HARISH CHAND

v.

LABASA TOWN COUNCIL

[HIGH COURT, 1998 (Fatiaki J) 20 November]

Appellate Jurisdiction

Crime: procedure- illegal parking- excess charge demand- whether demand notice duly served. Parking Meter (Labasa) Order 1988.

On an appeal against conviction for failing to pay an excess charge as demanded, the High Court HELD: that in the absence of any provision specifically authorising service by another mode personal service of the notice is mandatory.

No case was cited.

Appeal against conviction entered in the Magistrates' Court.

V. Parshuram for the Appellant.
R. P. Singh for the Respondent.

Fatiaki J:

The factual ambit of this appeal is very narrow, the legal issues however, are wide-ranging. I am therefore grateful to counsel for their assistance.

The appellant was convicted by the Labasa Magistrates' Court in a written judgment delivered on 7th November 1997 for the following offence:

"STATEMENT OF OFFENCE

Failure to Pay Excess Charge: Contrary to paragraphs 9 and 10 of the Parking Meter (Labasa) Order 1988 and Section 76 of the Traffic Act.

PARTICULARS OF OFFENCE

HARISH CHAND s/o Hari Dutt of Seaqaqa, Labasa on the 18th day of April 1996 at Labasa in the Northern Division being the registered owner of motor vehicle No CO 600 found parked in expired Parking Meter Space No. 109 at Naseakula, Labasa and having been demanded by Notice No. 0043 of 16/5/96 to pay the excess charge within 14 days, failed to pay such demand to Labasa Town Council."

The facts of the case are not in dispute and may be briefly summarised as follows: The appellant's vehicle was booked on 18th April 1996 by a parking meter attendant whilst it was parked on an expired parking meter zone on Naseakula Road in Labasa Town. A parking meter infringement notice was duly affixed to the vehicle requiring payment to the Council of a $2 excess

charge within 7 days. This was not paid and a second notice was posted on 16th May 1996 to the appellant this time requiring payment of a $10 excess charge within 14 days of service of the notice. Again the excess charge was not paid and a summons was issued out of the Labasa Magistrates' Court charging the appellant with the above-mentioned offence.

On 28th October 1996 when the case was called in Court the appellant appeared by counsel and pleaded not guilty. The respondent Council then called the parking meter attendant and its parking meter supervisor to prove its case, at the close of which, learned counsel for the appellant made a no case to answer submission which the trial magistrate rejected in a written ruling dated 10th September 1997.

Thereafter the appellant called no evidence and counsel made a further written submission which is included as pages 37 and 39 of the record. Noticeable by its absence was any suggestion that the posted demand notice was not received by the appellant or that the post box did not belong to him.

In a short judgment the trial magistrate convicted the appellant, fined him $30 and ordered that he pay costs of $98 in default 4 months imprisonment.

The appellant appeals against his conviction on the following four grounds:

"(a) THAT the Learned Magistrate has erred in law and in fact in holding that the Demand Notice No. 0043 issued by the Complainant namely the Labasa Town Council was served in accordance with the requirements of the Criminal Procedure Code or served at all upon the Petitioner;

(b) THAT the Learned Magistrate erred in law in holding that the Statement of Offence complied with the requirement of the Criminal Procedure Code or that the same disclosed an offence and therefore instead of dismissing the charge wrongly convicted the Petitioner;

(c) THAT the Learned Magistrate further erred in law in holding that the Particulars of Offence complied with the requirements of the Criminal Procedure Code in that the same were vague and uncertain and did not clearly or at all set out in simple language the facts relied upon the Complainant as constituting the offence alleged to have been committed by the Petitioner;

(d) THAT the Learned Magistrate erred in law and in fact in holding that the Particulars of Offence as set out by the Complainant disclosed an offence and therefore failed to dismiss the charge."

At the hearing of the appeal counsel for the appellant drew my attention to

the Skeleton Submissions advanced before the trial magistrate and fully argued.

