IN THE SEYCHELLES COURT OF APPEAL

PERCY SAMSON

V.

THE REPUBLIC

Criminal Appeal No. 11 of 1995

(Before H. Goburdhun, P. A.M. Silungwe, E.O. Ayoola, JJA.)

Mr. D. Lucas for the appellant
Mr. S. Fernando for the respondent

JUDGMENT OF THE COURT

On 14th June 1995 the appellant, Percy Samson, was convicted by the Supreme Court of the offence of importing dangerous drugs contrary to section 3 and punishable under section 26(2) of the Dangerous Drugs Act. He was sentenced to 10 years imprisonment. The appellant was charged as follows:

> "Importing Dangerous Drugs contrary to Section 3 and punishable under section 26(2) of the Dangerous Drugs Act.
>
> Particulars of Offence
>
> Percy Samson on the 30th day of October 1994 did import into Seychelles from Kenya 10kg. and 30 grms. of cannabis without lawful authority."

A summary of the facts on which the prosecution relied are as follows. On the 31st October 1994 one James Harry Lesperance who is an acquaintance of the appellant was arrested at the Seychelles International Airport cargo section by police officers after customs officers assisted by security officers from the Police Department had found a considerable amount of substance suspected to be cannabis resin in a cargo despatched to him in his name from Kenya. Lesperance claimed that the appellant had told him that a cargo consisting of wooden carvings had arrived from Kenya

and was awaiting clearance. The appellant who had returned from Kenya and had earlier offered to bring wooden carvings for Lesperance then asked Lesperance to clear this cargo. He gave Lesperance an air waybill. Lesperance proceeded to the Airport to transact his own business. On recalling that he had not cleared the said cargo he returned to the Airport and made efforts to have the cargo from Kenya released to him. On the cargo being collected, the crate was broken open and on inspection was found to contain, in addition to cushions and wooden carvings, packages in chocolate coloured paper wrappings which had been concealed in the wooden linings of the crate. A detective sub-inspector was eventually called in and he took possession of the packages which on analysis by a Government pharmacist was found to contain substances said to be cannabis resin. The appellant who had pleaded not guilty to the charge made a statement from the dock denying that he gave any paper to Lesperance.

Accepting the prosecution's case the learned Chief Justice who tried the case said:

> "The charge against the accused person is that of importing dangerous drugs contrary to section 3 and punishable under section 26(2) of the Dangerous Drugs Act. On the evidence adduced I am satisfied beyond doubt that by shipping the wooden crate containing drugs in the name of James Lesperance the accused did import in Seychelles or cause to be brought into Seychelles from Kenya 10kg. 30grms. of cannabis without lawful authority." (emphasis ours)."

It was on this finding that he found the appellant guilty as charged and convicted the appellant.

On this appeal from conviction and sentence several issues were raised. They touch on the evaluation of the

evidence, misplacement of the burden of proof and misdirection and non-direction on questions both of law and of fact. In view of the conclusion that we would arrive at in this appeal and in order not to hamper the Attorney General in whatever decision he may wish to take in the matter subsequent to our judgment, we refrain from making any pronouncement on issues other than that raised in ground 7 of the grounds of appeal as argued by counsel on behalf of the appellant. In our view that issue is of decisive importance and is sufficient to dispose of the appeal.

Without objection by the Republic, Mr. D. Lucas, counsel on behalf of the appellant, in arguing this ground submitted that the evidence does not disclose that there was importation or that cannabis was imported as charged. We do not think there is much substance in the submission that there was no evidence in support of importation. There appears to us to be sufficient evidence which if believed could lead to a reasonable inference of importation. The crucial question however is whether the substance imported was cannabis as charged, or put in another way whether the variance evident between the charge and the evidence was not fatal.

The particulars of the charge as laid is that the appellant imported cannabis whereas the evidence of the pharmacist (p.w.8) was that the substance which he examined was cannabis resin. That substance on the evidence of p.w. 10 S.I. Godfrey Hermitte, was that found in the cargo which Lesperance had cleared.

