A

## RAM LAKHAN

*v.*

## REGINAM

B

[SUPREME COURT, 1973 (Grant J.), 4th October]

Appellate Jurisdiction

C

*Criminal law—practice and procedure—charge—variance between charge and evidence —amendment of charge—whether variance material—Criminal Procedure Code (Cap. 14) s. 204 (2)—whether charge defective—Criminal Procedure Code s. 204(1)*

The appellant was charged with damaging 4 Hindi records valued $5 the property of Rajesh Kumar. During the trial Rajesh Kumar testified that only two records valued $2.60 had been broken and the charge was accordingly amended. No fresh plea was taken.

D

The appellant contended that this failure to comply with the Criminal Procedure Code (Cap 14) s. 204(1) rendered the proceedings null and void.

It was held that the proviso to subsection (1) of section 204 of the Criminal Procedure Code came into operation only when a charge was amended due to a defect either in substance or form. As by Criminal Procedure Code s. 204(2) any variance between the charge and the evidence relating to description or value was not material and therefore not a defect, it did not fall within the ambit of s. 204(1) of the Criminal Procedure Code and the proviso thereto consequently had no application.

E

Case referred to:

*Attorney-General of Fiji v. Hari Pratap.* Privy Council Appeal No. 10 of 1969—unreported.

F

Appeal against the conviction of the appellant in the Magistrate's Court.

GRANT J. [4th October 1973]—

On the 9th day of February 1973 at Suva Magistrate's Court the appellant was convicted after trial of Assault Occasioning Actual Bodily Harm contrary to Section 277 of the Penal Code and of Damaging Property contrary to Section 360(1) of the Penal Code and on the 5th day of March 1973 he was sentenced to two months' imprisonment in respect of each offence the sentences to run concurrently.

G

He has appealed against conviction on the ground that the charge having been amended the learned trial Magistrate erred in law and in fact in not reading over the charge to the appellant and asking him to plead thereon; and he has appealed against sentence as being harsh and excessive.

H

No amendment was made in respect of the charge of assault which constituted the first count, but the charge of damaging property which constituted the second count was amended during the course of the hearing and it is conceded by the Crown that the appellant was not called upon to plead to the altered charge as required by the first proviso to Section 204(1) of the Criminal Procedure Code.

The appeal against conviction relates only to the second count in view of the decision of the Privy Council in the *Attorney-General for Fiji v. Hari Pratap s/o Ram Kissun* (Privy Council Appeal No. 10 of 1969) that when one count is amended under the provisions of Section 204(1) of the Criminal Procedure Code it is not necessary for the accused to plead again to any other counts with which he may also be charged.

The particulars of the second count originally read that the appellant on the 29th day of December 1972 at Nasinu, Suva, in the Central Division "wilfully and unlawfully damaged four Hindi records valued five dollars and twenty cents, the property of Rajesh Kumar s/o Budh Ram".

On the trial the aforesaid Rajesh Kumar testified that although he had loaned four records to the appellant only two of them valued at $2.60 were broken by the appellant—whereupon the trial Magistrate amended the particulars to read "wilfully and unlawfully damaged two Hindi records valued two dollars and sixty cents, the property of Rajesh Kumar s/o Budh Ram".

By virtue of Section 26 of the Criminal Procedure Code (Amendment) Ordinance 1969, which came into force on the 31st October 1969, Section 204 of the Criminal Procedure Code was amended by repealing and replacing subsection (2) thereof by the following subsection:—

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

Thus, the fact that there was a variance between the charge and the evidence as to the description of and value of the records was not material and there was no need for the charge to be amended; and the Crown submits that in such circumstances, even although the trial Magistrate saw fit to amend the charge, he was not acting under the provisions of Section 204(1) of the Criminal Procedure Code so that the provisos thereto were of no application.

Subsection (1) of Section 204 of the Criminal Procedure Code relates specifically to the alteration of a charge where it appears to the Court that the charge is defective, either in substance or in form, the first proviso being stated to apply where a charge is altered "as aforesaid" and the second proviso being stated to apply where a charge is altered "under this subsection"; from which it is quite clear that the provisos to subsection (1) of Section 204 of the Criminal Procedure Code came into operation only when a charge is amended because it appears to the court that it is defective either in substance or in form. As by virtue of subsection (2) of Section 204 of the Criminal Procedure Code any variance between the charge and the evidence produced in support of it with respect, inter alia, to the description of or value of any property the subject of the charge is not a defect (as it is not material), any amendment of the charge in respect thereof does not, in my view, fall within the ambit of subsection (1) of section 204 of the Criminal Procedure Code and consequently the provisos to that subsection do not have any application.

I am fortified in this conclusion by the judgment of the Privy Council in the *Attorney-General for Fiji v. Hari Pratap s/o Ram Kissun* (supra), with particular reference to the following portions, the underlining being mine: A

The opening sentence of the fourteenth paragraph which reads as follows:—

"To deal first with the substantive part of the sub-section: on the first and second occasions on which the expression "charge" appears it is used to denote the written matter which is *defective* and to which "alterations" are to be made; on the third and fourth occasions on which it appears it forms part B of the description of alterations which may be made to that *defective* written matter in order to cure the *defects*."

The second and third sentences of the fifteenth paragraph which read as follows:—

"It (the word "charged") appears first in the introductory part of the proviso which refers to the circumstances already described in the substantive C part of the subsection in which the mandatory part of the proviso which follows comes into operation. In this context, viz. "Where a charge is altered as aforesaid" the word "charge" denotes the *defective* written material to which alterations were made under the substantive part of the sub-section and the appropriate meaning to be attributed to it is the "formal charge"."

The sixteenth paragraph which reads as follows:— D

"Where "charge" appears again, in the mandatory part of the proviso, it is qualified by the adjectival participle "altered" and is used in the context of something to which an accused person is required to plead. In such a context "charge", as in sections 197 and 199 is prima facie to be understood as meaning "count", and "the altered charge" as meaning any count to which an alteration authorised by the substantive part of the sub-section has been made, i.e., any count which has been amended or substituted or added to the E original *defective* formal charge. So construed the proviso reflects the same shift in meaning of the word "charge" from "formal charge" where it is used to denote the *defective* written material "count" where it refers to alterations made in the *defective* written material *to cure the defects*, as occurs in the substantive part of the subsection."

From these extracts it will be seen that, although the Privy Council judgment does not deal directly with the point, it envisages that the mandatory provisos F to subsection (1) relate only to the amendment of a defective charge.

I might add, *ex abundante cautela*, that where there is a variance between the charge and the evidence produced in respect of it which falls within the ambit of subsection (2) of Section 204 of the Criminal Procedure Code, the trial Magistrate whether or not he amends the charge is not relieved from compliance with subsection (3) of Section 204 of the Criminal Procedure Code, that is to adjourn the trial for G such period as may be reasonably necessary if the court is of the opinion that the accused has been misled or deceived by any such variance; but on the facts before me it has not been suggested, and indeed could not be suggested, that any adjournment was necessary.

The appeal against conviction is accordingly dismissed.

As to sentence, on the facts there was no logical motive for the appellant's H behaviour and this, combined with the opinion of a probation officer as to the degree of intelligence of the appellant, would indicate that he is more likely to

benefit from the guidance and control of a probation officer than from a period of two months' imprisonment, bearing in mind also that he is a young man with no previous convictions and that he spent nearly one month in prison custody pending sentence.

The sentence of imprisonment in respect of each count is accordingly varied to an order requiring the appellant to be under the supervison of the probation officer for a period of twelve months, the probation period in respect of each count to run concurrently.

*Appeal against conviction dismissed but sentence reduced.*