As to ground (a) which I shall call the service argument counsel submitted that in the absence of any provision in the Parking Meter (Labasa) Order 1988 (the Order) dealing with service of the demand notice on the registered owner of the motor vehicle to pay the excess charge, personal service on the appellant was mandatory and, it being common ground that no such service was effected, therefore, there had been no proper or effective service and no offence was committed by the appellant in not paying the amount demanded by the respondent's notice.

In particular, counsel referred to the provisions of Section 2 (6) of the Interpretation Act (Cap 7) as reinforcing the requirement for personal service insofar as counsel submitted that no contrary intention appears from the Order.

The trial magistrate in his brief ruling dismissing the service argument (on page 19 to 21 of the record) appears to have entirely misunderstood counsel's submissions (as summarised at page 41 of the record) in particular as to the document it is claimed was not properly served on the appellant.

The trial magistrate appears to have thought it was the service of the summons initiating the prosecution (at page 47) which was bad, whereas counsel's submission makes it sufficiently plain in my view, that it was the notice demanding payment of the excess charge which it is claimed had not been properly served.

This misunderstanding is further highlighted (and clarified somewhat) in counsel's closing submissions (at page 37) where he writes "The notice is not a summons issued under the CPC S.79." Unfortunately, the trial magistrate in his judgment appears to have ignored the clarification.

Given the above, the matter must be addressed afresh in this appeal. Accordingly, I set out in full the relevant provisions of paragraphs 9 and 10 of the Order which the appellant is said to have infringed.

Paragraph 9(1) reads:

> "If a motor vehicle is parked in a metered space during the prescribed hours whilst the parking meter for that metered space is displaying the prescribed indication, an excess charge of two dollars shall be payable."

And paragraph 9 (2) provides for the affixing of a parking meter infringement notice on the vehicle setting out various relevant details of the infringement and demanding payment of the $2 excess charge within 7 days.

Paragraph 10 (2) of the Order then provides that:

> "In the event of the excess charge not being paid in .... the council

> shall serve on the registered owner of the vehicle a demand in writing requiring payment of the charge within a period of fourteen days after the service of such demand."

A

It is this latter demand which appellant's counsel forcefully submits has not been properly served in so far as the respondent Council did not personally serve the appellant but instead posted the demand to the appellant's post box in Seaqaqa.

B The question raised is whether or not posting a written demand is sufficient compliance with the requirement in paragraph 10 (2) that:

> "...the council shall serve on the registered owner of the vehicle a demand in writing..."

C I accept at once that paragraph 10 (2) does not set out any particular mode of service of the written demand on the registered owner of the motor vehicle. I also accept that the written demand is not a summons to which the provisions of the CPC applies, and furthermore, that proof of service of a demand is an essential element in the offence with which the appellant was charged.

D Counsel for the respondent Council in reply, whilst accepting that the Order was silent as to mode of service, nevertheless sought to rely upon the provisions of Section 137 of the Local Government Act (Cap 125). That provision provides (so far as relevant) :

> "Any notice, order or other document required ....under the provisions of any .... written law by virtue of which the council
E is authorised to act, or is exercising its statutory powers, to be served on any person ....may be served in the manner provided in this Section."

And subsection (2) expressly authorises the service of any notice or other document:

F

> "(c) by posting such notice, ...by prepaid letter addressed to the last known place of abode or business of the person to be served:"

In this latter regard it is noteworthy that the demand was addressed not to the last known place of abode or business of the (appellant) as required by the
G section, but to a post box number in Seaqaqa. Quite plainly, there has not been strict compliance with the requirement of the section, and accordingly, the section cannot be invoked nor was it relied upon by the respondent Council in this particular instance.

I turn next to consider Section 2 (6) of the Interpretation Act which provides:

> "Where any written law authorizes or requires any notice or document to be served, then unless the contrary intention appears,

such notice or document may be served ...-

(a) by delivering it to the person on whom it is to be served."

