A

JAGDISHWAR SINGH

v.

REGINAM

[COURT OF APPEAL, 1976 (Gould, V. P., Marsack J. A., Spring J. A.),
B 1st, 23rd November]

Criminal Jurisdiction

Criminal law—review—powers of Supreme Court on appeal and review—no authority to interfere with finding of acquittal—Criminal Procedure Code (Cap. 14) *ss.* 300, 301, 304—306, 307 *Penal Code (Cap.* 11) *s.* 277.

C

Although the appellant had pleaded guilty to doing grievious bodily harm with intent to maim contrary to Penal Code s. 255*(a),* and there was medical evidence to support the injuries which were inflicted, the magistrate, after hearing the counsel in mitigation, proceeded to vary the convictions by replacing them with convictions for lesser offences under Penal Code s. 277 and passed a suspended sentence of
D imprisonment.

The Director of Public Prosecutions appealed against the leniency of the sentence and sought leave to appeal against the actions of the magistrate in varying the convictions. This latter application was held out of time and was disallowed by the judge who, nevertheless, did decide to review whether the magistrate had power to make such variations. The judge then proceeded to substitute convictions for the
E offences originally charged.

Held: The judge had exercised his power of review in a manner not strictly consistent with the cases in which the power granted by Criminal Procedure Code (Cap.14) ss/ 304—306 would have normally applied. The decision of the magistrate must be construed as the entry of acquittals on the charges under Penal Code s.
F 255*(a)* and, therefore, the Supreme Court had no power to reconvert these findings into convictions.

Appeal against conviction imposed by the Supreme Court for doing grievious bodily harm with intent to maim.

G *G. P. Shankar* for the appellant.
D. Adams for the respondent.

Judgment of the Court (read by Marsack J.A.) [23rd November 1976]—

This is an appeal against three convictions of the appellant imposed by the Supreme Court sitting at Lautoka on the 23rd April 1976 and also against the sentence
H imposed on such convictions.

The relevant facts may be shortly stated. On the 19th May 1975 the appellant was charged before the Magistrate's Court at Lautoka on two counts of doing grievious

harm with intent to maim. The appellant pleaded not guilty. The hearing was adjourned on several occasions. On the 23rd June 1975 he was charged on a third count; this was of assault with intent to cause grievious harm. The appellant pleaded not guilty to this charge also. Further adjournments occured from time to time, and it was not until the 18th February 1976 that the trial of the three charges took place in the Magistrate's Court at Lautoka. For some time now the appellant had been represented by counsel, and on the 18th February 1976 on the advice of counsel, the appellant pleaded guilty to each of the three counts. The facts were explained in detail to the presiding magistrate; these facts were admitted by the accused person who was present with his counsel; and the magistrate thereupon announced that the appellant would be convicted on all three counts as charged.

At this stage it is necessary to state this court has been placed in a position of some difficulty in that the court record is obviously not complete and it is at times a little difficult to follow. For example: in the course of his judgment the magistrate says:

> "The prosecutions suggested that it was still open for the court to convict the accused person on a lesser charge."

The record of proceedings however, does not show any such statement made by the prosecutor. Something of the sort must have been said, of course, or it would not appear in the magistrate's judgment. It is however, unsatisfactory in that we have before us no note of how the statement came to be made, or of the circumstances or principles upon which it was based.

After convictions had been entered on the three counts as charged, counsel for the appellant was apparently called upon to address the court on the question of sentence. Counsel did so, and in the course of his address asked that a probation officer's report be obtained. The magistrate agreed and the hearing was further adjourned for this purpose. It was not until the 15th April 1976 that the hearing was resumed, the probation officer's report having then come to hand. Counsel explained at some length the domestic circumstances of the appellant and submitted that a suspended sentence would be proper. He also suggested that there was no wound or grievous harm; though the medical officer's reports which were before the court showed that Ram Devi had "bleeding knife wounds including a wound six inches long over the mid shaft of the right forearm completely dividing both radius and ulna, and a second wound of three inches on the upper end of the left leg; with complete amputation of the tip of the right index finger." The injury sustained by Vidya Wati involved the amputation of the right middle finger.

