A

RAVINDRA CHANDRA

v.

REGINAM

B [SUPREME COURT, 1968 (Moti Tikaram Ag. P.J.), 27th February, 11th April]

Appellate Jurisdiction

Criminal law—charge—particulars of offence—omission of words "with intent to do some grievous harm"—charge defective but not a nullity—Penal Code (Cap. 8—1955) s.250(a)—Criminal Procedure Code (Cap. 9—1955) ss.120, 123(a)/(i), (ii), (iii), 325 (1).

C *Criminal law—practice and procedure—minor cognate offence—accused charged with "Acts Intended to Cause Grievous Harm"—convicted of "Unlawfully Doing Grievous Harm"—unnecessary to enter formal acquittal on original charge—Penal Code (Cap. 8—1955) ss.250 (a), 253—Criminal Procedure code (Cap. 9—1955) ss.155, 164 (1) (2), 206.*

D

In a charge of "Acts Intended to Cause Grievous Harm" contrary to section 250 (a) of the Penal Code the omission from the "Particulars of Offence" of the words "with intent to do some grievous harm," do not render the charge a nullity but merely defective and therefore curable under section 325 (1) of the Criminal Procedure Code.

E Where a person is charged with an offence against section 250 (a) of the Penal Code, it is open to the trial court, under section 164 of the Criminal Procedure Code, to convict him of unlawfully doing grievous harm contrary to section 253 of the Penal Code provided such a course is justified by the evidence. The latter offence is a minor or lesser offence in relation to an offenec under section 250 (a).

F In convicting an accused person of a minor offence under the provisions of section 164 of the Criminal Procedure Code, it is not necessary for the magistrate formally to acquit the person of the offence originally charged.

Cases referred to: *R. v. McVitie* [1960] 2 Q.B. 483; [1960] 2 All E.R. 498: *R. v. Franks* [1950] 2 All E.R. 1172n; 34 Cr. App. R. 222: *Vijay* G *Singh v. Reginam* (1967) 13 F.L.R. : *R. v. Yule* [1964] 1 Q.B. 5; (1963) 47 Cr. App. R. 229: *Police v. Wyatt* [1966] N.Z.L.R. 1118: *Attorney-General v. Vijay Parmanandam* (1968) 14 F.L.R. 6.

Appeal against conviction and sentence in the Magistrate's Court.

A. H. Sahu Khan for the appellant.

H

K. A. Stuart for the respondent.

MOTI TIKARAM J.: [11th April, 1968]—

The Appellant who pleaded not guilty was tried before the First Class Magistrate's Court sitting at Tavua on the following Charge:

Statement of Offence

ACTS INTENDED TO CAUSE GRIEVOUS HARM: Contrary to Section 250(a) of the Penal Code, Cap. 8.

Particulars of Offence

RAVINDRA CHAND s/o Pyre Lal, on the 12th day of September, 1967 at Yasi Yasi, Tavua in the Western Division, assaulted Bokini Rabenici causing him grievous harm.

He was not convicted under Section 250(a) of the Penal Code but was found guilty and convicted under Section 253 of the Code by virtue of the provisions of Section 164 of the Criminal Procedure Code, Cap. 9. The appellant was sentenced to twelve months' imprisonment.

The Appellant now appeals against conviction and in the alternative against sentence.

At the trial in the Court below, the Appellant was represented by his Counsel, Mr. S. Sahu Khan, Junior, who now also appears on behalf of the Appellant. No objection to the form of charge was taken either at the commencement or during the trial or at the close of the Prosecution's case. No application for any particulars was made at any stage. However, at the end of the Defence case the Learned Counsel for the Accused submitted, *inter alia*, that the Charge was bad in law in that it did not disclose any offence known to law.

The Learned Trial Magistrate obviously relying on the authority of *Regina v. McVitie* [1960] 2 All E.R. 498 dealt in his reserved Judgment with the point of law raised in the following way —

" . . . . Now comes the point of law which was submitted by Counsel claiming that the charge is bad in law and therefore it discloses no offence. He referred to the case of *R. v. Franks* [1950] 2 All E.R. 1172. This case is not fully reported and it is not clear on what ground the Court held that the charge was bad in law.

