DIRECTOR OF PUBLIC PROSECUTIONS

v.

PYARA SINGH

[SUPREME COURT, 1971 (Hammett C.J.), 12th, 26th March]

Appellate Jurisdiction

Criminal law—practice and procedure—charge—framing of charge averring offences in the alternative—alternative offences under separate sections to be charged in separate counts—practice of stating offence is averred in the alternative is permissible—Traffic Ordinance (Cap. 152) ss.37, 38(1), 39(1)—Traffic Regulations 1967, reg. 73(4)—Penal Code (Cap. 11) ss.255, 261—Criminal Procedure Code (Cap. 14) ss.121(2), 123(a) (iv), 123(a) (v), 123(b) (i), 201, 2nd Schedule.

Interpretation—enactment—meaning not restricted to "Ordinance" or "Act of Parliament"—can include section or part thereof—Criminal Procedure Code (Cap. 14) s.123(b) (i).

The word "enactment" used in section 123(b) (i) of the Criminal Procedure Code is not to be construed as having a limited meaning such as "Ordinance" or "Act of Parliament", but as embracing sections of an Ordinance or parts thereof. The section therefore does not require alternative charges of dangerous driving contrary to section 38(1) of the Traffic Ordinance and careless driving contrary to section 37 to be included in the same count and a count so framed would be bad for duplicity.

Semble: While there is no objection to the practice of stating in a charge that one of several counts is averred in the alternative, there is no statutory obligation to do so.

Case referred to :

Wakefield and District Light Railways Co. v. Wakefield Corporation [1906] 2 K.B. 140; affd. [1907] 2 K.B. 256 C.A.; [1908] A.C. 293 (H. Lds.).

Appeal from a dismissal of alternative charges in the Magistrate's Court.

G. Mishra for the appellant.

V. Parmanandam for the respondent.

26th March 1971

HAMMETT C.J.:

The respondent was charged in the Magistrates' Court at Labasa with a charge containing five counts as follows:—

1st Count: Driving a Motor Vehicle when under the influence of drink contrary to Section 39(1) of the Traffic Ordinance.

2nd Count: Dangerous Driving contrary to Section 38(1) of the Traffic Ordinance.

3rd Count: Careless Driving contrary to Section 37 of the Traffic Ordinance.

4th Count: Driving a Motor Vehicle with a defective footbrake contrary to Regulation 73(4) of the Traffic Regulations 1967.

5th Count: Driving a Motor Vehicle with a defective handbrake contrary to Section 73(4) of the Traffic Regulations 1967.

A

At the close of the case for the Prosecution in the Court below Counsel for the defence submitted that there was no case to answer on any of the five counts in the charge. The prosecution conceded this in respect of counts 1, 4, and 5 but not in respect of Counts 2 and 3.

The learned trial Magistrate upheld the submission of no case and
B acquitted the accused on each of the five counts in the charge.

In this appeal the Director of Public Prosecutions does not object to the acquittals in respect of Counts 1, 4 and 5. He does, however, complain that the basis on which acquittals were ordered in respect of Counts 2 and 3 is wrong in law, on the following grounds :

"(a) That the learned trial magistrate erred in law in holding that
C the provisions of section 123(b) (i) of the Criminal Procedure Code made it mandatory that the charge specifically state the second and third counts as being alternative to one another.

(b) That the learned trial magistrate erred in law in holding that a failure specifically to state that the third count in the charge was alternative to the second count made the proceedings in
D respect of those counts a nullity.

(c) That, having held that the proceedings in respect of the second and third counts were a nullity, the learned trial magistrate erred in law in acquitting the respondent on those counts."

In the Court below Counsel for the respondent submitted that the 2nd count (Dangerous Driving) and the 3rd count (Careless Driving) arose
E out of the same set of facts, but were not charged as alternative counts. He contended that for this reason the proceedings in respect of these two counts were a nullity.

In his ruling, which upheld this submission, the learned trial Magistrate said :

F "Reading the indictment it is clear that the 2nd and 3rd counts are not made alternative counts. Section 123(b) (i) of the Criminal Procedure Code Cap. 14 states as follows :—

'Where an enactment constituting an offence states the offence to be the doing or the omission to do any one of any different acts in the alternative, or the doing or the omission to do any act in any one of any different capacities, or with any one of any
G different intentions or states any part of the offence in the alternative, the acts, omissions, capacities or intentions or other matters stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence;'

These two offences namely Dangerous Driving charged under count 2 and the Careless Driving charged under count 3 are offences under
H the Traffic Ordinance Cap. 152. On the evidence before the Court they arise out of the same incident. In my view the prosecution cannot charge the accused for these two offences unless they are made alternative charges. As the charges stand now the prosecution is asking for a finding of guilty on both these counts. This they cannot

do. In my view the proceedings in respect of these two counts have been a nullity and I shall therefore dismiss the case and the accused is acquitted on these two counts — namely Count 2 and Count 3." A

It is clear from this that the learned trial Magistrate read and interpreted the word "enactment" in Section 123(b) (i) of the Criminal Procedure Code as being limited in its meaning. He construed it to mean only an "Ordinance" or "act of Parliament." But this is not so. As is stated in general terms in *Halsbury's Laws of England* 3rd Edition Vol. 36 at page 362 — B

"Whilst all statutes are properly referred to as enactments, the word enactment may equally well be used to describe a particular provision in a statute."

