A **OFFICIAL RECEIVER**

v.

AMBALAL PARSHOTTAM

[SUPREME COURT, 1965 (Knox-Mawer P.J.), 24th August, 14th
B September]

Appellate Jurisdiction

Criminal law—practice—charge—whether bad for duplicity—right of accused to acquittal where charge incurably bad—Bankruptcy Ordinance (Cap. 37) s.133(1) (o)—Criminal Procedure Code (Cap. 9) ss.155(2)(3), 206—Debtors Act 1869 (32
C *& 33 Vict., c.62) (Imperial) s:11—Indictments Act 1915 (5 & 6 Geo.5, c.90) (Imperial) r.5(1)—Road Traffic Act 1930 (20 & 21 Geo.v, c.43) (Imperial) ss.11(1), 12, 15(1)—Larceny Act 1916 (6 & 7 Geo.5, c.50) (Imperial) s.81.*

The respondents was charged in the Magistrates Court with pledging or disposing of property obtained on credit and not paid for contrary to section 133 (1) (o) of the Bankruptcy Ordinance. The magistrate
D acceded to submission that the charge of "pledging" or "disposing" was bad for duplicity and found that the charge was incurably defective. On appeal by the Official Receiver and cross appeal by the respondent claiming that he was entitled to acquittal:

Held: The section under which the respondent was charged created one offence only (the getting rid of property not paid for) but enacted
E three different ways of committing it. The matter was covered by section 123 (b) (i) of the Criminal Procedure Code and the charge was not bad for duplicity.

Per curiam: Assuming that the charge had been incurably bad the accused should have been acquitted under section 206 of the Criminal Procedure Code.

F Cases referred to: *R. v. Thomas* (1867-71) 11 C.C.C. 535: *R. v. Perry* (1945) 31 Cr.App.R.16; 174 L.T.178: *R. v. Molloy* [1921] 2 K.B. 364; 15 Cr.App.R.170: *R. v. Surrey Justices ex parte Witherick* [1932] 1 K.B.450; 146 L.T.164: *R. v. Wilmot* [1933] All E.R.(Rep.) 628; 24 Cr.App.R.63: *Viliame Buredamu v. Police* (Cr.App. No. 12 of 1950 — unreported): *R. v. Benson* [1908] 2 K.B. 270; 98 L.T.933: *R. v. Clow* (1963) 47 Cr.App.R.136; [1965] 1 Q.B.598: *G. Newton Ltd v. Smith*
G [1962] 2 All E.R.19: *Bastin v. Davis* [1950] 1 All E.R.1095; [1950] 2 K.B.579: *Thomson v. Knights* [1947] K.B.336; [1947] 1 All E.R.112: *Sheikh Anwar v. the Crown* (Cr.App. No. 54 of 1960 — unreported).

Appeal and cross appeal from judgment of the Magistrates Court.

B. A. Palmer for the appellant.

H *M. V. Pillai* for the respondent.

KNOX-MAWER P.J.: [14th September, 1965]—

This is a Case Stated by the Magistrate's Court of the First Class, Lautoka. At the instance of the Official Receiver, the accused Ambalal Parshottam was charged in the court below with the following offence:

Statement of Offence

Pledging or disposing of property obtained on credit and not paid for contrary to section 133 (1) (o) of the Bankruptcy Ordinance (Cap. 37)

Particulars of Offence

Ambalal Parshottam son of Parshottam within twelve months next before the presentation of a Bankrutcy Petition by him on the 16th day of July, 1963 did at Nadi in the Western District of the Colony of Fiji on the 8th day of February 1963 dispose or pledge property to wit stocks of shoes which he had purchased on credit and not paid for by giving a Bill of Sale to Madhavbhai Narottam son of Narottam trading as "Madhavbhai & Sons" of Nadi Shoemakers such pledging or disposing being not in the ordinary way of his trade.

The accused pleaded not guilty and his trial proceeded. At the conclusion of the evidence his Counsel submitted that the charge was bad for duplicity in that "disposing" and "pledging" constituted two distinct offences. The learned Senior Magistrate upheld the submission. He further considered that since he had no valid charge before him he was unable to comply with section 155 (2), section 155 (3) or section 206 of the Criminal Procedure Code. In these circumstances the learned Senior Magistrate made no finding except that the charge was incurably defective.

The accused has appealed against this finding contending that he should have been acquitted in the lower court. The Official Receiver has appealed aaginst the finding of the lower court that the charge was bad for duplicity.

