

A

ATTORNEY-GENERAL

v.

B

FARID MOHAMMED

[SUPREME COURT, 1969 (Knox-Mawer P.J.), 7th February, 7th March]
Criminal Jurisdiction

C

Criminal law—charge—larceny by servant—wrong subparagraph of relevant section specified in Statement of Offence—charge not wholly bad—conviction of embezzlement—Penal Code (Cap. 11) ss.306(a) (i), 306(a) (ii)—Criminal Procedure Code (Cap. 14) ss.123, 175(b), 178.

Criminal law—practice and procedure—charge of larceny by servant—conviction of embezzlement—Criminal Procedure Code (Cap. 14) ss.175(b), 178.

D

Section 306(a) (i) of the Penal Code defines the offence of larceny by a servant whereas section 306(a) (ii) defines that of embezzlement. The Statement of Offence in the charge against the respondent read, "Larceny by Servant: Contrary to section 306(a) (ii) of the Penal Code, Cap. 11", and the Particulars of Offence showed clearly that a charge of larceny by a servant was intended. The magistrate held that the evidence proved a clear case of embezzlement contrary to section 306(a) (ii) of the Penal Code. Though by virtue of sections 175(b) and 178 of the Criminal Procedure Code a person charged with larceny may be convicted in an appropriate case of embezzlement, the magistrate held that it was too late for any amending correction and acquitted the respondent. On appeal —

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Held: 1. The respondent was clearly charged with the offence of larceny by a servant contrary to section 306 of the Penal Code.

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2. The reference in the Statement of Offence to the wrong subparagraph of section 306 was no more than a typing slip which misled nobody and did not render the charge wholly bad.

3. The order of acquittal would be quashed and the respondent convicted of embezzlement contrary to section 306(a) (ii) of the Penal Code.

G

Appeal by the Attorney-General against the acquittal of the respondent in the Magistrate's Court on a charge of larceny by a servant.

T. U. Tuivaga for the appellant.

S. M. Koya for the respondent.

H

KNOX-MAWER J. [7th March 1969]—

The respondent was charged before the Magistrate's Court of the First Class, Suva, with the following offence:—

“ *Statement of Offence*

LARCENY BY SERVANT: Contrary to section 306 (a) (ii) of the Penal Code, Cap. 11. A

Particulars of Offence

FARID MOHAMMED s/o FAZAL MOHAMMED, on the 28th day of August, 1968 at Suva in the Central Division, being servant to Morris Hedstrom Co. Ltd., stole from the said Morris Hedstrom Co. Ltd., £36/10/11 cash money.” B

In his judgment, the learned trial Magistrate, after reviewing the evidence declared — quite rightly in my opinion — that this was a clear case of embezzlement contrary to section 306 (a) (ii) of the Penal Code. By virtue of sections 175 (b) and 178 of the Criminal Procedure Code a person charged with larceny may be convicted of embezzlement if the evidence establishes that he has committed that offence. C

However, the learned trial Magistrate did not proceed to convict the respondent of embezzlement. Instead, he observed the during the course of writing his judgment he had discovered a defect in the charge. Section 306 of the Penal Code reads as follows :—

“Any person who — D

(a) being a clerk or servant or person employed in the capacity of a clerk or servant —

(i) steals any chattel, money or valuable security belonging to or in the possession or power of his master or employer; or

(ii) fraudulently embezzles the whole or any part of any chattel, money or valuable security delivered to or received or taken into possession by him for or in the name or on the account of his master or employer;..... E

is guilty of a felony, and is liable to imprisonment for fourteen years.”

Thus, the Statement of Offence (see above) should have read “..... contrary to section 306 (a) (i)” instead of “section 306 (a) (ii)”. The learned trial Magistrate, after reference to certain English authorities and to the Criminal Procedure Code, decided that as it was too late for any amending correction the respondent must be acquitted. F

Against this order of acquittal the Crown has now appealed.

After careful consideration I have concluded that this appeal must succeed. In my view, the respondent was clearly charged with the offence of larceny by a servant contrary to section 306 of the Penal Code, the proper particulars of which were given. The “defect” noted by the learned trial Magistrate was no more than a typing slip, which misled nobody and was therefore of no consequence. It cannot possibly be said to have rendered the charge wholly bad, either for duplicity or for any other reason. I can find no case law to support the view taken by the learned Magistrate that in the circumstance arising here he must acquit the respondent. The learned Magistrate made reference to the provisions of section 123 of the Criminal Procedure Code. While it is obviously desirable, in stating the offence, to cite the appropriate sub- G
H

A section or sub subsection, a reference to the section is sufficient for the purposes of section 123. In the Second Schedule to the Criminal Procedure Code in respect of larceny by a servant it is shown to be sufficient merely to state "contrary to section 306 Penal Code".

B In the outcome the order of acquittal is quashed and the respondent is convicted of embezzlement contrary to section 306 (a) (ii) of the Penal Code. The case is remitted to the Court below with the direction that the same learned Magistrate do now proceed to sentence the respondent as he thinks appropriate.

Appeal allowed.