The magistrate further adjourned the case for 8 days until the 23rd April 1976 and on that day he proceeded to "vary" the convictions by replacing them with convictions of the lesser offences under section 277 of the Penal Code. He then passed sentence of 9 months' imprisonment on each count, suspended in each case for 18 months.

On the 5th May 1976 the Director of Public Prosecution lodged a petition of appeal against the sentences passed on the first and second counts on the ground that that sentence was in each case manifestly lenient having regard to the nature and circumstances of the offence. This was heard before the Supreme Court at Lautoka on the 4th of June 1976. Two days before the hearing counsel for the Crown sought leave to appeal against the action of the magistrate in varying the earlier convictions. The learned judge held that this application was out of time and it was on

that ground disallowed. In the result the only matter formally before the Supreme
A Court was an appeal against the sentence imposed by the magistrate on counts one and two. None the less, the learned judge stated that he proposed if necessary to exercise his powers of review, and he would hear counsel as to whether the magistrate had power to "vary the convictions" as he had purported to and if in any event his finding that no grievous bodily harm had been shown was not erroneous.

The judge's power to review is contained in section 306 of the Criminal Procedure
B Code, which provides that where the record of proceedings in a Magistrate's Court comes to the knowledge of the Supreme Court, the Supreme Court may, in the case of conviction, exercise any of the powers conferred on it as a court of appeal by sections 300 and 301 of the Code, and may enhance the sentence. The powers of the Supreme Court under section 300 include power to reverse or vary the decision of the Magistrate's Court or, to remit the matter, with the opinion of the Supreme Court thereon, to the Magistrate's Court; or to make such other order in the matter as to it
C may seem just.

Although the judge in the Supreme Court had rejected, as being out of time, the application by the Crown to include an appeal directed against the magistrate's variation of the earlier convictions, he proceeded in his review to do just that. In his judgment he stated:

D "Clearly the magistrate gravely erred when he stated there was no indication of grievous harm. In fact when the accused first appeared before him the magistrate made the following record:

> 'Both victims seriously ill. They are in the recovery ward. Full medical report not yet in. Both lost finger each—deep wounds.' "

There were good grounds for this comment by the learned judge, as the medical
E certificates which were already before the magistrate clearly demonstrated that grievous bodily harm had been inflicted upon the two victims; and the manner in which these injuries had been caused undoubtedly showed an intent to maim.

The learned judge also stated that the magistrate had acted wrongly in reducing the charges when he was merely considering the question of sentence on the more serious charges in respect of which pleas of guilty still stood. If the magistrate had
F made up his mind, on reconsideration, that the evidence supported conviction on the minor charges only, then, in the judge's view, the magistrate should have given an opportunity to the accused person to withdraw his pleas of guilty of the major offence and substitute pleas of guilty on the minor offence under section 277. As this had not been done, then the action of the magistrate was held to be so irregular that it could not be supported.

G The learned judge then proceeded to set aside the convictions on counts one and two in the court below and to substitute convictions for the offences originally charged, namely for causing grievous bodily harm with intent to maim, contrary to section 255*(a)* of the Penal Code. The learned judge went to say:

"There is no need to interfere with the findings on count three."

In fact, though the learned judge did not interfere with the findings, he did interfere
H with the sentence imposed on that count in the court below. There, the sentence was of nine months imprisonment suspended for 18 months. This sentence was varied in the Supreme Court to nine months imprisonment with no provision for suspension.

The question for determination by this court is whether the learned appellate judge, after rejecting the application of the Crown to appeal against the magistrate's judgment otherwise than in the matter of sentence, was justified in exercising his power of revision under sections 304 and 306 of the Criminal Procedure Code, to the extent of substituting convictions on more serious charges and passing sentence thereon.

