A

RAM CHANDRA NAIDU

v.

REGINAM

B

[COURT OF APPEAL, 1974 (Gould V.P., Marsack J.A., Bodilly J.A.), 12th, 31st July]

Criminal Jurisdiction

Criminal law—practice and procedure—charge of robbery with violence—whether charge laid under Penal Code (Cap. 11) s.326(1) (b) and s.416
C *instead of s.417 bad in law.*

Criminal law—sentence—increase of sentence on appeal—whether accused afforded opportunity of making submissions against proposed increase.

Criminal law—practice and procedure—lies told by accused—whether magistrate directed himself properly thereon.

Criminal law—principles of criminal liability—robbery with violence—driver
D *of ' get away car '—whether party to substantive offence.*

The appellant had been convicted in the Magistrate's Court of attempted robbery with violence under Penal Code (Cap. 11) s.326(1) (b) and s.416, and had been sentenced to 9 months' imprisonment. On appeal against conviction and sentence, the judge dismissed his appeal and increased his sentence to 2 years imprisonment.

E A courier carrying a dispatch case had been attacked by an unknown man who then ran to a car nearby which was driven off by the appellant who contended that he had been forced into this action at knife point.

The appellant appealed on the following grounds: 1. The statement of offence referred wrongly to Penal Code s.416 instead of s.417, and therefore disclosed no offence.

F 2. The judge, when he increased the sentence, failed to give the appellant or his counsel the opportunity of making submissions against the proposed increase.

3. The magistrate did not direct himself properly on the subject of the effect of lies told by the accused person.

G 4. On the facts of the case, it would have been impossible to impute to the appellant, as driver of the ' get away car ', knowledge that the force would go beyond that which would justify a conviction for simple robbery.

Held: 1. Although a charge laid under Penal Code s.326(1) (b) fell properly within s.417, it did not follow that a charge laid under s.416 was bad as it did create the offence of attempting to commit a felony.

H 2. Whilst it was true that a court would not condemn a person who had no opportunity to be heard, in this case the appellant was represented throughout, and his counsel should have been alerted to the fact that the judge had a review of sentence in mind from his comments on his powers of punishment made during the hearing.

3. A magistrate sitting alone would know the principles surrounding the proper direction of himself on lies told by the appellant and there was no evidence that he misdirected himself. A

4. Unless there was some indication to the contrary, the inference that the driver of the car actually present or close by was a party to all that was done, was justified and unavoidable.

Cases referred to : B

R. v. Bradley (1922) 16 Cr. App. R. 113.

R. v. Malden (1926) 19 Cr. App. R. 116.

R. v. Harris (1937) 26 Cr. App. R. 22.

R. v. Reade (1927) 20 Cr. App. R. 10.

Nicholson v. N.Z. Kennel Club Inc. [1968] N.Z.L.R. 529.

R. v. Abdul Aziz (1948) 15 E.A.C.A. 53. C

Cooper v. Wandsworth Board of Health [1863] 14 C.B. (N.S.) 180 ; 143 E.R. 414.

R. v. Dehar [1969] N.Z.L.R. 763.

R. v. Gibbons [1973] N.Z.L.R. 376.

R. v. Betts and Ridley (1930) 22 Cr. App. R. 148. D

Appeal against the judgment of the Supreme Court dismissing an appeal from the Magistrate's Court and increasing the sentence of the appellant.

M. S. Sahu Khan for the appellant.

R. Davies for the respondent.

Judgment of the Court (read by GOULD V.P.) : [31st July 1974]— E

The appellant was charged in the Magistrate's Court with the following offence—

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Statement of Offence

ATTEMPTED ROBBERY WITH VIOLENCE : Contrary to Sections 326(1) (b) and 416 of the Penal Code Cap. 11. F

Particulars of Offence

RAM CHANDAR NAIDU alias SATYA s/o GOPAL NAIDU and *UDENT KUMAR alias RAMEND KUMAR* s/o SHANTI LAL on the 17th day of May 1973 at Lautoka in the Western Division, attemped to rob THAKUR LAL s/o MAKANJI of a brief case containing $150.00 cash at the time of such attempted robbery did use personal violence to the said THAKUR LAL s/o MAKANJI. " G

The word " and " has obviously been omitted from the Particulars after the word " cash " though nothing turns on this. At the close of the case for the prosecution the learned magistrate found that the co-accused Udent Kumar had no case to answer and he was acquitted. The case proceeded against the appellant and he was convicted and sentenced to nine months' imprisonment. He appealed to the Supreme Court against both conviction and sentence, and the appellate Judge, having dismissed the appeal against conviction, stated that the sentence was decidedly inadequate and substituted a period of imprisonment of two years. H

In his present appeal to this Court the appellant is limited by section 22(1) to grounds of appeal which involve questions of law only (not including severity of sentence) ; a proviso to section 22(3) further provides that where the Court of Appeal dismisses an appeal against conviction (i.e. an appeal brought under section 22) it shall not increase, reduce or alter the nature of sentence, whether by the Magistrate's Court or the Supreme Court unless the sentence was an unlawful one or passed in consequences of an error of law.

