ATTORNEY-GENERAL

v.

KRISHNA

[Supreme Court, 1970 (Moti Tikaram P.J.), 2nd October, 11th December]

Appellate Jurisdiction

Criminal law—traffic offences—notice of intended prosecution—possibility of proceedings for one or more of four specified offences—prosecution for one—validity of notice—Traffic Ordinance (*Cap.* 152) *ss.* 38(1), 41(*a*), 41(*c*)—*Road Traffic Act* 1930 (20 & 21 *Geo.* 5, c.43) (*Imp.*) *ss.* 11, 21(*a*), 21(*c*)—*Criminal Procedure Code* (*Cap.* 14) *s.* 200.

The respondent was charged in the Magistrate's Court with dangerous driving contrary to section 38(1) of the Traffic Ordinance. He had been served with a notice of intended prosecution under section 41(*c*) of the Traffic Ordinance which indicated that it was intended to take proceedings against him, " for either one or more of the following offences, Exceeding Speed Limit, Careless, Reckless or Dangerous Driving against sections 36, 37 and 38 of the Traffic Ordinance. " On the ground that the requirement of section 41(*c*) was mandatory and should be strictly interpreted, the trial Magistrate ruled that the respondent had no case to answer.

Held: 1. The prosecution was not obliged to be irrevocably committed to a particular charge before issuing a notice under section 41(*c*).

2. The reference in the notice to the possibility of the respondent being charged with one or more of the four offences specified (with one of which he was in fact subsequently charged) did not invalidate the notice, but, by placing the respondent on guard in all possible respects, satisfied the object of the legislation to the fullest extent.

Cases referred to:

Clarke v. Mould [1945] 2 All E.R. 551; 173 L.T. 370.

Venn v. Morgan [1949] 2 All E.R. 562; 65 T.L.R. 571.

Pope v. Clarke [1953] 2 All E.R. 704; 37 Cr. App. R. 141.

Woodward v. Sarsons (1875) L.R. 10 C.P. 733; 32 L.T. 867.

Milner v. Allen [1933] 1 K.B. 698; 149 L.T. 16.

Watt v. Smith [1942] S.C. (J.) 109.

Appeal by the Attorney-General against the dismissal in the Magistrate's Court of a charge of dangerous driving on a ruling of no case to answer.

J. R. Reddy for the appellant.

M. V. Pillai for the respondent.

The facts sufficiently appear from the judgment.

MOTI TIKARAM P.J.: [11th December 1970]—

A This is an appeal by the Attorney-General against the order of the First Class Magistrate's Court sitting at Nadi whereby he acquitted the respondent on a submission of no case to answer on the charge of dangerous driving contrary to section 38(1) of the Traffic Ordinance, Cap. 152 in Criminal Case No. 20 of 1970.

At the conclusion of the prosecution's case the learned Counsel for the accused (now respondent) submitted that the contents of the notice served on the accused
B did not comply with the provisions of section 41 of the Traffic Ordinance, Cap. 152. The notice (Exhibit A) which the learned Counsel for the accused argued was invalid read as follows:—

FIJI POLICE FORCE

Nadi Police Station
Nadi.

C / /1970

NOTICE OF INTENDED PROSECUTION

Dear Sir/Madam.

In pursuance of the provisions of Section 41 of Traffic Ordinance, Cap. 152, I, the undersigned, do hereby give you notice that it is intended to institute proceedings against you for either one or more of the following offences,
D Exceeding Speed Limit, Careless, Reckless or Dangerous driving against Sections 36, 37 and 38 of the Traffic Ordinance, Cap. 152, in the driving of motor vehicle No.—U953 at Queens Road, Namaka at approximately 0220 hrs. on the 23rd day of November, 1969.

To:—Mr. Ram Samy Pillai s/o Mudliar

(Sgd.) B. B. Deo I.P.
E Station Officer, Nadi.

I hereby certify that I have served the true copy of this N.I.P. on subject thereon at Nadi P. S. at 1/12/69, Nadi.

(Sgd.) B. B. Deo
1/12/69."

The learned trial Magistrate upheld the submission, ruled that there was no
F case to answer and acquitted the accused. The reasons for his decision appear in his ruling the full text of which reads as follows:—

" *Court*: Re—S. 41(*c*): It seems to me that in enacting this subsection the Legislature contemplated, when it used the words " a notice of the intended prosecution *specifying the nature of the alleged offence* ", something a good deal more specific and precise than the notice contained in Ex. "A". That notice was to the effect that it was intended to prosecute the accused.

