JUDGMENT 17, 9 70

IN THE PRIVY COUNCIL No. 10 of 1969

ON APPEAL
FROM THE FIJI COURT OF APPEAL

B E T W E E N:

THE ATTORNEY GENERAL FOR FIJI — Appellant

- and -

HARI PRATAP S/O RAM KISSUM — Respondent

C A S E FOR THE RESPONDENT

Record

1. This is an Appeal by Special Leave from a Judgment of the Fiji Court of Appeal (Gould, V.P., Trainor, J.A. and Knox-Mawer, J.A.) dated the 24th day of May, 1968, which allowed the Respondent's appeal from a Judgment of the Supreme Court (Hammett, C.J.) dated the 22nd day of March 1968, dismissing the Respondent's appeal against his conviction by the Magistrate's Court at Labasa on three counts of receiving money on a forged document. pp. 144-155 pp. 111-136 pp. 94-107

2. The principal issue in this appeal is whether having regard to the terms of Section 204(1) of the Fiji Criminal Procedure Code, it is necessary, when an accused is asked to plead to an amended charge during a trial, that he should plead not only to additional counts, but also to the original counts.

3. Sections 120, 121 and 204(1) of the Criminal Procedure Code, which are relevant to this appeal, provide as follows:-

> "120. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving

Record

reasonable information as to the nature of the offence charged.

121. (1) Any offences whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts or form, or are part of, a series of offences of the same or a similar character.

121. (2) 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 paragraph of the charge or information called a count.

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;

(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".

4. The Respondent was tried, together with one Shri Prasad S/O Birogi (who was subsequently acquitted) before the Magistrate's Court at

Labasa on the following charge:

" FIRST COUNT pp. 1-3 l.13

Statement of Offence (a)

RECEIVED MONEY ON FORGED DOCUMENT: Contrary to Section 374 (a) of the Penal Code Cap. 8.

Particulars of Offence (b)

HARI PRATAP S/O RAM KISSUM and SHRI PRASAD S/O BIROGI, on the 12th day of April, 1966 at Nasea Labasa in the Northern Division with intent to defraud received from the bank of New Zealand Labasa, the sum of £93.-.- by virtue of a forged instrument, namely a cheque in the sum of £93. -. - drawn in favour of cash on the Bank of New Zealand purporting to be the cheque of MAHABEER S/O Ram Charan and signed by the said MAHABEER S/O Ram Charan knowing the same to be forged.

SECOND COUNT

Statement of Offence (a)

RECEIVING MONEY ON FORGED DOCUMENT: Contrary to Section 384(a) of the Penal Code Cap. 8.

Particulars of Offence (b)

HARI PRATAP S/O RAM KISSUM and SHRI PRASAD S/O BIROGI, on the 2nd day of July, 1966 at Nasea, Labasa in the Northern Division with intent to defraud received from the Bank of New Zealand Labasa, the sum of £86.-.- by virtue of a forged instrument, namely a cheque in the sum of £86.-.- drawn in favour of cash on the Bank of New Zealand purporting to be the cheque of MAHABEER s/o Ram Charan and signed by the said MAHABEER s/o Ram Charan knowing the same to be forged.

Record

THIRD COUNT

Statement of Offence (a)

RECEIVING MONEY ON FORGED DOCUMENT: Contrary to Section 374(a) of the Penal Code Cap. 8.

Particulars of Offence (b)

HARI PRATAP s/o RAM KISSUM and SHRI PRASAD s/o BIROGI, on the 13th day of December, 1966 at Nasea Labasa in the Northern Division with intent to defraud received from the Bank of New Zealand Labasa, the sum of £100.-.- by virtue of a forged instrument, namely a cheque in the sum of £100.-.- drawn in favour of cash on the Bank of New Zealand purporting to be the cheque of MAHABEER s/o RAM CHARAN and signed by the said MAHABEER s/o RAM CHARAN knowing the same to be forged.

FOURTH COUNT

Statement of Offence (a)

RECEIVING MONEY ON FORGED DOCUMENT: Contrary to Section 374(a) of the Penal Code Cap. 8.

