

**A****JAG NARAYAN SINGH**

v.

**B****REGINAM**

[SUPREME COURT, 1971 (Hammett C.J.), 14th May, 11th June]

## Appellate Jurisdiction

**C**

*Criminal law—charge—variance between charge and evidence adduced thereon in Magistrate's Court—curative provisions of section 323 of the Criminal Procedure Code—not applicable where amendment of charge required—Criminal Procedure Code (Cap. 14) ss.204, 323, 300(1)—Liquor Ordinance (Cap. 167) ss.76(1) (a), 76(2)—Magistrates Courts Act 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c.55) (Imperial) s.100(1).*

*Appeal—criminal appeal—variance between charge and evidence adduced thereon in Magistrate's Court—curative provisions of section 323 of the Criminal Procedure Code—not applicable where amendment of charge required—Criminal Procedure Code (Cap. 14) ss.204, 323, 300(1)—Magistrates Courts Act 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c.55) (Imperial) s.100(1).*

**D**

Section 323 of the Criminal Procedure Code, which provides that (with certain exceptions not here relevant) no finding, sentence or order of a magistrates' Court shall be reversed or altered on appeal or revision on account of any objection to any information, complaint, summons or warrant for any alleged defect therein in matter of substance or form or for any variance between such information, complaint, summons or warrant and the evidence adduced in support thereof, is not to be read literally as meaning there can be no attack on an information however fundamental the defect. Where the variance between the evidence and the charge is such as to require an amendment, in the absence of which there might be grave injustice to the accused person, the provisions of the section will not be applied.

**F**

*Wright v. Nicholson* [1970] 1 All E.R.12; [1970] 1 W.L.R. 635, followed.

Appeal from a conviction in the Magistrate's Court.

F. M. K. Sherani for the appellant.

**G**

T. U. Tuivaga for the respondent.

The facts sufficiently appear from the judgment of the learned Chief Justice.

11th June 1971

**H**

HAMMETT C.J. :

The appellant was convicted of the offence of selling liquor without a licence contrary to Section 76(1) (a) (2) of the Liquor Ordinance.

The Particulars of Offence read —

*PARTICULARS OF OFFENCE*

JAG NARAYAN SINGH s/o DURGA BAKASH SINGH, on the 23rd day of October, 1970, at Suva, in the Central Division, sold two bottles of beer to NOEL NEUWA, without holding any licence authorising the sale thereof. A

He has appealed against conviction on a number of grounds of which the first reads as follows:— B

1. There was no evidence that on the 23rd October 1970 your Petitioner had sold 2 bottles of beer to Noel Neuwa; therefore, the learned trial Magistrate misdirected himself in holding to the contrary.

Noel Neuwa gave evidence at the trial to the effect that on 22nd October, 1970, in company with a friend, Paul Kontarake, he went to the Tapa Guest House where the appellant sold him two bottles of beer. Paul gave corroborative evidence and said that the transaction took place at about 11.00 p.m. on the night of 22nd October, 1970. C

Police Constable Viliame Kaitani gave evidence that he was keeping watch on the Tapa Guest House on the night of 22nd October, 1970. At about 11.30 p.m. he saw Noel being supplied with 2 bottles of beer and seized him as he came away from the premises. D

Police Sgt. Namaka said that after P.C. Viliame had seized Noel at about 11.30 p.m. on the night of 22nd October he searched the premises under a Search Warrant.

Another Police Sergeant No. 24 was then called by the prosecution. He gave evidence that accompanied by other police officers he executed a search warrant at the Tapa Guest House at 8.30 p.m. on the night of 23rd October, 1970. Counsel for the defence then asked and was told by the Court that the date on the Warrant was 23rd September, 1970. He thereupon objected to this evidence being given. His objection was upheld but the reasons both for the objection and the ruling are not stated on the record. The witness was, however, stood down. E

When the witnesses for the prosecution had been heard there was a prima facie case that the offence charged had taken place on 22nd October, 1970 and not on 23rd October, 1970 as was stated in the particulars of offence. No one drew attention to this fact. F

Counsel for the defence had not objected to the admissibility of the evidence given of these events on 22nd October, 1970, although it was not relevant to an offence alleged to have been committed on 23rd October. The trial Magistrate clearly overlooked the point. He did not, as he should have done, draw his own attention to the matter and consider whether or not the charge should be amended before the close of the case for the prosecution under the provisions of Section 204 of the Criminal Procedure Code. G

The prosecutor then closed his case and the accused gave evidence. He was apparently only asked one question by his counsel, namely — H

Q. "On 23rd October, 1970 it is alleged you sold 2 bottles of liquor to Noel Neuwa. Is this true or untrue?"

A

To this he replied "It is not true". Since Noel Neuwa had alleged in his evidence that the accused sold him this liquor on 22nd October, 1970, this question was not free from ambiguity.

This discrepancy over the date was clearly overlooked by both the prosecutor who proceeded to cross-examine the accused about events that took place on 23rd October, and by the trial Magistrate who made no comment.