It is perfectly true that under section 306(1) *(a)* the powers of the Supreme Court on revision include the powers conferred on it as a court of appeal by section 300 of the Criminal Procedure Code. These powers, as has been pointed out, include powers to confirm, reverse or vary the decision of the Magistrates Court, which is exactly what the learned judge has done in the present case. At the same time it is clear that this is not the normal type of revision contemplated by sections 304 to 306. Under section 307 for example, no party has any right to be heard either personally or by counsel when the Supreme Court is exercising its powers of revision, though the Court may, in its discretion, afford the parties such an opportunity. Here the learned judge has in fact treated the appeal against sentence as also an appeal against conviction, though he refused the application of the Crown to include that in its appeal.

In our opinion the learned judge exercised his power of review in a manner not strictly consistent with the cases in which the power granted by sections 304—306 would normally apply. We fully confirm the judge's findings with regard to the irregularities of the proceedings in the court below, and consider that the learned judge was right in the reasons given for those findings. Where we are impelled to disagree with his judgment is in his entering convictions on the major charges and imposing sentence thereon. Although the wording of section 306 of the Criminal Procedure Code, setting out the powers of the Supreme Court on revision, is extremely wide, the limitations imposed by the section itself must be observed.

In order to determine this present appeal it is necessary, in our opinion, to go back to the proceedings before the magistrate on the 15th April 1976 after the report of the probation officer had been received. Despite the paucity of detail in the record it is clear that the question of whether convictions on the serious charges were justified, was argued by counsel on both sides. Counsel for the prosecution is reported to have said that the charges had been correctly laid under section 255*(a)*. Counsel for the appellant argued that there were no wounds or grievous harm and he appeared to refer to authorities which appear in the record but which were not produced and which are unknown to this court. What is manifest is that the validity of the convictions already entered on the serious charges was actually debated before the magistrate on that day.

When the hearing was resumed on the 23rd April 1976 the magistrate said:

"Sentence:

I must commend the defence counsel for an excellent submission on the question of sentence. On the question of the charge I agree with him that medical report does not show that the complainant received any grievous harm which is an essential ingredient of the offence. The prosecution suggested that it was still open for court to convict the accused person on a lesser charge. I have considered this and I am of the view that at this stage the court is in a position to alter the conviction on a lesser charge before the matter is finally disposed of. Accordingly, the convictions entered against the accused person under act intended

to cause grievous harm contrary to section 255*(a)* in each count is varied and accused is convicted of assault occasioning actual bodily harm contrary to s. 277 of the P.C. in respect of each count. In passing sentence I have taken into account all matters urged upon by the learned defence counsel."

Although the record is silent as to any further submissions by counsel, it must we think, be taken that the magistrate's statement was in fact an intimation that he was—despite the previous pleas of guilty—entering a verdict of acquittal on the serious charges, and convictions on the minor charges under section 277 of the Penal Code and the silence of counsel on that announcement amounted to acquiescene in the course proposed. If this view is correct then the learned judge had no power on revision to take the action which he did in fact take. Section 306 of the Criminal Procedure Code defines the powers of the Supreme Court on revision and subsections 1*(b)*—(4) of that section read:

"*(b)* in the case of any other order other than an order of acquittal, alter or reverse such order.

(4) Nothing in this section shall be deemed to authorise the Supreme Court to convert a finding of acquittal into one of conviction."

Put shortly, we are of the opinion that the interests of justice will be best served by treating the magistrate's judgment as an acquittal on the serious charges and conviction on the minor charges under section 277. That being so, the judgment of the learned judge in the court below should be limited to dealing with the matter formally put before him; that is to say, the appeal by the Crown against the sentences imposed by the magistrate, on the ground that those sentences were unduly lenient.

Accordingly, the appeal is allowed and it is ordered that the convictions entered by the learned judge, and the sentences imposed thereon, be set aside; and the original convictions under section 277 of the Penal Code restored; the matter is remitted to the court below to deal with the appeal against the sentences passed by the magistrate as the learned judge shall deem appropriate.

Appeal allowed and original convictions restored. Remitted to Supreme Court for hearing of appeals against sentence.