Particulars of Offence (b)

HARI PRATAP s/o RAM KISSUM and SHRI PRASAD s/o BIROGI, on the 27th day of January, 1967 at Nasea, Labasa in the Northern Division with intent to defraud received from the Bank of New Zealand Labasa, the sum of £80.-.- by virtue of forged instrument namely a cheque in the sum of £80.-.- drawn in favour of cash on the Bank of New Zealand purporting to be the cheque of MAHABEER s/o Ram Charan and signed by the said MAHABEER s/o Ram Charan knowing the same to be forged."

5. On the third day of the trial at which the Respondent was not represented, the prosecutor stated that he wished to add four alternative counts of Forgery contrary to Section 364(2) of the Penal Code. The record reads:-

"Chandra: I wish to add 4 alternative counts. I will not wish to adduce further evidence from witnesses already called. p. 27

1st Accused: Object. Case has been pending for last three months. Taken by surprise.

Chauhan: Object. Late stage. Material witnesses already heard. Taken defence by surprise.

Court: Bearing in mind the provision of S. 204, C.P.C. I will grant leave to add these 4 alternative charges; Every prosecution witness who has been called must be recalled for cross-examination if 1st accused or Counsel for 2nd accused so wishes".

A witness, Uma Kant, was then called and then the following (as appears from the record) occurred:-

"Court: I have forgotten to comply with S.4(1) C.P.C. in relation to the alternative counts. p. 30

All four alternative charges read and explained in English and Hindustani. Both Accused say they understand.

Right of trial by Supreme Court and provisions of S.211A C.P.C. explained.

1st Accused: I wish to be tried by this Court on all of the 4 alternative counts.

2nd Accused: I wish to be tried by this Court on all of the 4 alternative counts.

1st Accused: I plead not guilty to all of the 4 alternative counts.

2nd Accused: I plead not guilty to all of the 4 alternative counts."

Record

6. It is common ground that when the accused were asked to plead upon the amendment, they pleaded only to the four additional counts, and were not asked and did not plead again to the original four.

pp. 105-107

7. The Magistrate convicted the Respondent on all four counts and sentenced him to six months' imprisonment on each count to run consecutively.

8. The Respondent appealed to the Supreme Court, which, by reason of a weakness in the chain of evidence in the third count, quashed the conviction on that count, but sustained the other three. However, the Supreme Court increased the sentence on each of the counts 1, 2 and 4 to twelve months' imprisonment.

p. 136

p. 138

9. In relation to the Ground of Appeal based on Section 204(1) of the Criminal Procedure Code, the Supreme Court held, it is submitted wrongly, as follows:-

p. 133 l.2 - 135 l.28

"At the hearing of the appeal learned Counsel for the defence took the matter a stage further however. He contended that it was not sufficient merely to read the four additional counts and to take the accused's consent and pleas on these counts alone, and that the learned trial Magistrate should have taken the accused's consents and pleas afresh to the original four counts in addition to the four new counts.

This contention is based on the wording Section 204(1) of the Criminal Procedure Code and with special reference to the meaning of the word "charge" in that section.

It is submitted that on a criminal trial in the Magistrate's Court there can only be one charge. In this connection reference is made to section 121 of the Criminal Procedure Code. It seems clear to me that there can only be one charge before the Court at a trial. If more

offences than one are charged, whether in the alternative or not, they must be made the subject of separate counts in the charge. It is contended that if there is any alteration in one of several counts in a charge, or if other counts are added to the charge, the charge itself is altered. The altered charge in this case consists of the original counts and the new counts that have been added. It is the case for the Appellant that it is this "whole" altered charge to which the accused should have been called upon to plead after the additional counts had been added, and not merely the additional counts.

At first sight there seems to be considerable substance in this view. When however the words used in section 204(1) of the Criminal Procedure Code are examined critically and in detail, it appears that if so construed curious results, which it is doubtful could ever have been contemplated, ensue.

It is contended that the word "charge" in Criminal Procedure Code section 204(1) means the whole charge and all of the counts in a charge. If that is so the section may be altered, inter alia, by the addition of a "new charge". But if the new charge is to be "added" to the old charge in this sense, it would mean that there would in the result be more than one charge before the Court. This would conflict with the provisions of section 121 which clearly envisages that there may never be more than one charge and that all additional offences averred must be made the subject of separate and different counts in the charge.