Section 123(a) (i), (ii) and (iii) of Criminal Procedure Code as follows :-

123.

(a) (i) a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence;

(ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;

(iii) after the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary: (Proviso omitted).

The present charge in my view conformed to these provisions of the Criminal Procedure Code save only in one respect i.e. the words "with intent to do some grievous harm" should have been included.

When these words are included the particulars of offence should read as follows :

> 'Ravindra Chand s/o Pyre Lal, on the 12th day of September, 1967 at Yasi Yasi, Tavua in the Western Division, with intent to do some grievous harm assaulted Bokini Rabenici causing him grievous harm.'
>
> or better still
>
> 'Ravindra Chand s/o Pyre Lal, on the 12th day of September, 1967 at Yasi Yasi, Tavua in the Western Division with intent to do some grievous harm to Bokini Rabenici unlawfully wounded the said Bokini Rabenici.'

In my view the omission on the part of the Prosecution to include the words 'with intent to do some grievous harm' does not make the charge a bad charge in the sense of disclosing no offence known to the law, but merely defective or imperfect one in that it described a known offence with incomplete particulars, in other words, it described the offence with complete accuracy in the 'Statement of Offence', only the particulars which merely elaborate the 'Statement of Offence' were incomplete.

But the Prosecution has not indicated to the Court even in the address that they are alleging the necessary 'intent' on the part of the Accused. There is no doubt that that intent can be inferred from the facts before the Court but I am not sure whether the Prosecution is alleging that the Accused had that 'intent'.

On the evidence before this Court there is no doubt that the Prosecution has established a case against the Accused under Section 253 of the Penal Code. The question now is whether the Accused can be convicted under that Section. Section 164 of the Criminal Procedure Code gives the Court power to convict on a lesser charge and offence under Section 253 is a lesser charge and I have already held that the charge under Section 250 (a) is not a bad charge but merely a defective one.

The Court is satisfied that the Accused unlawfully did grievous harm to Bokini and therefore he is found guilty of that offence and he is convicted under Section 253 of the Penal Code."

The Grounds of Appeal contained in the Petition of Appeal are as follows : -

"1. That the learned trial Magistrate erred in law and in fact in accepting evidence of the Prosecution witnesses Bokini Rabenici, Louisa, Lote, Shiu Lingam, Samu and Josepha inasmuch as their evidence presented such inconsistencies and contradictions and were so unreliable that they should have been disregarded altogether having regard to the evidence as a whole.

2. That the learned trial Magistrate erred in law and in fact in holding 'I cannot find any contradictions. Even if there are they are minor ones and not material. The Prosecution witness Vereka was not a very intelligent witness and he might have

differed from other prosecution witnesses in some respects but these differences in my view,' inasmuch as there were material contradictions and inconsistencies in the evidence of the Prosecution witnesses. A

3. That the verdict and the findings of the learned trial Magistrate are inconsistent in the following particulars :-

   (a) The learned trial Magistrate held 'after considering the whole of the evidence and directing myself as stated above I am satisfied beyond all reasonable doubt that the B wounds inflicted on Bokini by the accused were not inflicted in self defence.' But later the learned trial Magistrate held 'But the Prosecution has not indicated to the Court even in the address that they are alleging the necessary 'intent' on the part of the accused. There is no doubt that the intent can be inferred from the facts before the Court but I am not sure whether the Prosecution is alleging C that the accused had that intent.'

   (b) The learned trial Magistrate held 'I hold all the Prosecution witnesses to be truthful witnesses. There is abundant evidence to support a clear case for the Prosecution. The Prosecution case is clearly made out on the evidence of Bokini, Shiu Lingam, Louisa and Lote alone, all of D whom were truthful and thoroughly reliable witnesses. 'But later the learned trial Magistrate found the accused not guilty of the offence as charged namely under Section 250 of the Penal Code but guilty of the offence under Section 253 of the Penal Code.

4. That the learned trial Magistrate erred in law and in fact in holding that the accused tethered the cattle on Bokini's land. E

5. That the learned trial Magistrate erred in law and in fact in not properly directing himself and considering the defence of self defence raised by the Accused.