The purpose of particulars in a charge or information is to give the accused person a reasonable information as to the nature of the offence charged. Section 111 of the Criminal Procedure Code provides as follows:

> "Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged...."

That an accused person must be informed of the nature of the offence he is charged with is a cardinal requirement of our criminal justice system. It becomes a constitutional obligation in section 19(2) of The Constitution of the Republic of Seychelles which provide that -

> "Every person who is charged with an offence -
>
> X X X X
>
> shall be informed at the time the person is charged or as soon as is reasonably practicable, in, as far as is practicable, a language that the person understands and in detail of the nature of the offence."

In this case, the allegation in the information is that the appellant had imported cannabis which is a "dangerous drug." The case went on, from trial to judgment, on that allegation.

It is manifest that cannabis is not the same as cannabis resin. Section 2 of the Dangerous Drugs Act (Cap. 186) defines "cannabis" and "cannabis resin" in different terms as follows:

> " "cannabis" (except in the expression "cannabis resin") means the flowering or fruit tops (including the leaves) by any plant of the genus "cannabis" from which the resin has not been totally extracted, by whatever name they may be designated.
>
> " "cannabis resin" means the separated resin, whether crude or purified, obtained from any plant of the genus "cannabis".

The evidence of the pharmacist Lailam when cross-examined by counsel for the defendant also to the effect that there is a distinction between "cannabis" and "cannabis resin" should have put the prosecution on notice that a variance between allegation and evidence has begun to manifest. The case however proceeded as if there was no variance.

The distinction between "cannabis" and "cannabis resin" being so evident, the information ought to have been, but was not, amended by substitution of "cannabis resin" for "cannabis" in the particulars of offence. An amendment was not sought and obtained and the appellant was convicted on the charge which alleged that he imported cannabis.

On this appeal, counsel on behalf of the appellant contended that the conviction should be quashed. Mr. S. Fernando learned state counsel, on behalf of the Republic argued in effect that by reason of the misstatement of the nature of the dangerous drug alleged imported the charge was defective but that as no miscarriage of justice has been occasioned the conviction should not be quashed by reason of that defect alone. Quite apart from the impressive number of cases to which Mr. Fernando has referred us, some only of which are relevant, he also relied on section 344 of the Criminal Procedure Code which provides that:

> "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account -
>
> (a) of any error, omission or irregularity in the summons, warrant, charge, proclamation order, judgment or other proceedings before or during the trial or in any inquiry or other proceeding under this Code.
>
> X X X X
>
> X X X X

> unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice:
>
> Provided that in determining whether any error, omission, or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

The main question, however, as we see it, is whether, notwithstanding that there is a variance between the charge as laid and the evidence led in support thereof we should still affirm the conviction.

In quite a number of cases it has been decided that a conviction may not be quashed notwithstanding an error in the indictment or information if a miscarriage of justice had not been thereby occasioned. In several of the cases to which Mr. Fernando, with commendable industry, has referred us, the defect in the charge was in omission to state fully the ingredients of the offence in the statement or in the particulars of offence. We do not see any need to discuss these cases. In our view what they decide is only of peripheral relevance to this appeal. However, we are compelled by the importance of R. v. McVitie (1960) 3 All ER 498, cited to us, to state, albeit briefly, why we do not consider the principle of that case applicable to this case.

