SURENDRA PRASAD

v.

REGINAM

[SUPREME COURT, 1963 (MacDuff J. L.), 30th November, 1962, 4th January, 1963]

Appellate Jurisdiction

Criminal law—shopbreaking and larceny—charge not bad for duplicity—Penal Code (Cap. 8) ss. 288 (1), 326, 327 (*a*)—Criminal Procedure Code (Cap. 9) ss. 123, 325 (1)—Larceny Act 1916 (Imperial) ss. 13 (*a*), 25 (1) 26 (1) 27 (2).

A charge of shopbreaking and larceny contrary to s. 327 (*a*) of the Penal Code is not bad for duplicity.

Per curiam—If the charge had been duplex it was in the circumstances a defect curable under the proviso to s. 325 (1) of the Criminal Procedure Code as causing no substantial miscarriage of justice.

R. v. Nicholls [1960] 2 All E.R. 449; 44 Cr. App. R. 188, distinguished.

Cases referred to:

R. v. Hungerford (1790) 2 East P.C. 518: *R. v. Withal* (1772) 1 Leach 88; 2 East P.C. 515: *R. v. Thompson* (1913) 9 Cr. App. R. 252.

Appeal against conviction.

Ramrakha for the appellant.

Greenwood Q.C. (*Attorney-General*) for the Crown.

MACDUFF C.J. [4th January, 1967]—

The appellant was charged with two other persons before the Acting Senior Magistrate, Lautoka with the offence of:

> " *Storebreaking and Larceny*: Contrary to sections 327 (*a*) and 288 (1) of the Penal Code Cap. 8.
>
> *Particulars of Offence*
>
> Ram Krishna son of Panchalaiya, Surendra Prasad son of Sam Lal and Alex Robinson on the 17th day of September, 1962 at Lautoka in the Western Division, broke and entered the store of Low Wai Mun and stole therein one steel safe, 600 Ascot cigarettes and £30 10s. 0d. in money, all of the total value of £62 15s. 0d. the property of the said Low Wai Mun."

He was convicted and sentenced to twelve months' imprisonment. He now appeals against that conviction.

The first ground of appeal is:

> " That the charge upon which your petitioner was tried was bad for duplicity and the learned trial Magistrate erred in ruling that it was otherwise."

Counsel has relied on the case of *R. v. Nicholls* (1960) 2 All E.R. 449 where it was held that an indictment charging in one count " warehouse-breaking contrary to sections 26 (1) and 27 (2) of the Larceny Act, 1916 " was bad for duplicity as two separate offences were charged in the one count. To understand the *ratio decidendi* of this decision it is necessary to appreciate that section 26 (1) of the Larceny Act, 1916, reads " Any person who—(1) breaks and enters any . . . warehouse . . . *and commits any felony therein* " (the equivalent of section 327 (*a*) of the Penal Code) while section 27 reads " Every person who *with intent to commit any felony therein* . . . (2) breaks and enters any warehouse . . . " These sections are separate and distinct sections of the Larceny Act, 1916 containing different elements and carrying different penalties.

In dealing with the offence of burglary there are three forms of indictment given in Archbold's Criminal Pleading Evidence and Practice 35th Edition:

(1) Burglary contrary to section 25 (1) of the Larceny Act, 1916,

(2) Burglary contrary to section 25 (1) of the Larceny Act, 1916 and Larceny, and

(3) Burglary and Larceny contrary to sections 25 (1) and 13 (*a*) of the Larceny Act, 1916.

It is noted by Archbold that the latter two forms of count charge two offences: *R. v. Hungerford*, 2 East P.C. 518: *R. v. Withal*, 1 Leach 88; but have always been held good notwithstanding the rules against duplicity.

It is conceded by the learned Attorney-General for the Crown that the law as to an indictment for burglary does not apply to the offence of housebreaking contrary to section 327 (*a*) of the Penal Code. With this concession I agree so far as it goes, but only that far. Section 326 (*a*) of the Penal Code provides that:

" 326. Any person who in the night—

(*a*) breaks and enters the dwelling-house of another with intent to commit any felony therein . . .

is guilty of the felony called burglary . . . "

The offence of burglary is complete once the breaking and entering by night and the intent are proved. This then is identical with the indictment in England of " Burglary contrary to section 25 (1) of the Larceny Act, 1916."

Section 123 of the Criminal Procedure Code authorises the stating in an information of the offences of burglary and larceny in this form:

" *Statement of Offence*

Burglary, contrary to section 326 (*a*), and larceny, contrary to section 296 of the Penal Code.

Particulars of Offence

A.B., in the night of the day of , 19 , in the District, did break and enter the dwelling-house of *C.D.* with intent to steal therein, and did steal therein, one watch, the property of *S.T.*, the said watch being of the value of £10."

It will be observed that this charge is obviously duplex. It is identical with the second and third forms of indictment for burglary quoted in Archbold *supra*. The common law authority for such duplicity has been replaced by statutory authority in this Colony.

To return to section 327 (*a*) of the Penal Code. This section corresponds with 26 (1) of the Larceny Act, 1916. The offence is described shortly in both cases as:

" Housebreaking and committing felony ".

The form of indictment given in Archbold (*supra*) at paragraph 1826 is in this form:

" *Statement of Offence*

Housebreaking and larceny, contrary to section 26 (1) of the Larceny Act, 1916."

The reason for the charge being in this form is that the offence created by section 327 (*a*) of the Penal Code and by section 26 (1) of the Larceny Act, 1916, consists of two elements the housebreaking and commission of a felony in the dwelling-house, etc., both of which must be present before an offence against these sections is committed.

In my view the charge in this case suffers only from the unnecessary addition of the words " and 288 (1) of the Penal Code ". These are no more than surplus verbiage and do not make the charge duplex in any way. For that reason I would hold that the charge was good.

The learned Attorney-General submits, however, that even if there were a defect in the form of charge that there has been no substantial miscarriage of justice and that the appeal on this point should be dismissed under the proviso to section 325 (1) of the Criminal Procedure Code. It is clear that the defence was in no way prejudiced by any alleged duplicity or any defect—it was perfectly clear what case the appellant had to meet. It appears to me, following *R. v. Thompson*, 9 Cr. App. R. 252, that this is a proper case where the discretion of the court should be exercised and the proviso to section 325 (1) applied, were that course necessary.

The second ground of appeal is that the verdict is unreasonable and cannot be supported having regard to the evidence. Counsel for the appellant very ably argued that the conviction of the appellant depended entirely on his statement to the police, that up to the time the safe was brought to the car he was driving there was no evidence of any knowledge on his part of the storebreaking and that at the most there was evidence only that he was an accessory after the fact, and that what he did was the result of coercion by the actual storebreakers. It appears clear on the authorities quoted by the learned Attorney-General that if a person knew all the circumstances and those circumstances constituted an offence and he helped in the actions which constituted the offence, that was sufficient to convict him of being an aider and abetter. On the facts of the case under appeal it is clear that the appellant was aiding and abetting the commission of the offence and that he was not merely an accessory after the fact.

I am also of opinion that the facts given in the statement of the appellant to the police, even if believed, do not constitute duress within the meaning of that term given in section 16 of the Penal Code.

What counsel for the appellant appears to have ignored is that there is other evidence against the appellant, insufficient of itself perhaps on which to convict, but which does connect him with the commission of the offence charged. On the whole of the evidence I am of the view that there was ample believable evidence on which the learned trial Magistrate was entitled to convict.

In the result the appeal is dismissed.

Appeal dismissed.

Solicitors for the appellant: *Koya and Company.*

Solicitor-General for the respondent.