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HARI PRATAP

v.

REGINAM

B [COURT OF APPEAL* 1968 (Gould V.P., Trainor J.A., Knox-Mawer J.A.), 14th, 22nd May]

Criminal Jurisdiction

Criminal law—practice and procedure—amendment of charge in Magistrate's Court—addition of alternative counts—on amendment plea taken to new counts only—
C *whether new plea to original counts necessary—whether application of "proviso" appropriate when new plea not taken—Penal Code (Cap. 8—1955) s.374(a)—Criminal Procedure Code (Cap. 14—1967) ss.120, 121, 123, 204, 300(1)—Criminal Procedure Ordinance (Nigeria—Cap. 43) s.164(4).*

Criminal law—plea—amendment of charge in Magistrate's Court—additional counts—necessity of taking new plea on original counts—effect of neglect to take—proceedings a nullity—application of "proviso" inappropriate—Criminal Procedure Code (Cap. 14—1967) ss.204, 300(1).

D *Interpretation—criminal law—meaning of expression "altered charge"—Criminal Procedure Code (Cap. 14—1967) s.204(1).*

The appellant was tried in the Magistrate's Court on four counts of receiving money on a forged document. During the trial the prosecution was given leave to add four alternative counts, which were read and explained to the appellant and to which he pleaded not guilty. He had
E already pleaded not guilty to the original counts and was not asked to plead to them again. He was convicted by the magistrate on the four original counts (one conviction being quashed in the Supreme Court on appeal) and not on the alternative counts. Proviso (a) of section 204 (1) of the Criminal Procedure Code provides that where a charge is altered the court shall thereupon call upon the accused to plead to the altered charge.

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Held: 1. By virtue of sections 120 and 121 of the Criminal Procedure code the word "charge" means something which contains statements of the sum total of the offences which are intended to be tried together, each offence being set out in a separate count.

G 2. Reading section 204 in the light of sections 120 and 121 of the Criminal Procedure Code, the expression "altered charge" in proviso (a) of Section 204 (1) means, where additional counts have been added to the charge, the whole of the charge as altered, and not merely the additional counts.

H * The judgment of the Court of Appeal in this case was reversed by the Privy Council in Privy Council Appeal No. 10 of 1969 (unreported), where it was held that the word "charge" in section 204 of the Criminal Procedure Code had been used with a dual meaning. The phrase "altered charge" in proviso (a) meant "any count which has been amended or substituted or added to the original defective formal charge."

3. As no plea was taken at the time of the amendment to the original counts the appellant was not properly before the court and the proceedings were null and void : the defect being fundamental the proviso to section 300 (1) of the Criminal Procedure Code could not be applied.

Cases referred to : *Eronini v. The Queen* (1953) 14 Selected Judgments of the West African Court of Appeal 366: *Fox v. Commissioner of Police* 12 Selected Judgments of the West African Court of Appeal 215: *R. v. McVitie* [1960] 2 Q.B. 483; [1960] 2 All E.R. 498: *R. v. Thompson* [1914] 2 K.B. 99; 9 Cr. App. R. 252.

Appeal from a judgment of the Supreme Court sitting in appellate jurisdiction.

Appellant in person.

B. A. Palmer for the respondent.

The facts sufficiently appear from the judgment of the Court.

Judgment of the Court (read by GOULD V.P.) : [22nd May, 1968]—

The appellant was convicted by the Magistrate's Court sitting at Labasa on each of four counts of receiving money on a forged document contrary to section 374 (a) of the Penal Code (Cap. 8 Laws of Fiji 1955; now Cap. 11 s.381 (a) Laws of Fiji, 1967) and sentenced to six months' imprisonment on each count, to run consecutively. Another accused person tried jointly on the same counts was acquitted on all of them. The appellant appealed to the Supreme Court, which, by reason of a weakness in the chain of evidence on the third count, quashed the conviction on that count, but sustained the other three. After the appeal in the Supreme Court, the learned Chief Justice reviewed the sentences passed by the magistrate and, having considered the appellant's criminal record, increased the sentence on each of the counts 1, 2 and 4 to twelve months' imprisonment.