The facts alleged by the prosecution were, in brief, that Thakor Lal was attacked on stairs adjacent to a footpath by a man who violently attempted to wrest from his grip a despatch case which contained money. Thakor Lal saw only his assailant who, his attempt having failed, ran to and entered a car parked nearby with a person sitting in the driver's seat. The car drove off. Another witness, Champaklal, heard the disturbance and saw two men running from the scene, one of whom entered the nearby car and the other disappeared down a side street. Champaklal took the number of the car. It was common ground that the appellant was the person in the driver's seat, who drove the car away. He drove from Lautoka to Nadi and then reported to the police that while he was parked waiting for a girl he had seen two Indians fighting, and that one of them had entered his car, threatened him with a knife and forced him to drive away. He repeated this explanation in detail in evidence, but the magistrate disbelieved him. It was also a part of the prosecution case accepted by the magistrate, that the appellant had attempted to persuade one of the prosecution witnesses, Mariappa, to alter his testimony.

Mr Sahu Khan, who appeared in this Court for the appellant, did not adhere to the order of his grounds of appeal, and we will deal with his argument as put forward. His first and perhaps his main ground, was that the charge disclosed no offence. The basis of this was that, in counsel's submission, the Statement of Offence wrongly referred to section 416 of the Penal Code instead of section 417. The sections are as follows :—

> " 416. Any person who attempts to commit a felony or misdemeanor is guilty of an offence, which, unless otherwise stated, is a misdemeanour.
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> 417. Any person who attempts to commit a felony of such a kind that a person convicted of it is liable to the punishment of death or imprisonment for a term of fourteen years or upwards, with or without other punishment, is guilty of a felony, and is liable, if no other punishment is provided, to imprisonment for seven years. "

Section 326(1) under which the charge was also laid, provides that the various kinds of aggravated robbery which it creates are felonies punishable by imprisonment for life. On the face of it therefore, it is submitted, the attempt charged falls within section 417. So far as it goes we would accept this, but it does not follow that a charge laid under section 416 is bad. Section 416 undoubtedly creates the offence of attempting to commit a felony. It says so in as many words, and that is what is charged here. The attempts are to be misdemeanours unless otherwise stated. Section 417 is the complement to the words " unless otherwise stated " in section 416. It states that attempts to commit felonies in certain categories shall be felonies punishable by seven years ' imprisonment. Section 326(1) makes it plain that this is in such a category. The charge would have been improved by a reference to section 417 but there is, in our opinion, no question of its being a nullity, so as to prevent the " proviso " being applied if necessary. We are satisfied that no miscarriage

of justice arises from anything touching this argument, put forward now for the first time, and we do not need to consider whether, as crown counsel contended, it would in any event be met by section 323 of the Criminal Procedure Code (Cap. 14). For these reasons this ground of appeal cannot succeed.

Mr Sahu Khan's next submission was that, when the learned Judge increased the sentence from nine months' to two years' imprisonment he failed to give the appellant (or his counsel, for he was represented) an opportunity of making submissions against the proposed increase, and that this was an error of law upon which an appeal could be based. It is true that when contemplating the exercise of a power to increase a sentence against which a convicted person has appealed, a court will normally give notice that it is considering or may consider such a course. The appellant may wish to withdraw the appeal. In for instance *R. v. Bradley* (1922) 16 Cr. App. R. 113 where the court gave leave to appeal so as to consider whether the sentence should be increased; *R. v. Malden* (1926) 19 Cr. App. R. 116 ("We said, with the usual warning, that the sentence called for further consideration"); *R. v. Harris* (1937) 26 Cr. App. R. 22 ("He (the appellant) was warned that if he persisted in his appeal against sentence it would be the duty of the court to pass such sentence as appeared to the court to be right"); *R. v. Reade* (1927) 20 Cr. App. R. 10 (warned appellant etc.) We see this as an application of the rule, be it of natural justice or the common law, that a judicial body will not condemn a person who has had no opportunity of being heard.