The questions as stated for determination by this Court are:

1. Was this Court correct in holding that the charge was bad for duplicity.

2. If the answer to the first question is in the affirmative, was this Court correct in failing to acquit the accused.

Section 133 (1) (o) of the Bankruptcy Ordinance Cap. 37 corresponds to section 11 of the Debtors Act 1869. The meaning of this section was considered by Lush J. in *R. v. Thomas* Cox's Criminal Law Cases Vol. XI 1867-71 p.535. As explained by the learned Judge in that case, the act which the law here forbids a bankrupt to do is to get rid of, otherwise than in the ordinary course of trade, any property he has not paid for. The bankrupt may commit this offence, of getting rid of his property, in three alternative ways — by pawning, by pledging or by disposing of the property. In other words the section creates one offence only (the getting rid of property not paid for) but enacts three alternative ways of committing it. This matter

is precisely covered by section 123 (b) (i) of the Criminal Procedure Code. The relevant words of this subsection (which correspond to Rule 5 Sub-Rule (1) of Schedule I to the Indictments Act 1915) are:

A "Where an enactment constituting an offence states the offence to be the doing or the omission to do any one of any different acts in the alternative, ... the acts, omissions ... stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence;"

In view of the provisions of this subsection it follows that the B charge in the instant case was not bad for duplicity.

In arriving at this conclusion I have studied the following authorities: *Perry* 31 Cr. App. R. 16; *Molloy* 1921 2 K.B. 364; *R. v. Surrey Justices ex parte Witherick* [1932] 1 K.B. 450; *Wilmot* [1933] All E.R. Rep. 628; *Viliame Buredamu v. Police* Fiji Criminal Appeal No. 12 of 1950; *R. v. Benson* [1908] 2 K.B. 270; *Clow* 47 Cr. App. R. 136; *G. Newton Ltd. v. Smith* [1962] 2 All E.R. 19; *Bastin v. Davis* [1950] 1 All C E.R. 1095; *Thomson v. Knights* [1947] 1 All E.R. 112.

It is, of course, an elementary principle of law that different offences must not be charged in the alternative in one count because the defendant cannot then know with precision with what he is charged. It becomes therefore a question of construction for the court in each case whether the section under consideration creates D separate offences, or one offence with alternate ways of committing such an offence.

The authorities merely illustrate the considerations which have moved the courts to interpret a particular enactment one or the other way.

E Thus in *R. v. Surrey Justices ex parte Witherick* (supra) the court held that section 12 of the Road Traffic Act 1930 created two separate offences and that the information charging the defendant with the two offences in the alternative was bad for duplicity. Again in *R. v. Wilmot* (supra) the court held that section 11 (1) of the Road Traffic Act 1930 created more than one offence and that the count upon which the appellant had been convicted in that case was similarly F bad for duplicity.

R. v. Molloy (supra) was another case in which the court upheld the submission of duplicity. There the indictment charged the appellant with larceny contrary to section 81 of the Larceny Act 1916 in that he "stole, or with intent to steal, ripped and severed or broke ... the property of etc.". The Court of Criminal Appeal held that the section created two different offences, namely the act of stealing, and G the act of ripping etc. with intent to steal. It is to be noted, however, that as regards the second of these two offences, the section (81) specifies alternative ways of committing it, (ripping, severing or breaking). Thus in delivering the judgment of the Court of Criminal Appeal Avery J. was careful to point out that Rule 5 of Schedule I to the Indictments Act 1915 authorised a single count charging a H defendant with committing this second offence in these alternative ways. This dicta lends support to the view I have adopted in the present case.

Two instances where the court construed the sections under consideration the other way, viz. as creating one offence only, are *Perry* (supra) and *Thomson v. Knights* (supra).

In *Perry* the defendant was charged with obtaining credit, contrary to section 13(1) of the Debtors Act 1869. The particulars of offence were that the defendant "had obtained credit . . . under false pretences or by means of other fraud". The *ratio decidendi* of the judgment in this case is that "by false pretences" or "by other fraud", in section 13(1) are alternative methods of committing the same offence. Hence the count charging these methods in the alternative was not bad for duplicity.

In *Thomson v. Knights*, the defendant had been charged (and convicted) under section 15(1) of the Road Traffic Act 1930 of being unlawfully in charge of a motor car while under the influence of drink or a drug. In construing section 15(1) the court held that Parliament had not meant to create one offence of being incapable by reason of a drug and another offence of being incapable by reason of drink. What it meant to provide was that a man who was in charge of a car when in a self-induced incapacity, whether it was due to drink or drugs, committed the offence.

I consider that I have now made sufficient reference to the relevant authorities for the purpose of illustrating the problem of construction involved in these cases. Upon the construction which this court has placed upon section 133(1)(o) of Cap. 37, it follows that the answer to the first question stated is that the court below was incorrect in holding that the charge was bad for duplicity. The case is accordingly remitted to the Magistrate's Court with the direction that the court do proceed in accordance with section 206 of the Criminal Procedure Code.

Although I have now disposed of the case stated I think it will be useful for this Court to advert to the second question. I refer in this context to the decision of this Court in *Sheik Anwar v. The Crown* Cr. App. No. 54 of 1960. Upon upholding a submission by learned Defence Counsel that a charge is incurably bad for duplicity a Magistrate should acquit the accused, under section 206 of the Criminal Procedure Code.

Appeal allowed; case remitted to magistrates court.