In the Magistrate's Court proceedings the appellant appeared in person. After commencing his appeal to the Supreme Court he at first declined the legal assistance which was offered to him, but later agreed to accept and was granted legal aid. It would appear that he has, at some time, had some experience as a lawyer's clerk. From the Supreme Court decision the appellant brought the present appeal, again, by his own choice conducting the appeal in person. As the appeal to this court, from the Supreme Court in its appellate jurisdiction, is confined to questions of law, the task was in fact one beyond the capability of the appellant. He made frequent references to matter not on the record of appeal and his submissions, some of which he was permitted to make in writing, were sometimes scandalous in character. Our perusal of the record of proceedings in the Supreme Court shows that the appellant's complaints were fully and patiently investigated there, and that his counsel had, on instructions, withdrawn applications to supplement the record for the purpose of impugning the motives of the trial magistrate. One aspect of the proceedings in the Magistrate's Court, however, has caused us serious concern. It appears, partly by implication, from Ground 2 of the Notice of Appeal, which reads : -

> "The Learned Appellate Court Judge erred in allowing convictions to stand on 3 counts and overlooked miscarriage of justice occurred while at the joinder of the alternative counts plea and consent was

not taken and the provisions of Section 204 of C.P.C. Cap. 9 Laws of Fiji was borne by the learned Magistrate in mind but only part of it were applied and the rest ignored whereby the appellant has been deprived and deceived of his rights and the trial is at nullity."

This ground has reference to events which took place on the third day of the proceedings before the magistrate. At 2.20 p.m. the prosecutor stated that he wished to add four alternative counts; the record reads —

"Chandra :

I wish to add 4 alternative counts. I will not wish to adduce further evidence from witnesses already called.

1st Accused : Object. Case has been pending for last three months. Take by surprise.

Chauhan :

Object. Late stage. Material witnesses already heard. Taken defence by surprise.

Court :

Bearing in mind the provision of s.204, C.P.C. I will grant leave to add these 4 alternative charges. Every prosecution witness who has been called must be recalled for cross examination if 1st accused or Counsel for 2nd accused so wishes."

A witness, Uma Kant, was then called and gave evidence of considerable importance to the chain of proof. Then, the same afternoon, the following appears in the record —

"Court :

I have forgotten to comply with S.4 (1) C.P.C. in relation to the alternative counts.

All four alternative charges read and explained in English and Hindustani. Both Accused say they understand.

Right of trial by Supreme Court and provisions of S.211A C.P.C. explained.

1st Accused :

I wish to be tried by this Court on all of the 4 alternative counts.

2nd Accused :

I wish to be tried by this Court on all of the 4 alternative counts.

1st Accused :

I plead not guilty to all of the 4 alternative counts.

2nd Accused :

I plead not guilty to all of the 4 alternative counts."

It transpires that the four counts charged the appellant with forgery and were expressed to be alternative to the original counts. In the event, the magistrate convicted the appellant upon the original four counts, but not on the alternative ones.

One question which arises from the course which the proceedings took, and which was considered in the Supreme Court is what is the effect of the interval between the granting of leave to add the alternative charges and their being read and explained to, and pleaded to by, the two accused who were then before the court. If the amendment took place on the earlier occasion there is authority for saying that the evidence (which was material) given after the amendment and prior to the plea was a nullity — *Eronini v. The Queen* (1953) Vol. 14 Selected Judgments of the West African Court of Appeal 366. As a matter of inference from the record and the surrounding circumstances, the learned Chief Justice held that the charge was not amended until the time when the four additional counts were read out in open court. We do not propose to examine this finding but proceed to the next question which was decided by the learned Chief Justice.

It arises from the fact that, when the accused were asked to plead upon the amendment, they pleaded only to the four additional counts, and were not asked and did not plead again to the original four. The submission of counsel for the appellant in the Supreme Court, that this was fatal to the trial, is summarized in the judgment of the learned Chief Justice, as follows :-

> "This contention is based on the wording section 204 (1) of the Criminal Procedure Code and with special reference to the meaning of the word "charge" in that section.
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> It is submitted that on a criminal trial in the Magistrate's Court there can only be one charge. In this connection reference is made to section 121 of the Criminal Procedure Code. It seems clear to me that there can only be one charge before the Court at a trial. If more offences than one are charged, whether in the alternative or not, they must be made the subject of separate counts in the charge. It is contended that if there is any alteration in one of several counts in a charge, or if other counts are added to the charge, the charge itself is altered. The altered charge in this case consists of the original counts and the new counts that have been added. It is the case for the Appellant that it is this "whole" altered charge to which the accused should have been called upon to plead after the additional counts had been added, and not merely the additional counts."

