

[SUPREME COURT, 1962 (Hammett P.J.), 19th April, 4th May]

B

Appellate Jurisdiction

Criminal law—practice and procedure—absence of accused from trial—jurisdiction —Customs Ordinance (Cap. 166) ss.101,116—Criminal Procedure Code (Cap. 9) ss.155(1), 184, 191, 196.

Criminal law—practice and procedure—adjournment—refusal of—reasonable C *grounds—no application made at appropriate later stage—no application to set aside conviction—Criminal Procedure Code (Cap. 9) s.196.*

Criminal law—judgment—neglect by magistrate to include reasons—material on record sufficient for consideration on merits—defect not fatal—Criminal Procedure Code (Cap. 9) s.155(1).

The appellant was charged before a magistrate with two offences under the Customs Ordinance. When the case was called the appel- D lant was not present but counsel applied for an adjournment on his behalf on the ground that the appellant's wife was ill. The court, having been informed that the only witness for the prosecution was about to leave the jurisdiction, refused the adjournment. Having heard the prosecution evidence the magistrate convicted the appellant upon both counts, but did not set out his reasons for doing so in his E judgment.

Held: 1. Under section 191 of the Criminal Procedure Code the magistrate had jurisdiction to hear, in the absence of an accused person, a charge for an offence punishable with imprisonment for a term not exceeding six months and/or a fine not exceeding £50. The maximum punishment prescribed for the charged in the second count F (but not the first) exceeded these limits and the conviction and sentence on the second count must be quashed.

2. Though it would have been better if the magistrate had adjourned the case at the close of the evidence for the prosecution, no application for an adjournment at that stage was made, nor did the appellant apply under section 196 of the Criminal Procedure Code to set aside G the conviction. The appeal could not therefore succeed on this ground.

3. The record disclosing ample evidence to support the conviction on the first count, the neglect by the magistrate to give reasons in his judgment, was not a fatal defect.

H Criminal Procedure Code s.155(1): Every such judgment shall, except as otherwise expressly provided by this Code . . . contain . . . the decision thereon and the reasons for the decision . . .

Cases referred to : *Willy John v. R.* (1956) 23 E.A.C.A. 509 : *R. v. Lute* (1934) 1 E.A.C.A. 106 : *Samwiri Senyange v. R.* (1953) 20 E.A.C.A. 277.

Appeal from convictions by the Magistrate's Court. A

R. I. Kapadia for the appellant.

B. A. Palmer for the respondent.

HAMMETT P.J. : [4th May 1962]—

The Appellant was convicted by the Magistrate's Court sitting at Nadi on 6th March, 1962 of the following offences of which the Statements of Offence read : — B

First Count :

STATEMENT OF OFFENCE

Possession of undeclared dutiable goods contrary to section 101 of the Customs Ordinance, Cap. 166. C

Second Count :

STATEMENT OF OFFENCE

Failing to truly answer reasonable questions put to him by an officer of customs contrary to section 116 of the Customs Ordinance, Cap. 166. D

The sentence imposed by the Court below was as follows : —

"Sentence : —

Count 1 taken into consideration — fine on Count 2 £50 or 4 months — 1 month to pay. E

The Grounds of Appeal are as follows : —

1. That the learned Magistrate erred in hearing the case in the absence of Your Petitioner and convicting him.
2. That the learned Magistrate ought to have granted an adjournment in the interest of justice having regard to all the circumstances of the case. F
3. That the learned trial Magistrate failed to comply with the provisions of Section 155 of the Criminal Procedure Code.

When the case was called before the Court on 6th March, 1962 the Appellant was not present. Counsel appeared for the Appellant and asked for an adjournment, on the ground that the Appellant was absent due to the illness of his wife. The Court having been informed that the only witness for the prosecution was going away on 13th March, 1962 ruled that the case must go on and proceeded to hear the only prosecution witness, a Customs Officer. Counsel for the Appellant did not remain to hear the evidence of this witness or to cross examine him but applied for and was granted leave to withdraw. G H

The first ground of appeal concerns the question of jurisdiction.

