VINOD NARAYAN A

v.

REGINAM

[COURT OF APPEAL, 1983 (Henry J. A., Mishra J. A., Jeffries J. A.) 2nd, 28th November] B

Criminal Jurisdiction

Criminal law—practice and procedure—conviction for alternative offence—order for retrial on—amendment of charges—necessity for plea thereto—Criminal Procedure Code (Cap. 21) Section 214(1)(a). C

On appeal to the Supreme Court against his conviction in the Magistrates Court the conviction was set aside but a retrial ordered. On appeal to the Court of Appeal against the order for retrial:

Held: D

(i) The Magistrate having had no jurisdiction to convict the appellant on a charge which he had never faced there was no power to order a retrial on that charge.

(ii) When a court wishes to prefer an amended charge it is mandatory that the accused be called upon to plead to the amended charge. A failure to comply with this requirement renders any subsequent conviction on the amended charge a nullity. E

Cases referred to:

Jay Narayan Singh v. R. FLR 81
Attorney-General v. Vijay Parmanadam 14 FLR 7
Abel Hassan & Anr. v. Reg. 19 FLR 11
Attorney-General for Fiji v. Hari Pratap—Privy Council 10/69 F

Mrs A. Hoffman for the Appellant
D. Fatiaki for the Respondent

HENRY J. A.: G

Judgment of the Court

This is an appeal from the Supreme Court in its appellate jurisdiction. The appeal is confined to questions of law only. The charge was an attempt to steal $2.00 from a postal packet contrary to Sections 267*(c)* and 381 of the Penal Code. The proceedings were heard before a Resident Magistrate pursuant to Sections 4 & 5 of the Criminal Procedure Code. H Section 267 of the Penal Code declares the offence to be a felony and provides a maximum sentence of 3 years. The Magistrate convicted appellant of an attempt to commit an offence against Section 267*(b)* and fined appellant in the sum of $80.00. Appellant was allowed 14 days to pay with a default period fixed at 80 days imprisonment.

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Section 267 provides for a number of offences in relation to larceny of mail. The relevant parts read as follows:

"267. Any person who—

(b) steals from a mail bag, post office, office of the post office, or mail, any postal
B packet in course of transmission by post; or

(c) steals any chattel, money or valuable security out of postal packet in course of transmission by post."

Appellant, who was represented by Counsel, did not make a submission of "no case" at the conclusion of the case for the prosecution. The Magistrate then complied with Section
C 211(1) of the Criminal Procedure Code whereupon appellant elected to give evidence and to call further evidence. In his judgment the Magistrate said:

"Now, accused is charged with an *attempt* to commit an offence under S.267*(c)* (stealing *out of* a postal packet, and not under S.267*(b)* stealing a packet). Since I am not prepared hold that accused in fact attempted to steal the $A2 note, or whatever was in the letter
D seen by PW1, I can only convict of attempting to steal the letter itself (i.e. under para. *(b)*, and not *out of* the letter (under *(c)*).

It would have been better if the prosecution had spotted this at the close of the prosecution case and made an application to amend under S.214*(i)* of the Criminal Procedure Code. There has been no embarrassment to the defence, however. The
E accused's account of the matter was such that no point turned on the distinction between paras *(b)* and *(c)* of S.267. The course of the trial has not been altered. As things have turned out, it cannot, as matter of common sense be right to acquit accused altogether when, as I find he is so clearly guilty under *(b)*, which, as a matter of common sense, was included in *(c)*.

F Accordingly I find accused guilty and convict him of attempting to steal a postal packet, namely a letter, under S.267*(b)* of the Penal Code, of which the nature of the contents, if any, have not been proved."

On appeal to the Supreme Court the learned Chief Justice said:

G "I accept that the trial Magistrate erred in law in convicting appellant for an offence with which he was not charged on the ground that he had no jurisdiction, statutory or otherwise to do so."