In McVitie (supra) in the indictment the count charging possession of explosives contrary to the Explosive Substances Act, 1883 was defective in that it was not alleged in the particulars of offence that the accused persons were "knowingly" in possession of explosives. McVitie was convicted. He appealed against conviction on the ground that the indictment was bad and that he had been arraigned on a non-existent offence. It was held by the English Court of Criminal Appeal, dismissing the appeal, that though the word "knowingly" should have been included in the particulars of offence, its omission did not make the indictment bad but

only defective or imperfect and that since knowledge which was an essential ingredient of the offence was established at the trial, and, as no embarrassment or prejudice had been caused to the appellant by the omission from the indictment and the omission on arraignment, there had been no miscarriage of justice. Accordingly, the proviso to 4(1) of the Criminal Appeal Act, 1907, was applied and the appeal was dismissed. The significant point in McVitie is that the accused admitted that he knew that there were explosive substances in the paper bag in his car; and, therefore, the essential ingredient of the offence was established. In these circumstances the objection that the word "knowingly" was omitted in the charge was manifestly a technicality.

The case which bears some similarity to the present is Gregory 1972 56 Cr. app. R.441. In that case the appellant was charged with handling a stolen starter motor, "the property of W.A.W." At the close of all the evidence the trial judge amended the count by striking out the words "the property of W.A.W." which he treated as mere surplusage. He then directed the jury that it was open to them to convict the defendant of handling a stolen starter motor the property of some person unknown. It was held by the English Court of Appeal (Criminal Division) that the Judge was wrong in treating the words as mere surplusage, as they informed the defendant of the nature of the only case which the Crown set out to establish and in any event, in allowing the amendment to be made at so late a stage in the case and in summing up on the line on which he did, he ran the risk of injustice being done to the defendant. The conviction was, therefore, quashed. Edmund Davies L.J. said at p.449:

> "If the defence had known beforehand that the case they had to meet was one of handling a stolen starter motor, the property of a person unknown, their approach might well had been entirely different ...."

The principle of that case is applicable to the present case.

In Krishnamart Pillay & Ors. v. The Republic Cr. Appeal Nos. 5 & 6/93 (unreported judgment delivered on 28th October 1993) Pillay was charged with conspiracy to commit a felony contrary to section 381 of The Penal Code. The particulars of offence are that he and two others "conspired to steal tax documents pertaining to Krishnamart Pillay from tax Seychelles Trade Tax Department Building." The evidence adduced revealed that the documents in question pertained not to Krishnamart Pillay but to a company of which he was a director. There was therefore a variance between the evidence and the particulars of offence as set out in the information. This court did not treat the case as one of defect in the charge but was of the view that:

> "The prosecutkon had, in this case, elected to indict the appellants on a charge but it has failed to prove that particular charge."

The conviction was therefore quashed.

The present case is not substantially dissimilar to The Pillay Case. Once the pharmacist's evidence had disclosed a variance between the charge and the evidence an application should have been made to amend the charge whereon the appellant would have been afforded all the rights available to him under section 187(3) of the Criminal Procedure Code after his plea to the new charge would have been taken. In the absence of an amendment of the charge it was wrong for the appellant to be convicted of importing cannabis resin when there was no such allegation. It would be wrong to convict him of importing cannabis as charged when the evidence did not show that he imported cannabis.

This in our view is not a case to which we can apply

section 344 of the Criminal Procedure Code, nor, for that matter, is it one to which we can apply the proviso to Rule 4(1) of the Court of Appeal Rules. The fairness of a trial, as we have said, consists among other things in a person accused of an offence being given information about the nature of the allegation made against him and his having an opportunity to answer the particular allegation. Regardless of what the evidence disclosed, a person cannot be expected to answer a charge that has not been made against him, the charge or information being the process by which the charge is brought to his notice.

After we have given a most anxious consideration to the issue raised by ground 7 of the grounds of appeal, we are contrained to come to the conclusion that the appellant's conviction should not stand. We come to this conclusion not without some regret because much judicial time and obvious industry had been expended on this matter. Be that as it may, this appeal must be allowed.

In the result we allow the appeal and quash the appellant's conviction.

Dated the 19th day of October, 1995.

H. GOBURDHUN
(PRESIDENT)

A.M. SILUNGWE
(JUSTICE OF APPEAL)

E.O. AYOOLA
(JUSTICE OF APPEAL)