G '. . . . for either one or more of the following offences, Exceeding Speed Limit, Careless, Reckless, or Dangerous driving against Section 36, 37 *and* 38 of the Traffic Ordinance, Cap. 152 . . . . '

Whereas such a warning (if given at the time the offence was committed) would no doubt have met the requirements of subsection (*a*) it is very significant in my view, that the legislature has in subsection (*c*) used words very
H different from those used in subsection (*a*). This, I think, must be because the legislature contemplated in subsection (*c*) a more specific and precise warning than that which it contemplated in subsection (*a*).

In my view the requirement contained in subsection (*c*) that the notice should specify the nature of the alleged offence is a mandatory requirement which should be strictly interpreted. In the result I hold that Ex. " A " does not satisfy the requirements of subsection (*c*). A

As I have already held that the requirements of subsections (*a*) and (*b*) were not met by, respectively, the verbal warning given at the Terminal Building or the service of the summons it follows that I must, and I do, rule that there is no case to answer and acquit the accused in accordance with Section 200 of the Criminal Procedure Code.

B

I might add that I have found support for my view that the warning given at the Terminal Building was insufficient in the Scottish case of *Watt vs. Smith* (1942) S.C.(J.) 109 referred to in *E. & E. Digest*, Vol. 45, at page 114.

(Sgd.) R. A. Kearsley. "

It is against the learned trial Magistrate's ruling and consequent acquittal that the Crown is now appealaing on the following grounds:— C

" (i) the learned trial Magistrate erred in law in holding that the terms of the notice of intended prosecution which was served on the said *KRISHNA* s/o Ram Nambiar did not satisfy the requirements of section 41(*c*) of the Traffic Ordinance; and

(ii) the learned trial Magistrate erred in law and fact in acquitting the said *KRISHNA* s/o Ram Nambiar of the offence of dangerous driving having regard to the evidence adduced before the court. " D

The whole of section 41 of the Traffic Ordinance reads as follows:—

" 41. Where a person is prosecuted for an offence under any of the provisions of this Part of this Ordinance relating respectively to the maximum speed at which motor vehicles may be driven, to reckless or dangerous driving, and to careless driving he shall not be convicted unless either— E

(*a*) he was warned at the time the offence was committed that the question of prosecuting him for an offence under some one or other of the provisions aforesaid would be taken into consideration; or

(*b*) within fourteen days of the commission of the offence a summons for the offence was served on him; or

(*c*) within the said fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person registered as the owner of the vehicle at the time of the commission of the offence: F

Provided that—

(*a*) failure to comply with this requirement shall not be a bar to the conviction of the accused in any case where the court is satisfied that— G

(i) neither the name and address of the accused nor the name and address of the registered owner of the vehicle, could with reasonable diligence have been ascertained in time for a summons to be served or for a notice to be served or sent as aforesaid; or H

(ii) the accused by his own conduct contributed to the failure; and

A (*b*) the requirement of this section shall in every case be deemed to have been complied with unless and until the contrary is proved. "

The learned Counsel for Crown has argued that the learned trial Magistrate failed to appreciate the primary object of the legislation. He contended that the words " the nature of the alleged offence " in section 41(*c*) have to be assigned some meaning when construing the object and the meaning of that section. He submitted that there was a common thread running through all the offences

B mentioned in the notice of intended prosecution (Ex." A "), namely that they all related to the manner of driving.

The learned Counsel for the respondent has sought to support the decision of the learned trial Magistrate. He emphasised the words " specifying the nature of the alleged offence . . . . " and contended that in setting down in the notice more than one offence which was being considered against the respondent, the

C prosecution had failed to satisfy the mandatory provisions of the section. He argued that whilst hne would concede that all the offences mentioned in the notice related to the maner of driving, yet it was possible, for example for a person to exceed the maximum speed limit without being careless or to drive carelessly without exceeding the speed limit. He in fact adopted the reasoning of the learned trial Magistrate and argued that the legislature intended that if the driven was not warned at the spot and that summons was not issued within 14 days

D then the police would be obliged to state in the notice of intended prosecution, the particular offence with which it was intended to charge the driver. He also drew my attention to the fact that there was a difference in wording between section 41(*a*) and 41(*c*). In support of his argument that section 41 of the Traffic Ordinance was a penal provision and therefore ought to be strictly construed, he cited the case of *Clarke v. Mould* [1945] 2 All E.R. 551.