In my view, therefore, the words in section 204 - "the court may make such order for the alteration of the charge . . . by way of . . . addition of a new charge" must intend and mean "the court may make such order for the alteration of the charge . . . by way of . . . addition of a new count to the charge".

In other words in this section the word

Record

"charge" must there be used as and be interpreted as the word "count to the charge", if section 204 is to be construed properly and consistently with section 121.

The first proviso to section 204 appears to me to cover, as it stands, the case where a charge, consisting of one count charging one offence, is altered. In such a case the accused must be called upon to plead to this altered "charge". Where, however a charge contains several different counts, I construe the word "charge" in the first proviso to section 204(1) to mean and have reference to "a count in a charge". After giving this matter careful consideration and bearing in mind the cardinal principles that the Court must apply to the construction of statutes, I cannot think of any other construction to which this proviso can be open, if it is to be construed consistently both with itself and with section 121 of the Code.

In my view the additional alternative counts which were added to the charge in the charge in the Court below should have been numbered 5, 6, 7 and 8, respectively. They all formed a part of the original charge, which was amended, not by the addition of a new "charge" but the addition of these four new counts.

It was sufficient compliance with the provisions of the first proviso of section 204(1) for the Appellant's pleas to be taken to these four additional counts, as was done in the Court below. It was not, in my view, necessary for the Appellant's pleas to be taken again to the first four original counts. Even if I am wrong in this view, no conceivable miscarriage of justice can have occurred by only taking the Appellant's pleas to the additional counts. In my view, in these circumstances, if it was an irregularity, it was one of procedure and not substance and did not go to the jurisdiction. In that event I would, therefore, apply the proviso of

section 325(1) of the Criminal Prodecure Code."

10. The Court of Appeal, it is submitted correctly, rejected the Supreme Court's above interpretation of S.204(1) and held:

"This view of the section was adopted by Crown Counsel in argument before this court, but with great respect, we take the view that this is not the correct interpretation. Where there is only one offence contained in a charge it may be amended by a change in its own wording, the substitution of another offence or the addition of one or more counts: We feel that where the learned Chief Justice refers to "a charge, consisting of one count charging an offence" he visualizes it being amended only in its particulars or by substitution. Then the direction to call the accused person to plead to the "altered charge" can only mean plead to the resultant varied or new charge. But where it is amended by the addition of another count surely the "altered charge" is the original charge as altered by the addition. We do not see that any difference arises whether there is only one offence contained in the original charge or whether there are two or more. p.152-p.155 1.19

Section 204 clearly embraces in the concept of alteration, variation, substitution and addition. Whichever course is taken, it is the original charge which is altered. When you add material to an existing object it is the existing object which is altered - it is not the new material. When you add a count to an existing charge it is not the new count which is altered, but the existing charge. We see no escape from the plain meaning of the words "altered charge" in proviso (a) and do not find anything that can be drawn from the one anomaly in the earlier part of the section, of sufficient weight to affect what we consider to be the only possible construction of the proviso.

Record

It is idle to speculate upon the underlying reason for the provision. Where an accused person has pleaded not guilty to a number of counts in a charge he is at liberty to change his plea to "guilty" at any time so the provision offers him no advantage. On the other hand it does appear to afford him the opportunity, where he has pleaded "guilty" to some counts and "not guilty" to others of reversing his plea of "guilty". That is just. If an accused person has pleaded guilty to counts (a) and (b) and not guilty to counts (c) and (d) of a charge, he is surely entitled to reconsider his position if the prosecutor then proposes to add two new counts.

In our judgment the result of the failure to take the Appellant's plea to the whole charge upon the amendment is that the proceedings thereafter became a nullity. On not dissimilar legislation in Nigeria a similar conclusion was reached in Fox v. Commissioner of Police Vol. 12 Selected Judgments of the West African Court of Appeal at p.215 and Eronini v. The Queen (supra). It is true that the Criminal Procedure Ordinance (Cap. 43) which was the legislation which applied, contains a provision in section 164(4) that "when a charge is so amended . . . the charge shall be treated for the purpose of all proceedings in connection therewith as having been filed in the amended form". That section does not appear in the Fiji Criminal Procedure Code but we feel that its absence makes no difference to the fact that at least from the time of the amendment, the proceedings must be taken as having continued without any plea being taken, when a plea was required by law.

