

A

ABEL HASSAN AND ANOTHER

v.

REGINAM

B

[SUPREME COURT, 1973 (Tuivaga J.), 11th May]

Appellate Jurisdiction

Criminal law—practice and procedure—charge—amendment of charge—compliance with Criminal Procedure Code (Cap. 14) s. 204(1).

C

The appellants were originally charged in Court with larceny and receiving stolen photographic property to which they pleaded not guilty. In the original charge the goods were divided into 185 instamatic cameras valued \$2,177.00, 60 camera cases valued \$38.00 and 20 projector magazines valued \$32.00 of total value \$2,247.00, the property of Her Majesty the Government of Fiji. Subsequently, at the commencement of the trial, the description of the property was amended to read, "4 cases of photographic goods marked P.D. Stinson Lautoka of the approximate value of \$2,247.00". No fresh pleas were taken.

D

The appellants contended that the failure to comply with the Criminal Procedure Code (Cap. 14) s. 204(1) rendered the proceedings null and void.

E

It was held that the amendment clearly fell within Criminal Procedure Code (Cap. 14) s. 204(1) as the particulars of the charge had been so extensively altered so as to render it defective. It followed, therefore, that the proceedings were null and void.

Cases referred to:

Attorney General for Fiji v. Harry Pratap, Privy Council Appeal No. 10 of 1969.

Attorney General v. Vijay Parmanandam, 14 F.L.R. 6.

F

R. v. West, 64 T.L.R. 241; [1948] 1 All E.R. 718

Appeal against the decision of the Magistrate's Court convicting the appellants.
S. M. Koya for the appellant.

R. Davies for the respondent.

G TUIVAGA J. [11th May 1973]—

At the hearing of this appeal three new grounds of appeal were added by leave of this Court. It was pointed out by both counsel and accepted by the Court that ground (1) thereof raises an important point of law which if decided in a certain way would dispose of the whole appeal. For that reason this Court decided as a matter of convenience to confine the hearing of the appeal in the first instance to that ground alone and reach a conclusion thereon. Ground (1) is in the following terms:—

H

"(1) THAT inasmuch as a new Charge (effecting amendment to the 1st and 2nd counts in the original charge) was filed by the Prosecution against the

Appellants on the 4th November, 1970 with the leave of the learned trial Magistrate, it was incumbent on the Learned trial Magistrate to take the Appellants' consent to try them before the Magistrate's Court having regard to the value of the property involved and take a fresh plea thereon. The failure of the Learned trial Magistrate to do this either in respect of the count amended thereby has rendered the trial a nullity and the Learned Trial Magistrate acted without jurisdiction by operation of Section 4 of the Criminal Procedure Code Cap. 14:"

The appellants elected trial in the Magistrate's Court and the charge was read and explained to them. For some reason the original charge is not on the Magistrate's Court file as it should have been; nor has there been any satisfactory explanation given as to its fate. Having regard to the nature of this ground of appeal it was incumbent upon this Court to know the precise formulation of the original charge. This was done by way of supplementing the Magistrate's Court record with an affidavit sworn by the Police Prosecutor on the day in question and to which a copy of what purports to be the original charge was annexed and it is common ground that on the 24th August, 1970 the appellants were formally charged in the Magistrate's Court with the following offences:

CHARGE

(Complaint by Public Officer)

FIRST COUNT

Statement of Offence (a)

Larceny from Dock: Contrary to Section 304(b) of Penal Code, Cap. 11

Particulars of Offence (b)

ABEL HASAN s/o Shorath Ali and *MOHAN LAL* s/o Kesoji, on the 21st day of August, 1970 at Suva in the Central Division, stole from King's Wharf, Suva 185 instamatic cameras valued \$2,177.00; sixty camera cases valued \$38.00 and twenty projector magazines valued \$32.00 together of the total value of \$2,247.00 the property of Her Majesty the Government of Fiji.

SECOND COUNT (Alternative to first count)

Statement of Offence:

RECEIVING STOLEN PROPERTY: Contrary to Section 347 (1) of Penal Code, Cap. 11.

PARTICULARS OF OFFENCE

MOHAN LAL s/o Kesoji, on the 21st day of August, 1970 at Suva in the Central Division, received 185 instamatic cameras valued \$2,177.00; sixty camera cases valued \$38.00 and twenty projector magazines valued \$32.00 together of the total value \$2,247.00, the property of Her Majesty the Government of Fiji, knowing the same to have been stolen."

The hearing was then adjourned on a number of occasions. On the 4th November, 1970 the trial Magistrate made the following notes on the files:—

A

“INSPECTOR: May I amend Count one.

PARMANANDAM: No objection.

COURT: Very well. Put amended charge on file and serve copy on Counsel for Defence.

B

Adjourned to 14 and 15/12/70 for hearing. To 23/11/70 mention only. (2 days). Bail extended.”

Although the notes are somewhat sketchy as to what transpired in Court on that day it is clear, however, that an amended charge was filed and accepted by the Court in substitution for the original charge. The amended charge which the appellants then faced is in the following terms:—

C

“FIRST COUNT

Statement of Offence

LARCENY FROM DOCK: Contrary to Section 304 (b) of the Penal Code, Cap. 11

D

PARTICULARS OF OFFENCE

ABEL HASSAN s/o Shorath Ali and MOHAN LAL s/o Kesoji, on the 21st day of August, 1970, at Suva, in the Central Division, stole from King's Wharf, Suva 4 cases of photographic goods marked P.D. STINSONS, LAUTOKA, of the Approximate value of \$2,247.00.