B

The defence called one witness, a resident at the Tapa Guest House who gave evidence that on the evening of the 23rd October, 1970 a police party raided the premises. He said he had been drinking liquor all day on 23rd October since about 7.30 a.m., and that he went to bed soon after the police arrived to search the premises. According to the record the Court questioned this witness about his sobriety at the material time and he replied —

C

"On 23rd October at 11.30 I was drunk — not very drunk."

It is clear from this that although Noel and Viliame had given evidence that the accused sold Noel this liquor on the night of 22nd October, 1970, the accused was charged that he sold it on the 23rd October, 1970 and his only witness gave evidence in support of what happened on the night of 23rd October, 1970. At no stage did the prosecutor, counsel for the defence or the Magistrate draw the attention of the only witness for the defence to the night of 22nd October, 1970 or asked any question about the events of that night.

D

The confusion arising from the discrepancy over dates is perhaps increased by the fact that evidence was led by the prosecutor that the premises of the Tapa Guest House were searched by the police both on the night of 22nd October and again on the night of the 23rd October.

E

In its judgment, the Court below made no reference to this variance between the evidence and the charge in the matter of the date. The trial Magistrate remained to the very end of the case under the mistaken impression that the evidence of Noel and Viliame referred to the events of the night of the 23rd October, 1970 as averred in the charge. This is made clear when he said —

F

"The date and time of the alleged offence in accordance with the charge was proved by other witnesses who also gave corroborative evidence in support of the charge."

This is simply not so. All the witnesses for the prosecution gave evidence concerning events that took place on the night of the 22nd October, whereas the charge referred to events that took place on 23rd October and both the witnesses for the defence referred specifically to events that took place on the night of the 23rd October.

G

The learned trial Magistrate rejected the evidence of the only witness called by the accused for the very logical reason that the witness admitted he was drunk on the night of the 23rd October. According to the evidence this witness was also there on the night of the 22nd October. We do not know what his evidence would have been had he been questioned about the events on the night of the 22nd October nor whether it have been accepted or not.

H

I have considered whether in this case the provisions of Section 323 of the Criminal Procedure Code should be applied. This section reads as follows:—

“No finding, sentence or order passed by a magistrates’ court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any objection to any information, complaint, summons or warrant for any alleged defect therein in matter of substance or form or for any variance between such information, complaint, summons or warrant and the evidence adduced in support thereof, unless it be found that such objection was raised before the magistrates’ court whose decision is appealed from, nor unless it be found that, notwithstanding it was shown to the magistrates’ court that by such variance the appellant had been deceived or misled, such magistrates’ court refused to adjourn the hearing of the case to a future day :

Provided that if the appellant was not at the hearing before the magistrates’ court represented by a barrister and solicitor, the Supreme Court may allow any such objection to be raised.”

This section is very similar to Section 100(1) of the English Magistrates Courts Act 1952 which reads :—

“No objection shall be allowed to any information or complaint or to any summons or warrant to procure the presence of the defendant, for any defect in it in substance or in form, or for any variance between it and the evidence adduced on behalf of the prosecutor or complainant at the hearing of the information or complaint.”

The provisions of this section were considered in the case of *Wright v. Nicholson* [1970] 1 All E.R. 12. As was then said by Lord Parker C.J. at p.14 —

“It of course has always been held that those words cannot be read literally as meaning: there can be no attack on an information however fundamental the defect. It depends in every case whether, for instance, the variance between it and the evidence is such as to require an amendment. Circumstances vary infinitely, and it may well be that in many cases a variance between the evidence and the information will not require even an amendment; a misdescription of premises might not even require an amendment. But, as it seems to me in this case, unless the information is amended there might be grave injustice to the appellant, an amendment is called for.”

In that case the Court declined to apply the provisions of Section 100(1) and similar considerations apply to this case.

According to the witnesses for the prosecution this offence is alleged to have taken place at 11.30 p.m. on 22nd October, 1970. If it had been made clear at the hearing that the date in the charge, namely 23rd October, referred to the period of time at about midnight on the night of the 22/23 October, I would have considered this to be a “variance” between the date given in the charge and the evidence adduced in support. In my view such a variance would have been curable and covered by the provisions of Section 323

A The learned trial Magistrate, however, never appreciated that the witness called by the accused was referring in his evidence to events on the night of the 23rd October, 1970, i.e. about 24 hours later than the time referred to by the witnesses for the prosecution. If the evidence of the witnesses for the defence had concerned events happening, according to them, in the early hours of the morning of 23rd October and the Court below had held that the offence was committed shortly before or shortly after midnight on the night of the 22/23 October, I would again have considered this to be a "variance" covered by Section 323 of the Criminal Procedure Code.

B This was not the position however and I have come to the conclusion that the trial in the Court below was so unsatisfactory in this respect that it would be unsafe and inappropriate to call in aid the provisions of Sections 323 of the Criminal Procedure Code in the particular circumstances of this case.

C I do therefore allow the appeal. The conviction is quashed and the sentence is set aside. Under the provisions of Section 300(1) of the Criminal Procedure Code I order that the case be reheard and that the new trial be held before another Magistrate.

D *Appeal allowed.*