The cases quoted above are all cases in which the would-be appellant has not been represented by counsel and generally the warning has been given at a stage where the prisoner has been applying for leave to appeal against sentence. In the present case no leave was necessary and the appellant was represented by counsel at all stages. Counsel would of course be fully aware of the power of the Court to increase a sentence. In this connection the following passages from the judgment of Wild C.J. in *Nicholson v. N.Z. Kennel Club Inc.* [1968] N.Z.L.R. 529, 531-2, are of interest :—

> "Upon consideration, however, I do not think that the omission from subcl. (5) of any reference to a hearing justifies the executive council in failing to afford one if it is minded to increase the penalty. The executive council is required to exercise an important disciplinary function. Although it is a domestic tribunal and not a statutory body I think the principle expressed in the judgment of Byles J. in *Cooper v. Wandsworth Board of Works* (1863) 14 C.B. (N.S.) 180; 143 E.R. 414 is applicable. Speaking of the Board in that case he said: "I conceive they acted judicially because they had to determine the offence, and they had to apportion the punishment as well as the remedy. That being so, a long course of decisions, beginning with Dr Bentley's case and ending with some very recent cases, establish that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the Legislature" (ibid., 194, 420).
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> The fact that the executive council was merely reviewing the trial board's penalty does not, I think, make any real difference. It is the executive council's decision that finally determines the penalty. I do not think that a Judge dealing with an appeal by a man who did not appear would, whatever the demerits of the appeal, increase the sentence without hearing the appellant. The same principle should, in my view, be followed by a domestic tribunal exercising disciplinary powers over its members."

. . . . . .

A "I feel sure that, if there had been any hint of increasing the penalty or a reminder that the executive council had that power, then the solicitor would have wished to appear or make some written representation. As it was I find that the possibility that the plaintiff might be in peril of an increased penalty was not mentioned and did not enter the solicitor's mind. I conclude then on the facts that the plaintiff was not given an opportunity to be heard before the penalty was increased. On that ground
B I decide in the plaintiff's favour. I do not need to consider further a second point as to error of law which did not impress me at the hearing."

Though that was not a criminal case the analogy used by the learned Chief Justice points the similarity between dealing with an appeal in the absence of the accused and dealing with it in his presence, but without notice to him of the course which is being considered. Finally, there is a decision of the East
C African Court of Appeal in the case of *R. v. Abdul Aziz* (1948) 15 E.A.C.A. 53. The High Court had, on appeal, enhanced sentences of six months' imprisonment, to eighteen months and two years respectively. The Court of Appeal said, at p. 52 :—

"One of the appellant's grounds of appeal in their appeal to the High Court was that the sentences were excessive. Where that is so, it is clear that the Appeal Court has the power to reduce or enhance the sentences
D as justice may require. We think, however, that an Appeal Court in such circumstances should not enhance sentences without giving the appellants an opportunity of showing cause against enhancement where, as in this case, Crown Counsel appearing for the respondent in the Court below did not ask for enhancement. If in reply to the appellants' advocate's address in the Court below Crown Counsel had asked for enhancement that of course would have given the appellants' advocate in reply the
E opportunity of showing cause and the Court below could properly have enhanced sentences having heard both sides on the question. In the present case the Court below heard neither side of this question."

In that case the Court of Appeal did not need to decide whether upon the ground of lack of notice alone the sentences would be quashed, as it decided upon the merits that the enhancement was in any event unjustified; clearly,
F however, the Court took the view that the appellants, even when represented by counsel, were entitled to be forewarned. The Court obviously assumed that, if there were no application for enhancement by the Crown, and if the appellate Court was inclined *sui moto* to enhance a sentence it would afford an opportunity to the appellant to show cause. With this approach we agree.

In the present case there is the difficulty that the record of appeal does not,
G for some reason, contain a transcript of the notes of the learned Judge in the Supreme Court. Neither counsel appearing on the present appeal appeared in the Supreme Court proceedings and counsel for the appellant now appears to be asking this Court, without any attempt to supplement the record, to assume that counsel for the appellant in the Supreme Court had no opportunity to show cause on this point. In the circumstances we have looked at the learned Judge's original notes and find that before counsel for the appellant was
H called upon to reply, there is the following note :—

"*Court*

The Mag. does not appear to have ordered that "Muttu Kumar" be be declared hostile.

417 P.C. Attempts to commit felonies carrying 14 yrs. or over is in itself a felony carrying 7 yrs.

Robbery Under P.C. carries life w. or w/o corpl. punish't. ".

Mr Sharma, who appeared for the appellant, then replied, but confined himself to the question of hostile witnesses, making no reference to sentence.

The note quoted above shows clearly that the learned Judge made some statement at the hearing as to the measure of the sentence by which this crime might be punished. We think this in the circumstances would have been sufficient to alert counsel, who addressed the court immediately afterwards; even if the Judge did not specifically indicate his intention. We are not prepared, therefore, to treat this episode as an error of law on the part of the Judge; we would add that had the question of severity been open to us on the merits, we would not have been disposed to interfere with the increased sentence.