A

The section which is of general application plainly reinforces the ordinary requirement of personal service unless the contrary intention appears, and counsel for the appellant forcefully submits that there is nothing in paragraph 10 (2) of the Order which suggests the contrary namely, that any other mode other than personal service is contemplated by the paragraph.

B

After careful consideration and mindful of the inconvenience and additional expenses likely to be involved and the possible consequences on similarly worded provisions in other existing Parking Meter Orders, I am reluctantly driven to agree with the submission of counsel for the appellant that the written demand under paragraph 10 (2) of the Order must be personally served on the registered owner of the motor vehicle where the owner is a natural person.

C

I reach this conclusion for the following reasons :

Firstly, because the non-payment of an excess charge is a criminal offence punishable by a fine;

D

Secondly, in terms of Section 79A (2) of the Traffic Act (Cap 176) the registered owner of a motor vehicle is conclusively presumed (to be) the driver of the vehicle at the time (of the parking meter infringement) and accordingly, that acts or omissions of the driver of the vehicle were his acts or omissions. These would include such acts as parking the vehicle in the metered zone and failing to insert any sufficient coins, removing the parking meter infringement notice and failing to pay the $2 excess charge within 7 days.

E

Undoubtedly the presumption is rebuttable by the registered owner, but his ability to do so where he was in fact not driving, is entirely dependant upon his being informed as early as possible of the infringement as well as the fact that an excess charge has been incurred and not paid.

F

The only sure and certain way to ensure that the registered owner of the offending vehicle is fully and properly informed of the above matters is by requiring personal service of the written demand notice on him.

Thirdly, paragraph 10 (1) of the Order itself recognizes and expressly provides for payment of the excess charge by post and the omission of such a similar mode in paragraph 10 (2) for the service of the written demand on the registered owner of the vehicle must be construed as intentional.

G

Fourthly, the written demand that was posted to the appellant (at page 35) clearly demanded the payment of an excess charge of $10.00 whereas paragraph 9 of the Order clearly prescribes that, for a parking meter

infringement, "...an excess charge of two dollars shall be payable". The demand for $10.00 is accordingly *ultra vires* and the pre-printed form must be changed.

A

It is noteworthy that the written demand in paragraph 10 (2) of the Order does not speak of "a charge" but of "the charge" which latter expression is clearly, referable to the unpaid excess charge earlier mentioned in the paragraph.

Needless to say nowhere in either the empowering provisions of Part VI of the Traffic Act or in the Order is the figure of $10.00 either mentioned or

B prescribed.

It might well be that in the light of the conclusive presumption in Section 79A (2) of the Traffic Act, paragraph 10 (2) of the Order might be considered unnecessary or superfluous, but, not having heard argument on that matter, I express no concluded opinion.

C

Suffice to say that the combined effect of Sections 79A (2) and (3) of the Traffic Act suggests that notification to the owner of a registered vehicle in respect of which an excess charge has been incurred, where the vehicle is being driven with the owner's express or implied authority, would not necessarily prevent the successful prosecution of the owner for an offence of

D failing to pay the excess charge incurred.

In light of the foregoing having upheld the principal submission of counsel for the appellant it is unnecessary for me to deal with his other well-argued submissions dealing with the defectiveness of the Statement of Offence and Particulars of Offence set out in the charge. [See: grounds (b), (c) and (d)]

E Suffice it to say that given the nature of the appellant's defence which was a bare denial, and given the undisputed fact that a demand notice was posted and no excess charge was ever paid, I would have had no hesitation in applying the proviso to Section 319 of the CPC and dismissing the argument as giving rise to no substantial miscarriage of justice.

F The appeal is accordingly allowed. The fine and costs if paid are hereby ordered to be refunded forthwith to the appellant.

(Appeal allowed; conviction quashed.)

G