E

SECOND COUNT

Statement of Offence

RECEIVING STOLEN PROPERTY: Contrary to Section 347(1) of the Penal Code, Cap. 11

F

Particulars of Offence

MOHAN LAL s/o Kesoji, on the 21st day of August, 1970 at Suva, in the Central Division, received 4 cases of “photographic goods marked P.D. STINSONS, LAUTOKA, of the approximate value of \$2,247.00 knowing the same to have been stolen.”

G

Thus the particulars of both offences were extensively altered; but the appellants were given no opportunity to elect or plead afresh to the amended charge.

Counsel for the appellants has submitted that the convictions entered in the Magistrate's Court against each appellant cannot be allowed to stand because of the failure of the learned Magistrate to comply with the provisions of section 204 (1) of the Criminal Procedure Code which are mandatory. Section 204(1) reads:—

H

“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; **A**
- (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. **B**

He submitted that because the charge was amended by the Court upon the application of the prosecution by rewording the particulars of offence in both counts the Court was under a legal duty to put the right of election again and obtain fresh pleas to the amended charge; and that as this was not done the trial was a nullity. The case of the *Attorney General v. Harry Pratap* (Privy Council Appeal No. 10 of 1969) was cited in support of the proposition that where an amendment is made to a charge in respect of any particular count therein a fresh plea must be obtained from the defendant with respect to such count. (And see also the judgment in *The Attorney-General v. Vijay Parmanandam* (14 F.L.R. 6). **C**

Counsel for the respondent argued that from the particular nature of the alterations made to the original charge in the Magistrate's Court there has been no contravention of the provisions of section 204(1) of the Criminal Procedure Code. He submitted that the particulars of offence in relation to counts 1 and 2 were altered not because of any defect in them but mainly to remove superfluous detail. He contended that the original charge could have been left intact and was perfectly valid as it then stood, in view of the provisions of section 204(2) (as amended) of the Criminal Procedure Code which reads:— **D**

“ 204.(2) Variance between the charge and the evidence produced in support of it with respect to the date or time at which the alleged offence was committed or with respect to the description, value or ownership of any property or thing the subject of the charge is not material and the charge need not be amended for such variation: **E**

Provided that where the variation is with respect to the date or time at which the alleged offence was committed, the proceedings have in fact been instituted within the time, if any, limited by law for the institution thereof.” **F**

He submitted that the original charge in effect remained basically unaltered in that the two offences preferred in the original charge were the same two offences appearing in the amended charge, namely Larceny contrary to Section 304(b) of the Penal Code and Receiving Stolen Property contrary to section 347(1) of the Penal Code. **G**

The question is whether during the trial there was an amendment made, within the meaning of the provisions of section 204(1), to the charge preferred on the 24th August, 1970. In the particulars of offence to count 1 of the original charge the words:

“ 185 instamatic cameras valued \$2,177.00; sixty camera cases valued \$38.00 and twenty projector magazines valued \$32.00 together with the total value of \$2,247.00, the property of Her Majesty the Government of Fiji ” **H**
were replaced by the words:

“ 4 cases of photographic goods marked P.D. Stinsons, Lautoka of the approximate value of \$2,247.00.”

A A similar alteration in the particulars of offence of count 2 was effected. In their advice in the case of *Harry Pratap* (supra) the Judicial Committee of the Privy Council considered that the introductory phrase in the first proviso to section 204(1) should be construed to read:

“ Where the formal charge has been altered by the amendment of any count contained in it or by a substitution of a new count for any count contained in it or by an addition of any new count.”

B This construction makes it clear that an amendment envisaged by section 204(1) may take one of three forms, namely:

- (i) by an amendment of any count contained in the formal charge; or
- (ii) by substitution of a new count for any count contained in the formal charge; or
- (iii) by addition of any new count.

C The amendment in the present case clearly falls under (i) above; and to quote from *R. v. West* 64 T.L.R. 241, “ It is an essential feature of the criminal law that an accused person should be able to tell from the indictment the precise nature of the charge or charges against him so as to be in a position to put forward his defence and to direct his evidence to meet them ”. If the particulars of a charge do not comply with these long-established requirements the charge is defective. In the case of the subject matter of this appeal, the particulars were altered so extensively as to render the original charge defective in that it no longer represented the offences with which the appellants were faced under the amended counts. The fact that some of the particulars contained in the original charge may have been unnecessary does not affect this position.

D I do not think that the provisions of section 204(2) are of any assistance here. These provisions are concerned with sufficiency of evidence in support of a charge and cannot be prayed in aid to cure a charge which is intrinsically defective.

E I am satisfied that in the present case both counts 1 and 2 were amended within the meaning of section 204(1). In my view therefore the amendment to the charge which was effected on the 4th November 1970 initiated entirely new proceedings so far as the Magistrate's Court and the appellants were concerned. It follows that the amended charge should have been read and explained to the appellants, whose consent should have been obtained pursuant to section 4(1) of the Criminal Procedure Code, and fresh pleas obtained in accordance with the provisions of section 204(1). The failure of the Magistrate's Court to put the appellants to their election after the amendment of the original charge and to call for a plea from each of the appellants as required by law renders the whole proceedings null and void.

F In these circumstances the appeal must be allowed and the conviction and sentence entered against each of the appellants are accordingly quashed.

G *Appeals allowed.*