6. That the learned trial Magistrate erred in law and in fact in F holding 'The present charge in my view conformed to these provisions of the Criminal Procedure Code Section 123(a) (i) (ii) and (iii) save only in one respect i.e. the words 'with intent to do some grievous harm' should have been included . . . . 'in my view the omission on the part of the Prosecution to include the words 'with intent to do some grievous harm' does not make the charge a bad charge in the sense of disclosing no offence G known to the law, but merely defective or imperfect one in that it described a known offence with incomplete particulars in other words it described the offence with complete accuracy in the statement of offence; only the particulars' which merely elaborate the statement of offence were incomplete.'

7. That the learned trial Magistrate erred in law in convicting the H appellant inasmuch as the charge and/or information disclosed no offence in law.

7a. That the learned trial Magistrate erred in law in convicting the Appellant under Section 253 of the Penal Code, Cap. 8 inasmuch as (a) the learned Magistrate had not acquitted the Appellant under Section 250(a) of the Penal Code as charged; (b) the learned Magistrate had no jurisdiction to convict under Section 253 of the Penal Code.

8. That the verdict of the learned trial Magistrate in unreasonable and cannot be supported having regard to the evidence as a whole.

9. That the sentence imposed by the learned trial Magistrate is harsh and excessive.

For obvious reasons it would be more convenient to deal with grounds 6, 7 and 7(a), (b) first. Grounds 6 and 7 can be dealt with together. An intent to maim, disfigure or disable or to do some grievous harm to any person is an essential ingredient of the offence created by Section 250(a) of the Penal Code. Where the Crown alleges that the victim was grievously harmed it has to prove not only that the victim was grievously harmed but also that the act causing such harm was accompanied by an intent to maim, disfigure or disable or to do some grievous harm as the case may be. Under Sub-section (a) of Section 250 it is open to the Crown to merely prove unlawful wounding provided one of the intents as set out in the Section is also alleged and proved.

The form of a charge is regulated by the Criminal Procedure Code, Section 120 of which provides:

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

By virtue of Section 123(a) (i) and (ii) the Statement of Offence is to be set out first and the Particulars follow.

In this case the Statement of Offence, namely "Acts Intended to Cause Grievous Harm Contrary to Section 250(a) of the Penal Code, Cap. 8" does describe with accuracy the nature of the offence alleged and the Section under which the offence arises. I emphasise the words "Acts Intended." However, there is no doubt that the Particulars of Offence are incomplete in that no reference is made to the ingredient of intent.

The question is whether this omission makes the Charge incurably bad or that the charge is so defective that it does not disclose any offence known to law. If the Charge is merely defective and no one was misled, deceived or prejudiced by reason or inadequate particulars then it cannot be suggested that any substantial miscarriage of justice has occurred, and this Court would be entitled in its discretion to apply the proviso to Section 325(1) of the Criminal Procedure Code which Proviso reads as follows :

" . . . . . Provided that the Supreme Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

But if Counsel for the Appellant is correct in arguing that by reason of the failure to allege the ingredient of intent in the Particulars of Offence, the Charge was rendered a nullity, then there would be such a miscarriage of justice and this Court would not be entitled to apply the proviso for nullity is something which cannot be cured and cannot support a conviction. However, it is important to note in this case that the Appellant in fact was not convicted under Section 250 (a) of the Penal Code.

I have given careful consideration to the submissions of Learned Counsel for the Appellant and have also borne in mind the decisions and authorities he has cited. A similar point was raised and argued before the Fiji Court of Appeal in *Vijay Singh v. Regina,* Criminal Appeal No. 25 of 1967. In the course of their Judgment their Lordships said:

> "Similar questions have been considered in a number of cases. We were referred to *R. v. McVitie* [1960] 2 All E.R. 498, in which the statement of offence was 'Possessing explosives contrary to Section 4 (1) of the Explosive Substances Act 1883' which makes it a felony 'knowingly' to have in a person's possession explosive substances in particular circumstances. The word 'knowingly' was omitted from the particulars of the offence but the Court of Criminal Appeal, consisting of five judges held that the omission did not make the indictment bad but only defective or imperfect. It was therefore lawful, no substantial miscarriage of justice having occurred, to apply the proviso. *McVitie's* case was followed in *R. v. Yule* (1963) 47 Cr. App. R. 229.
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> The New Zealand Court of Appeal very recently decided a second appeal in a somewhat similar case — *Police v. Wyatt* [1966] N.Z.L.R. 1118 — in which it was argued that merely to charge careless driving was not enough, and that particulars of the negligence must be set out. The argument was rejected and North P. said, at page 1129 — 'Plainly if the information is defective the proper course is to require the prosecution to give further particulars, and only if the necessary particulars are refused should dismissal be contemplated'. McCarthy J. pointed out (page 1132) that though the relevant legislation gave no express power to order further particulars it was conceded that the Court had that power inherently and also power to dismiss should its directions be ignored.
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> We have no doubt that the present case is one which falls within the principle enunciated in the *McVitie* case. The statements of the offences, 'Failed to stop after an accident' and 'Failed to report an accident' followed in each case by reference to the relevant section, state the offences alleged with sufficient accuracy. The use of the word 'vehicle' in the particulars was a defect, but it was nevertheless a term which, as defined, included motor vehicles; it was not something which could not possibly fall within the section such as (to resort to an extreme example) a bullock. Section 123 (a) (iii) of the Criminal Procedure Code requires only that the particulars be set out in ordinary language so as to give the 'reasonable information as to the nature of the offence charged'. If the appellant desired further information he could have applied for further particulars, but, in fact, he was under no misapprehension. We are accordingly satisfied that this argument cannot prevail and was rightly rejected in the Supreme Court."

I adopt the reasoning and principle applied in Vijay Singh's case (supra) and hold that the Charge as originally laid in the Court below was merely defective and not incurably bad or a nullity. The words used in the Statement of Offence entirely militate against any suggestion that the Appellant might have been misled, deceived or in any way prejudiced or embarrassed in his defence.

Further, no miscarriage of justice or prejudice has in fact or could have been occasioned in this case because the Appellant was in fact not convicted under Section 250(a). For reasons given, I invoke the proviso to Section 325 of the Criminal Procedure Code and dismiss the grounds of appeal contained in paragraphs 6 and 7 of the Petition of Appeal.

I now turn to grounds 7(a) and 7(b) of the Appeal. As the question of jurisdiction has been raised under 7(b) it is obviously desirable that I should deal with that ground of appeal first. Section 164 of the Criminal Procedure Code provides as follows:

> "164(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."

I hold that on a charge under Section 250(a) of the Penal Code it is open to the Trial Court to convict an Accused person under Section 253 by virtue of the provisions of Section 164 of the Criminal Procedure Code, provided such a course is justified by the evidence before the Court, notwithstanding that the Accused was not charged under Section 253. This is so because an offence contrary to Section 253 of the Penal Code is, in my view, a minor or a lesser offence in relation to an offence under Section 250(a) because —

(I) on a charge under Section 253 it is not incumbent on the prosecution to either allege or prove that the doing of the unlawful grievous harm was accompanied by intent to do such harm;

(II) that conviction under Section 253 of the Penal Code carries a lesser maximum punishment, that is seven years as against life imprisonment provided for by Section 250 of the Penal Code; and

(III) that the offence created by Section 253 of the Code is of a cognate character to an offence under Section 250 of the Code.

In support of my view I cite with respect and approval the construction placed on Section 164 of the Criminal Procedure Code by his Lordship the Chief Justice of Fiji (Hammett C.J.) in the recent appeal case — *Attorney-General v. Vijay Parmanandam* (1968) 14 F.L.R. 6 — wherein His Lordship observed as follows:

> "In my view an offence cannot be regarded or treated as a 'minor offence' under Section 164 of the Criminal Procedure Code of Fiji unless it has at least the two following characteristics:
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> *Firstly*—That it is an offence of a cognate character to the offence actually charged, and

Secondly—That it is a less grave offence than the offence actually charged, in the sense that it carries a lower maximum punishment upon conviction than that carried by the offence actually charged. A

In addition to this, however, it is essential to note the two different classes of case which are covered by sub-sections (1) and (2) of Section 164 respectively, with reference to 'minor offences'.