The material part of Section 184 of the Criminal Procedure Code reads as follows :—

A " Except as otherwise expressly provided, all evidence taken in any . . . trial under this Code shall be taken in the presence of the accused . . ."

The material parts of Section 191 of the Criminal Procedure Code read :—

B " Notwithstanding the provisions of section 184 of this Code, if an accused person charged with any offence punishable with imprisonment for a term not exceeding six months and/or a fine not exceeding fifty pounds does not appear at the time and place appointed in and by the summons . . . the court may, . . . proceed to hear and determine the case in the absence of the accused . . ."

The maximum sentence prescribed for the offence charged in the First Count is a fine of £25, and the maximum sentence for the offence C charged in the Second Count is a fine of £200.

It is clear therefore that whilst the Court below had jurisdiction to hear the case against the Appellant in his absence on the First Count it had no jurisdiction to hear the case against him in his absence on the Second Count.

D The appeal against the conviction on the second count must therefore succeed.

The second ground of appeal concerns the refusal of the learned trial Magistrate to adjourn the hearing of the case. The record shows that he refused to grant the application for an adjournment because the only witness for the prosecution, a Customs Officer, was due to go away within a few days. In these circumstances I consider a Court E is perfectly entitled to decline to adjourn the hearing of the whole case. Nevertheless it would have been better if, after hearing the evidence of the witness who was about to go away the Court had entertained a further application to adjourn the hearing so as to enable the Appellant to appear and be heard at a later date. The Appellant was represented by Counsel who did however choose not F to make any such application, and in these circumstances it was not unreasonable for the Court below to assume that no such adjournment was sought.

At no stage either in the Court below or at the hearing of this appeal was it ever suggested by Counsel for the Appellant that there was a bona fide defence on the merits open to the Appellant. It is also pertinent to refer to Section 196 of the Criminal Procedure Code G which reads as follows :—

" If the court convicts the accused person in his absence, it may set aside such conviction upon being satisfied that his absence was from causes over which he had no control, and that he had a probable defence on the merits."

H If the Appellant did have a defence on the merits it was open to him to apply to the Court below to set aside the conviction which had been recorded in his absence and to show that he had a probable

defence on the merits. No such application has ever been made and it would therefore appear that he did not have a probable defence on the merits.

In these circumstances I do not consider there are any merits in the second ground of appeal. A

The third ground of appeal concerns the form in which the Court's Judgment was recorded. This was in an abbreviated form which merely found the Appellant guilty and convicted him on each count, without setting out the Court's reasons for doing so. It is well established that although a judgment should contain the reasons for the decision and should comply with the relevant provisions of the Criminal Procedure Code, failure to do so is not of itself necessarily fatal to a conviction if there is sufficient material on the record to enable the appeal Court to consider the appeal on its merits. See *Willy John v. Reginam* (1956) 23 E.A.C.A. 509. *Rex v. Lute* (1934) 1 E.A.C.A. 106 and *S. Senyange v. Reginam* (1953) 20 E.A.C.A. 277. B C

In the present case the unchallenged evidence of the only witness for the prosecution showed that the Appellant arrived by air at Nadi Airport on 22nd December, 1961. He was found in possession of certain undeclared dutiable goods shortly after he had, to a Customs Officer, falsely declared that he was not in possession of any such articles. There was ample evidence which, if believed—and it clearly was believed—supported the conviction on the first count. The omission of the learned trail Magistrate to record formally the reasons for his decision and strictly to comply with the provisions of Section 155 (1) of the Criminal Procedure Code was not therefore a fatal defect. D

For these reasons the appeal against the conviction on the first count is dismissed. The conviction on the second count is however quashed and the sentence passed thereon is set aside. E

Appeal on first count dismissed. Appeal on second count allowed — conviction and sentence set aside.