

PIO NAWAQABULI

v.

REGINAM

[SUPREME COURT, 1977 (Mishra A. C. J.) 19th August]

Appellate Jurisdiction

Criminal law—charge—power to convict of offence not charged—allegation expressly or impliedly including allegation of lesser offence—robbery with violence—whether power to convict of assault occasioning actual bodily harm or merely of common assault—Penal Code (Cap. 11) ss. 276, 277, 326(1)(a)(6)—Criminal Procedure Code (Cap. 14) s. 163(1)—Larceny Act 1916 (6 & 7 Geo. 5 c. 50) (Imp.) s. 23(1) (a) (b)

The accused was originally charged with robbery with violence. The magistrate found that the accused used violence causing actual bodily harm, but did not rob his victim. The magistrate, therefore, invoking the provisions of Criminal Procedure Code s. 163(1) entered a conviction for assault occasioning actual bodily harm considering it to be a minor offence of a cognate character to robbery with violence.

Held: The use of personal violence did include "assault", but did not necessarily include an assault occasioning actual bodily harm. In the circumstances, therefore, the magistrate was only entitled to convict the accused of common assault. (*R. v. Springfield* followed and applied).

Case referred to:

R. v. Springfield 53 Cr. App. R. 608; [1969] Crim. L.R. 557.

Appeal against conviction in the Magistrate's Court for assault occasioning actual bodily harm.

MISHRA Ag. C. J.: [19th August 1977]—

The appellant was charged jointly with one Lorosio Kadavu with robbery with violence contrary to section 326 (a) of the Penal Code and was tried by the Magistrate's Court Suva. The particulars alleged that they had used violence against one Waisake Tomu and robbed him of a watch valued at \$30.

According to prosecution evidence Tomu and his wife were driving towards Wailoku when near a narrow bridge the two accused, with some other young men, threw stones at his car. When he stopped to remonstrate, the two accused punched him. After the scuffle Tomu found his watch missing from his wrist.

Towards the end of the prosecution case Lorosio informed the Court that he wished to plead guilty to assault if such a plea were to be accepted. At the request of the prosecution a charge of assault occasioning actual bodily harm contrary to

A section 277 of the Penal Code, with the necessary particulars, was put to Lorosio who pleaded guilty and was dealt with accordingly, receiving a sentence of 12 months' imprisonment.

The trial against the appellant continued on the original charge of robbery with violence.

B In his defence the appellant made an unsworn statement to the effect that he had been present at the time of the assault on Tomu but, instead of taking part in it, he was trying to stop it. He denied assaulting or robbing Tomu. He called, as a witness for the defence, Lorosio who supported what the appellant had said in his statement.

C The issue then became one mainly of credibility. The learned magistrate rejected the defence version and found as follows:

D "I am satisfied from what Prosecution Witness 1 and 2 have told this Court that P.W.1's van was stoned and he was caused to leave it to speak to a group of men whom he thought responsible. I am satisfied that this Accused, with Accused 1 assaulted P.W.1 and broke his jaw. However I am not satisfied that there was a deliberate theft of his watch. It may have been taken by these Accused, it may not, I am in doubt and am inclined to the view that it was lost in the scuffle. I shall give the Accused the benefit of the doubt in that regard."

The learned magistrate was quite entitled to make that finding and I see no reason whatever for disturbing it.

E He then went on to say:

F "However, using the provisions of section 163(1) of Criminal Procedure Code, whilst I find that all the ingredients of Robbery with Violence have not been proved to my satisfaction. I am satisfied beyond a reasonable doubt that sufficient ingredients have been placed before me to ground and fully support a charge of Assault Occasioning Bodily Harm contrary to section 277 of Penal Code. I consider it to be a minor offence of a cognate character to Robbery with Violence. I consider Assault Occasioning Bodily Harm to be violence without the robbery. I therefore find this Accused not guilty of the offence charged and I acquit him for it, but I find him guilty under section 163(1) Criminal Procedure Code, *supra*, for Assault Occasioning Bodily Harm contrary to section 277 and I convict him for that offence."

G Section 163(1) of the Criminal Procedure Code provides:

H "When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it."

In the instant case the particulars alleged "robbery" and "use of violence". The learned magistrate found the use of violence proved; not the theft of the watch.

The issue of whether an offence is "minor" to the one charged often comes up before the Courts. In my view the test to be applied is to be found in the case of *Springfield* (53 Cr. App. R. 608 at 610). A

"The question accordingly arises as follows. Where an indictment thus charges a major offence without setting out any particulars of the matters relied upon, what is the correct test for ascertaining whether it contains allegations which expressly or impliedly include an allegation of a lesser offence? The test is to see whether it is a necessary step towards establishing the major offence to prove the commission of the lesser offence: in other words, is the lesser offence an essential ingredient of the major one? To take obvious examples, it is impossible to establish larceny from the person without proving a larceny. Similarly one cannot establish a wounding with intent to do grievous bodily harm without proving as steps in ascending order a common assault, an assault occasioning actual bodily harm, and an unlawful wounding. Similarly, if robbery with violence had been charged under section 23(1) (b), this could not have been established without proving that a common assault had taken place: and the same would apply if there had been a charge of assault with intent to rob under section 23(1) (a)."

Though the statutory provision under consideration in *Springfield* was slightly different, the test is equally applicable to section 163(1) of the Criminal Procedure Code. Sections 23(1) (a) and 23(1) (b) referred to in the quotation above are identical with sections 326(1) (a) and 326(1) (b) of the Fiji Penal Code. D

Use of personal violence undoubtedly includes "assault". But does it necessarily include occasioning actual bodily harm? Robbery with violence may be, and sometimes is, committed without any actual bodily harm resulting to the person robbed. In my view, therefore, the learned magistrate was entitled, under section 163(1) of the Criminal Procedure Code, to find the appellant guilty only of assault contrary to section 276 of the Penal Code, but not of assault occasioning actual bodily harm under section 277 of that Code. E

Conviction of the appellant for that offence is set aside and in its place is substituted a conviction of common assault contrary to section 276 of the Penal Code. The sentence of 12 months, which is the maximum for common assault, is also set aside and in its place is substituted a sentence of 9 months' imprisonment. F

In passing I must add that the drafting of the charge in this case was extremely careless and slipshod. The statement of offence states that the charge is laid under section 326(a) of the Penal Code. There is no such section. The correct number is 326(1) (a). Furthermore, though the charge is laid under section 326(1) (a) of the Penal Code, the particulars alleged follow the language not of that section but of section 326(1) (b). Unlike the case of *Springfield* (*supra*), however, both the statement and the particulars of offence in this case specifically allege violence and I do not, therefore, consider the defects fatal to the charge. G

Conviction for assault occasioning actual bodily set aside; conviction for common assault substituted. H