Crown Counsel has submitted that the case should be treated as one in which no valid amendment was ever made, and that the trial in relation to the original four counts should be held valid, provided no prejudice to the Appellant arose. This point was not considered specifically in the

West African cases referred to above, though the fact that it does not appear to have been raised may indicate that it was not considered a valid argument. Before this court counsel contended that the amendment was irregular because the taking of a plea was a necessary ingredient. It was therefore legally irrelevant to the proceedings. Ably though this argument was presented, we are unable to agree with it. Under section 204 the charge must first be altered and then ("thereupon" is the word used) the plea must be called for. If the plea was completely forgotten and never called for, the charge would nevertheless have been amended.

The learned Chief Justice expressed the view that if he was incorrect in his construction of section 204 he would have applied the proviso of section 325(1) of the Criminal Procedure Code (now s.200(1) Cap.14 Laws of Fiji 1967), on the ground that no conceivable miscarriage of justice could have occurred. While we sympathise with this opinion from a factual point of view, we are unable to agree that this omission was one which was curable by the application of the proviso. We understand from Crown Counsel for the West African cases above-mentioned were not quoted in argument before the learned Chief Justice but they support our own view that proceedings after there has been failure to call for a plea which is required by law, are a nullity. We know of only one case in which it is said there is jurisdiction to try a person without a plea being taken (except for those cases in which a plea of not guilty is entered on refusal to plead) and that is where a person is, after due investigation found mute by visitation of God and yet is capable of following the proceedings - see Archbold, Criminal Pleading and Practice (36th Edn.) Paragraph 427.

We have observed that in R. v. McVitie (1960) 2 All E.R. 498 the court appeared to indicate a wide view of the power to exercise the

proviso, though it refrained from saying that it could be applied where the indictment disclosed no offence. R. v. Thomson (1914) 2 K.B. 99, which is referred to in R. v. McVitie, is a strong case in that the proviso was applied though the indictment was bad for duplicity. In our opinion the defect in the case before us was more fundamental. From the time the plea should have been taken, but was not, the Appellant was not properly before the court. The proceedings were null and void and the evidence given could not be regarded. We do not think it is open to this court to say that by virtue of the proviso, we can give full value to the evidence which we have held the magistrate must disregard, and convict the Appellant where the magistrate could not lawfully do so. In our judgment such a course would do violence to established principles concerning the trial of persons accused and would therefore involve a miscarriage of justice".

11. The Court of Appeal accordingly allowed the appeal and quashed the convictions and sentences imposed on the Respondent.

p. 155 ll. 20-30

pp. 156-157

12. By Order, dated the 18th day of March, 1969, the Appellant herein was granted Special Leave to Appeal to Her Majesty in Council.

13. The Respondent respectfully submits that this appeal should be dismissed with costs for the following, among other

R E A S O N S

(1) BECAUSE when the Respondent was asked to plead upon the amended charge, he pleaded only to the four additional counts and was not asked to and did not plead again to the original four.

(2) BECAUSE the result of the failure to take the Respondent's plea to the whole charge upon the amendment is that the proceedings thereafter became a nullity.

(3) BECAUSE the Supreme Court's interpretation of Section 204(1) of the Criminal Procedure Code is wrong.

(4) BECAUSE the Court of Appeal's interpretation of Section 204(1) is right for the reasons stated in their Judgment.

(5) BECAUSE the Court of Appeal were right in holding that the proviso to Section 325(1) of the Criminal Procedure Code could not be applied in this case.

10

E. F. N. GRATIAEN

EUGENE COTRAN

No. 10 of 1969

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE FIJI COURT OF APPEAL

BETWEEN:

THE ATTORNEY GENERAL FOR FIJI Appellant

- and -

HARI PRATAP S/O KISSUM Respondent

CASE FOR THE RESPONDENT

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