E The learned Counsel for the Attorney-General has drawn my attention to a number of cases which support his argument and if these cases had been cited to the learned trial Magistrate I am of the view that he would not have acceded to the submission of no case to answer and would have ruled that the notice was valid. It will be useful to note right at the outset that the provisions of section 21 of the English Road Traffic Act, 1930, are identical with the provisions of section 41 of our Traffic Ordinance. In *Venn v. Morgan* [1949] 2 All E. R. 562

F Lord Goddard C.J. said . . . . " we ought to use a modicum of common sense " . . . . in considering whether a notice purporting to be given under section 21 is sufficient. In the same case Oliver J. in giving the judgment pointed out that these notices are not formal documents like informations or indictment. He said (ibid. 564): " The object of the notices is to call the attention of the driver of the motor car to the time and circumstances in respect of which he may be charged so as to give him . . . . an opportunity, in good time while memories are

G still fresh, to prepare his defence ".

In *Pope v. Clarke* [1953] 2 All E.R. 704 the Queen's Bench Division held that the provisions of the section 21(*c*) that a notice of intended prosecution should be served on a defendant was mandatory but the provisions with regard to the specification of the time of the alleged offence was only directory; and the purpose of the notice was to call the respondent's attention to the fact that he was to be

H prosecuted while the circumstances were still fresh in his mind. In this case the intended charge and the date and the place of the collision were correctly cited but the time of the alleged offence was inserted incorrectly. The Queen's Bench Division held that the purpose had been fulfilled and therefore, the incorrect

statement as to the time of the collision did not invalidate the notice. It applied the dictum of Lord Colleridge C.J. in *Woodward v. Sarsons* (1875) L.R. 10 C.P. 733 at 746, where in giving judgment of the court, he said as follows:— A

> " . . . . the general rule is that an absolute enactment must be obeyed or fulfilled exactly but it is sufficient if a directory enactment be obeyed or fulfilled substantially. "

The Queen's Bench Division directed the jutices who had dismissed the charge on the ground that the notice was invalid, to proceed to hear the case.

Another case of importance is that of *Milner v. Allen* [1933] 1 K.B. 698. In B this case the appellant was charged before the court of summary jurisdiction with driving a motor vehicle without due care and attention. No warning had been given to him under section 21(*a*) at the time of the alleged offence, nor was a summons served within 14 days thereafter. But a notice was sent to him by a constable two days after the alleged offence warning him that prosecution is being considered for dangerous driving. All other particulars were stated with particularity. A summons was issued later for driving without due care and attention. C

The appellant objected that this was not a valid notice under section 21—

(*a*) because it was notice not of an intended prosecution but merely that the question of prosecution was being considered; and

(*b*) that the offence referred to in the notice was " driving in a manner dangerous to the public " i.e. an offence under section 11 of the Act whereas the offence charged was " driving without due care and attention" under section 12 of the Act. D

The King's Bench Division held that the notice was good and it was not necessary that a prosecution should have been irrevocably decided on before the notice was sent. The notice sent sufficiently specified " the nature of the alleged offence " with all particulars necessary to recall the mind of the motorist to the fact on which it was intended to rely. It, further held that " driving to the danger of the public " was not a term of art referable only to the offence created by section 11 and an accused person was not entitled to object that he was charged with E a less serious offence than the prosecution had originally contemplated.

I have come to the clear conclusion that the fact that the notice of intended prosecution refers to the possibility of the respondent being prosecuted with one or more of the four offences specified does not invalidate the notice. On the contrary it satisfies the object of the legislation to the fullest extent in that it places the defendant on guard in all possible respects.

The prosecution was not obliged to be irrevocably committed to a particular F charge before issuing notice. In the instant case the respondent cannot complain that reference to the possibility of prosecution for one or more of the four possible offences has in any way been misleading, embarrassing or prejudicial. The respondent was in fact charged with one of the four offences specified in the notice and there can be no complaint on this score. The respndent was entitled to know the nature of the alleged offence (or offences) with which it was intended to charge him and this was done within the specified time. G

I therefore uphold the Attorney-General's appeal, set aside the order of acquittal and remit the case back to the First Class Magistrate's Court, Nadi with the direction that the court rule that there is a case to answer and to proceed with the hearing of the case in the ordinary way.

Appeal allowed.

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