Under subsection (1) a person can only be convicted of a 'minor offence' not charged where a combination of some only of the several particulars, which go to make the offence charged, are proved, and the combination of the particulars which are proved constitutes the complete minor offence. B

Under subsection (2) however there is the distinction that if the facts which are actually proved reduce the offence charged to a minor offence the accused can be convicted on the minor offence although he was not charged with it." C

I, therefore, hold that the Learned Trial Magistrate had jurisdiction to convict under Section 253 of the Penal Code. He obviously was not satisfied that the Prosecution had satisfactorily proved that the Appellant had acted with an intent to do grievous harm, although he was satisfied that all the ingredients under Section 253 had been proved.

As regards the complaint contained in ground 7(a) that the Learned Trial Magistrate had erred in law in convicting the Appellant under Section 253 in that he had not acquitted the Appellant under Section 250(a), it is, in my view, not necessary for the trial Magistrate to formally acquit an accused person if he is convicting him of a lesser offence by virtue of the provisions of Section 164 of the Criminal Procedure Code. It is sufficient if the Magistrate indicates that he finds the charge as laid not proved but the Accused is guilty of the lesser offence so long as he complies with the relevant provisions of Section 155 and Section 206 of the Criminal Procedure Code. Sub-sections (1) and (2) of Section 155 provide as follows : D E

(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the court in English, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it : F

Provided that where the accused person has admitted the truth of the charge and has been convicted, it shall be a sufficient compliance with the provisions of this subsection if the judgment contains only the finding and sentence or other final order and is signed and dated by the presiding officer at the time of pronouncing it. G

(2) In the case of a conviction the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced. H

In my view, the learned Magistrate has in substance complied with these sub-sections. Sub-section (3) of Section 155 provides as follows :

"In the case of an acquittal the judgment shall state the offence of which the accused person is acquitted and shall direct that he be set at liberty."

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In this case there was no question of a finding of not guilty simpliciter because the Learned Trial Magistrate proceeded to convict the Appellant of a lesser offence by virtue of powers conferred upon him by Section 164 of the Criminal Procedure Code. A formal order of acquittal in this case would have entailed compliance with the consequential requirement that the Magistrate shall direct that the accused be set at liberty. This B would have been a self-defeating course for the Learned Magistrate to adopt in the particular circumstances of this case. Furthermore, an order of acquittal may possibly support a plea of autrefois acquit. Section 206 of the Criminal Procedure Code provides as follows:

"The court having heard both the prosecutor and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to C law or shall acquit him or make an order under the provisions of Section 38 of the Penal Code."

The Court below, in my view, has not in any way contravened the provisions of this Section either.

The Learned Counsel for the Appellant also argued during the hearing of this Appeal that the Learned Magistrate erred in law in not specifying D the Subsection of Section 164 of the Criminal Procedure Code he was acting under. In my opinion it is desirable but not incumbent on the Trial Magistrate to specify whether he is invoking Subsection (1) or Subsection (2) of Section 164 of the Criminal Procedure Code. As long as authority or jurisdiction exists in law, non-citation of the source of authority or jurisdiction does not and cannot in any way vitiate the judgment.

E

I therefore find no merit in the grounds urged in 7(a) and 7(b) and they must also fail.

As regards the complaint contained in paragraph 5 of the Petition namely, that the Trial Magistrate did not properly direct himself in considering the defence of self-defence, I can find no substance in the argument advanced. I find that the Learned Trial Magistrate dealt with F the question of self-defence adequately and proceeded on the right principles in approaching the question of onus. This ground of appeal must also, therefore, fail.

The remaining grounds of appeal merely supply particulars of the complaint contained in ground 8 of the Petition. In my view there was ample evidence if accepted, and it was accepted, for the Learned Trial Magistrate to arrive at the conclusion he did. The Learned Trial Magis- G trate was not unmindful of certain inconsistencies and he has referred to them in his judgment. He was in my view, perfectly entitled to treat them as being of no special significance. The appeal against conviction must therefore fail on the remaining grounds also.

As regards appeal against severity of sentence, I am not persuaded, having regard to the type of weapon used and the extent of injuries inflicted, that the sentence of twelve months imprisonment was in any H way excessive. Neither is it wrong in principle.

Appeal against conviction and sentence dismissed.

Appeal dismissed.