He then went on to consider the proviso to Section 319*(a)* of the Criminal Procedure Code and later said:

H

"With respect I do not think this is a case in which the proviso should be applied. Apart from the conviction being entered upon an offence with which appellant was not charged in the first place and in respect of which the Court had no jurisdiction the proceedings were unsatisfactory in other respects.

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The appeal is allowed. The conviction is quashed and the sentence is set aside. A new trial is ordered to be held before another Magistrate."

It will be noticed that the order made does not specify on what charge the new trial is to be based. No amendment, other than an inconsequential one as to date, was applied for or made either in the Magistrate's Court or in the Supreme Court. We respectfully agree with B the learned Chief Justice that appellant was convicted of an offence with which he was not charged and that the Magistrate had no jurisdiction to do so. This finding was not challenged by the Crown. There were a number of grounds argued but the primary question is whether or not, in the events which happened, there was jurisdiction to grant a new trial.

The first pertinent comment is that the Crown is seeking to uphold an order for a new trial C in respect of a charge of an attempt to contravene to Section 267*(b)*—a charge which has never been made against appellant either orginally or at any stage of the proceedings by way of amendment or otherwise. He knew pronounced. If the order for a new trial is upheld the only charge which will appear in the record is a charge referable to Section 267*(c)*. Appellant has been tried on that charge. The effect of the judgment of the Magistrate is that he found appellant had not in fact committed an offence which came within Section 267*(c)*. This, in D our view, was an acquittal so appellant cannot be tried again on that charge. Indeed, Crown Counsel does not contend otherwise. For any new trial under Section 267*(b)* appellant must be charged on a fresh complaint under Section 78 because the original complaint has been completely disposed of in the finding of not guilty by the Magistrate. The validity of such a new proceeding is not a matter for us.

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In the result, in our view, the foundation of the case against appellant on the only charge made, was destroyed when he was acquitted on that charge without any amendment being made at any time which might require appellant to face a charge under Section 267*(b)*. There was nothing extant in the nature of a charge in the Magistrate's Court upon which appellant could now be tried.

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Although what we have said will determine the appeal we desire to refer to the powers of amendment. Sec. 214 of the Criminal Procedure Code provides for a variance between the charge and evidence and the amendment of the charge. The relevant provisions are:

"Provided that—

(1) *(a)* where a charge is altered as aforesaid, the court shall thereupon call upon the G accused person to plead to the altered charge;

(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- H examination.

(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

A 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:

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
B within the time, if any, limited by law for the institution thereof."

The saving in subsection (2) does not apply. Section 342 of the Criminal Procedure Code provides that there shall be no appeal on point of form or matter or variance unless there is an objection before the Magistrate. It does not override the requirement in Section 214 which requires the altered charge to be the subject matter of a plea. No argument has been advanced
C that Section 342 might apply. Moreover, appellant could not object because he was unaware of the course taken until after judgment. Cases in the Fiji Supreme Court which are apposite are *Jay Narayan Singh v. Reginam* 17 FLR 81; *Attorney-General v. Vijay Parmanandam* 14 FLR 7 and *Abel Hassan & Anor. v. Reginam* 19 FLR 11, 15—Further, in the case of the *Attorney-General for Fiji v. Hari Pratap s/o Ram Kissun*—Privy Council appeal No. 10 of 1969, the Privy Council referred to the requirement to call upon the accused to plead to the
D altered charge (under a corresponding section in the 1967 Revised laws of Fiji) *as a mandatory requirement.*

In our view, compliance with Section 214(1)*(a)* which requires an accused person to be called upon to plead to an amended charge, is mandatory and a condition precedent to any amendment which is not expressly excepted. Any purported conviction of an offence which
E contravenes Section 214(1)*(a)* is a nullity. Accordingly the Magistrate's Court never at any time during the hearing had power to deal with a charge under Section 267*(b)*. It follows that the Supreme Court also had no jurisdiction to order a new trial on a charge which had never come within the jurisdiction of the Magistrate's Court.

The appeal will be allowed and the order for a new trial will be quashed. The other
F findings of the learned Chief Justice are affirmed.

Appeal allowed.