We return now to Mr Sahu Khan's argument on the appeal against conviction. He submitted that the learned magistrate had omitted to direct himself properly on the subject of the effect of lies told by an accused person. Two New Zealand cases were referred to—*R. v. Dehar* [1969] N.Z.L.R. 763 and *R. v. Gibbons* [1973] N.Z.L.R. 376. We fully accept what is said there as to the proper directions to a jury when lies by an accused form an important element in a prosecution case. The jury must be satisfied that the statement in question is not merely a mistake, must guard against the tendency to think that a person who is lying must be guilty and if the lies make the prosecution case no stronger than if the accused had given no evidence, they should be disregarded. A magistrate sitting alone however, would know these principles and it is not necessary for him to burden his judgment with full statements on every element of the law. In the passage complained of in the summing up the learned magistrate simply found that a witness, Mariappa was trustworthy and said—

> " The denial by the Accused person that he had no person with him in his car on the face of Mariappa's testimony leaves the Court to draw no other inference than that the two other persons in the car were the same who shortly afterwards ran for their lives after the attempt by one of them to snatch the brief case completely failed, and one of them entered the waiting car while the other decided to enter into the side lane. "

This is no more than drawing an adverse inference as to the identity of the occupants of the car from the fact (as the magistrate held) that the appellant had lied about their existence. We consider the inference well justified and do not think that an elaborate self direction upon lying was called for; there was no indication that the magistrate had misdirected himself on the subject. This ground of appeal also fails.

A further ground was that a witness, Muttu Kumar, was permitted to be cross-examined by the prosecution as a hostile witness prematurely; before he had shown hostility. We think that in the circumstances of the case nothing turns on this; as the learned Judge pointed out, it was never contended that the witness was other than hostile and the learned magistrate gave only " negligible " weight to his evidence.

Mr Sahu Khan also submitted that the learned magistrate misdirected himself on the burden of proof. We see no evidence of this and at the conclusion of his judgment he stated that it had been borne in mind that it was incumbent on the prosecution to establish the guilt of the accused beyond reasonable doubt.

It was also claimed that the learned magistrate had placed too much weight on the lies of the appellant and therefore had not been guided by proper principles in assessing circumstantial evidence. As to this, we do not agree; and when it comes to a question of the weight of evidence, of lies or otherwise, this is a matter of fact and not within our jurisdiction on a second appeal. None of these grounds of appeal has merit.

Finally we turn to the ground—" That the learned magistrate erred in law in holding that your petitioner was a party to the offence of attempting to rob with violence". We did not understanding Mr Sahu Khan's submission under this head to go so far as to deny that such a crime was a possibility. But he said that on the facts of the case it would be impossible to impute to the appellant, as the driver of the " get away " car, knowledge that the force intended to be used would go beyond what would justify a conviction of simple robbery (had the design succeeded) and would have constituted the aggravated form of the crime known as robbery with violence. The charge ought to have been, it was submitted, either attempted robbery or assault with intent to rob.

This argument was not put forward in the Magistrate's Court or the Supreme Court. We are inclined to agree that a preferable charge would have been either attempted robbery or assault with intent to rob but we are also of the opinion that the offence charged does exist. In the present case the degree of force actually used would certainly have been enough to justify conviction of the assailant of the crime of robbery with violence had he succeeded in obtaining possession of the brief case. The complainant's face was cut and scratched and there were a number of abrasions. Unless there were some indication to the contrary the inference that the driver of the car actually present or close by was a party to all that was done, is justified and unavoidable. In the case of *R. v. Betts and Ridley* (1930) 22 Cr. App. R. 148 Ridley waited in a car while Betts snatched a bag from an elderly man, who was injured. Ridley claimed that he only anticipated that the man would be pushed and the bag snatched. In the judgment of the Court of Criminal Appeal, at p. 152 it was said—

> "; and it is quite obvious, and must have been obvious to the jury, that such a scheme, to rob a man who was in the habit of carrying money to the bank in a bag, could not be carried out without the probability, at least, of violence having to be used in order to get possession of that money. "

We think that a similar situation was held to exist here and, had this point been taken in the courts below, it must have failed on the facts accepted by the learned magistrate. In any event it was open to the magistrate to have convicted of the lesser cognate offence of attempted robbery, the maximum punishment for which is also seven years' imprisonment. This ground of appeal also fails, as does the final ground that the finding of the magistrate was unreasonable.

For the reasons we have given, the appeal, both as to conviction and sentence, is dismissed.

Appeal against conviction and sentence dismissed.