It will be convenient at this stage to set out the relevant provisions of the Criminal Procedure Code (Cap. 14 — Laws of Fiji, 1967). They are :-

> "120. 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.
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> 121. (1) Any offences, whether felonies of misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts or form, or are part of, a series of offences of the same or a similar character.

121. (2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a paragraph of the charge or information called a count.

204. (1) Where, at any stage of the trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that —

(a) where a charge is altered as aforesaid, the court shall thereupon call upon the accused person to plead to the altered charge;

(b) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his barrister and solicitor and, in such last-mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination."

The Criminal Procedure Code does not define the word "charge" but it is obvious that the question of the construction of section 204 (1) must be approached in the light of the earlier sections quoted, which show that a charge is something which contains statements of the sum total of the offences which are intended to be tried together. Each offence is to be set out in a separate count. That a charge is to be in writing is indicated by the rules for framing charges contained in section 123.

When one looks at section 204 with this background it is clear that, with one exception, the comprehensive meaning attaching to the word "charge" by reason of the earlier sections is fitting and appropriate. The exception is in the words permitting alteration of the charge "by the . . . addition of a new charge." There appears to be no specific provision in the Criminal Procedure Code to the effect that not more than one charge is to be tried at one time, which, of course is the universal rule. But in any event the addition of a new charge, in the sense of section 121, would not be the "alteration" of an existing charge. Therefore if "addition of a new charge", is to have any meaning at all, it must be read as "addition of a new count." The question is whether that consideration entitles the court to construe the word "charge" as "count" where it appears in proviso (a) to the section. The learned Chief Justice arrived at the conclusion that it did so by reasoning expressed in the following passage from his judgment —

"In my view, therefore, the words in section 204 — "the court may make such order for the alteration of the charge . . . by way of . . . addition of a new charge" must intend and mean "the court may make such order for the alteration of the charge . . . by way of . . . addition of a new count to the charge."

In other words in this section the word "charge" must there be used as and be interpreted as the word "count to the charge," if section 204 is to be construed properly and consistently with section 121.

> The first proviso to section 204 appears to me to cover, as it stands, the case where a charge, consisting of one count charging one offence, is altered. In such a case the accused must be called upon to plead to this altered "charge." Where, however a charge contains several different counts, I construe the word "Charge" in the first proviso to section 204 (1) to mean and have reference to "a count in a charge." After giving this matter careful consideration and bearing in mind the cardinal principles that the Court must apply to the construction of statutes, I cannot think of any other construction to which this proviso can be open, if it is to be construed consistently both with itself and with section 121 of the Code."

This view of the section was adopted by Crown Counsel in argument before this court, but with great respect, we take the view that this is not the correct interpretation. Where there is only one offence contained in a charge it may be amended by a change in its own wording, the substitution of another offence or the addition of one or more counts. We feel that where the learned Chief Justice refers to "a charge, consisting of one count charging an offence" he visualizes it being amended only in its particulars or by substitution. Then the direction to call upon the accused person to plead to the "altered charge" can only mean plead to the resultant varied or new charge. But where it is amended by the addition of another count surely the "altered charge" is the original charge as altered by the addition. We do not see that any difference arises whether there is only one offence contained in the original charge or whether there are two or more.

Section 204 clearly embraces in the concept of alteration, variation, substitution and addition. Whichever course is taken, it is the original charge which is altered. When you add material to an existing object it is the existing object which is altered — it is not the new material. When you add a count to an existing charge it is not the new count which is altered, but the existing charge. We see no escape from the plain meaning of the words "altered charge" in proviso (a) and do not find anything that can be drawn from the one anomaly in the earlier part of the section, of sufficient weight to affect what we consider to be the only possible construction of the proviso.