In *Wakefield & District Light Railways Co. v. Wakefield Corporation* [1906] 2 K.B. 140, Ridley J. said: C

"The word enactment does not mean the same thing as 'Act'. 'Act' means the whole Act whereas a section or part of a section in an Act may be an enactment."

When this case was considered on appeal by the House of Lords, the appellants contended, as they had done in the Court of Appeal, that the words "general enactments" meant "public Acts" and did not include D isolated sections picked out of an Act. The House of Lords did not call upon the respondents to reply to this argument. It upheld the decision of the Court of Appeal and dismissed the appeal in one very brief judgment by Lord Loreburn, in which the three other Law Lords sitting concurred.

If the construction placed upon the word "enactment" by the learned trial Magistrate were correct Section 123(b) (i) would permit the laying E of alternative charges of dangerous driving and careless driving in the same count. This would, of course, make the count bad for duplicity. It would also offend against the specific provisions of the Criminal Procedure Code at Section 121(2) which reads:

"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 separate F paragraph of the charge or information called a count".

As I understand it, the submission of Counsel for the respondent in the Court below was not that the charges of Dangerous Driving and Careless Driving should have been framed in the alternative in one count as appears to have been the construction the learned trial Magistrate placed on Section 123(b) (i). What he did contend, however, was that the charges G of Dangerous Driving and Careless Driving should not have been charged as counts 2 and 3 in the charge but as a single count in the following alternative form:

"*Second Count:* Dangerous Driving contrary to Section 38(1) of the Traffic Ordinance.

or Alternatively: Careless Driving contrary to Section 37 of the H Traffic Ordinance."

This is in fact the way in which I have seen such an "alternative" charge framed in some cases. It is, however, an error so to frame alter-

native charges or counts to which I have on other occasions drawn attention and taken exception. It is a practice that should be discontinued. This is because it completely ignores and is directly contrary to the express provisions of the Criminal Procedure Code set out in Section 123(a) (v) which read

> "Where a charge or information contains more than one count the counts shall be numbered consecutively."

There are in fact no express provisions in the Criminal Procedure Code requiring it to be stated specifically in a charge whether any of the separate counts it contains are averred in the alternative. Whilst I have no objection to the practice of stating in a charge that one of several counts is averred in the alternative, there is no statutory obligation to do so.

Section 123 of the Code sets out the rules for the framing of charges. Section 123(a) (iv) provides that in drafting charges the forms set out in the 2nd Schedule to the Code shall be followed and in other cases forms to the like effect shall be used.

A study of the forms of specimen charges in the 2nd Schedule show clearly that the two counts in form 5 are intended to be alternatives and show how such alternative counts should be framed. Similar considerations apply to the two counts set out in Form 6 also.

Form No. 5 which is headed "Wounding" reads as follows :

"

First Count

Statement of Offence

Wounding with intent, contrary to section 255 of the Penal Code.

Particulars of Offence

A.B., on the day of , 19 ,
in the Division, wounded C.D., with
intent to maim, disfigure or disable, or to do some grievous harm, or to resist the lawful arrest of him the said A.B.

Second Count

Statement of Offence

Wounding, contrary to section 261 of the Penal Code.

Particulars of Offence

A.B., on the day of , 19 ,
in the Divison, unlawfully wounded C.D."

The material part of Section 255 of the Penal Code reads as follows :

"Any person who, with intent to maim, disfigure or disable any person or to do some grievous harm to any person or to resist or prevent the lawful arrest or detention of any person (a) unlawfully wounds or does any grievous harm to any person by any means whatsoever;
.....etc."

In the particulars of offence in the first count in Form 5 of the specimen charges in the 2nd Schedule some of the alternatives stated in Section 255 of the Penal Code are set out. This is an illustration of the meaning and effect of the provisions of Section 123(b) (i) of the Criminal Procedure Code. This also serves to show that Section 255 of the Penal Code is an "enactment" such as is referred to in Section 123(b) (i). To construe the word "enactment" to mean the entire Penal Code would, of course, be quite erroneous and lead to manifestly absurd conclusions. A

The ruling of no case to answer, in respect of counts 2 and 3 of the charge was based on a misinterpretation of the provisions of Section 123(b) (i) of the Criminal Procedure Code. These two counts were framed correctly. It was not correct for the learned trial Magistrate to rule that the proceedings in respect of these two counts were a nullity. B

I do therefore, set aside the decision of the Court below acquitting the respondent on count 2 and count 3. C

I order that the case be remitted to the Court below for the learned trial Magistrate to proceed to hear and determine the case as is provided in Section 201 and the other appropriate provisions of the Criminal Procedure Code. D

Appeal allowed.