It is idle to speculate upon the underlying reason for the provision. Where an accused person has pleaded not guilty to a number of counts in a charge he is at liberty to change his plea to "guilty" at any time so the provision offers him no advantage. On the other hand it does appear to afford him the opportunity, where he has pleaded "guilty" to some counts and "not guilty" to others of reversing his plea of "guilty." That is just. If an accused person has pleaded guilty to counts (a) and (b) and not guilty to counts (c) and (d) of a charge, he is surely entitled to reconsider his position if the prosecutor then proposes to add two new counts.

In our judgment the result of the failure to take the appellant's plea to the whole charge upon the amendment is that the proceedings thereafter became a nullity. On not dissimilar legislation in Nigeria a similar conclusion was reached in *Fox v. Commissioner of Police* Vol. 12 Selected Judgments of the West African Court of Appeal at p.215 and *Eronini v. The Queen* (supra). It is true that the Criminal Procedure Ordinance (Cap. 43) which was the legislation which applied, contains a provision in

section 164 (4) that "when a charge is so amended . . . the charge shall be treated for the purpose of all proceedings in connection therewith as having been filed in the amended form." That section does not appear in the Fiji Criminal Procedure Code but we feel that its absence makes no difference to the fact that at least from the time of the amendment, the proceedings must be taken as having continued without any plea being taken, when a plea was required by law.

Crown Counsel has submitted that the case should be treated as one in which no valid amendment was ever made, and that the trial in relation to the original four counts should be held valid, provided no prejudice to the appellant arose. This point was not considered specifically in the West African cases referred to above, though the fact that it does not appear to have been raised may indicate that it was not considered a valid argument. Before this court Counsel contended that the amendment was irregular because the taking of a plea was a necessary ingredient. It was therefore legally irrelevant to the proceedings. Ably though this argument was presented, we are unable to agree with it. Under section 204 the charge must first be altered and then ("thereupon" is the word used) the plea must be called for. If the plea was completely forgotten and never called for, the charge would nevertheless have been amended.

The learned Chief Justice expressed the view that if he was incorrect in his construction of section 204 he would have applied the proviso of section 325 (1) of the Criminal Procedure Code (now s.300 (1) — Cap. 14, Laws of Fiji 1967), on the ground that no conceivable miscarriage of justice could have occurred. While we sympathise with this opinion from a factual point of view, we are unable to agree that this omission was one which was curable by the application of the proviso. We understand from Crown Counsel that the West African cases abovementioned were not quoted in argument before the learned Chief Justice but they support our own view that proceedings after there has been failure to call for a plea which is required by law, are a nullity. We know of only one case in which it is said there is jurisdiction to try a person without a plea being taken (except for those cases in which a plea of not guilty is entered on refusal to plead) and that is where a person is, after due investigation, found mute by visitation of God and yet is capable of following the proceedings — see *Archbold, Criminal Pleading and Practice* (36th Edn.) Para 427.

We have observed that in *R. v. McVitie* [1960] 2 All E.R. 498 the court appeared to indicate a wide view of the power to exercise the proviso, though it refrained from saying that it could be applied where the indictment disclosed no offence. *R. v. Thompson* [1914] 2 K.B. 99, which is referred to in *R. v. McVitie*, is a strong case on that the proviso was applied though the indictment was bad for duplicity. In our opinion the defect in the case before us was more fundamental. From the time the plea should have been taken, but was not, the appellant was not properly before the court. The proceedings were null and void and the evidence given could not be regarded. We do not think it is open to this court to say that by virtue of the proviso, we can give full value to the evidence which we have held the magistrate must disregard, and convict the appellant where the magistrate could not lawfully do so. In our

judgment such a course would do violence to established principles concerning the trial of persons accused and would therefore involve a miscarriage of justice.

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From the point of view of the case before us we have arrived with reluctance at the conclusion we have expressed, as there was ample evidence which, if it could lawfully be regarded, would justify the conviction of the appellant. Nevertheless we must apply the law as we find it and accordingly the appeal is allowed and the convictions and sentences of the appellant on the three remaining counts are quashed.

Appeal allowed.