IN THE SEYCHELLES COURT OF APPEAL

DAVID BENOITON

V.

THE REPUBLIC

Cr. Appeal No. 15/95

Before: Goburdhun, P., Silungwe, Ayoola JJ.A.

Mr. J. Renaud for the appellant
Mrs. A. Antao for the respondent

JUDGMENT OF THE COURT

At the Supreme Court, the Chief Justice on 18th September 1995 convicted David Benoiton, the appellant, of the offences charged in the first count of being armed with intent to cause a felony by night contrary to and punishable under section 293(b) of the Penal Code and in the second count of being masked or with face blackened or disguised with intent to commit a felony contrary to and punishable under section 293(e) of that Code. He sentenced the appellant to 30 (thirty) months imprisonment on the first count but did not pass any sentence on the second count as he regarded it as part and parcel of the same offence. The appellant has now appealed from his conviction on the main grounds that he had been charged in the first count with an offence unknown to the law; and that his conviction cannot be supported by the evidence.

Section 293(b) of the Penal Code ("the Code") under which the appellant had been charged in the first count provides that:

"Any person who is found .....

(b) being armed (with any dangerous or offensive weapon or

> instrument) by night and being so armed with intent to break or enter a dwelling house, and to commit a felony therein,
>
> is guilty of a felony, and is liable to imprisonment for three years."

By virtue of section 293(e) of the Code under which the appellant had been charged in the second count a person is also guilty of a felony and liable to imprisonment for three years if he is found:

> "having his face masked or blackened or being otherwise disguised, with intent to commit a felony."

It is evident that what constitutes an offence under section 293(b) of the Code is not merely being found armed with a dangerous or offensive weapon or instrument by night with intent to commit a felony but being so armed with the following intents: to break and enter a dwelling house, and to commit a felony therein. However the charge as laid in the first count contained the following:

> "Statement of Offence
>
> Being armed with intent to cause a felony by night contrary to and punishable under section 293(b) of the Penal Code.
>
> Particulars of Offence
>
> David Benoiton with a person unknown to the prosecution on 3rd July 1995 was armed with a knife and the person unknown to the prosecution armed with an AK47 at Cote d'Or Praslin with intent to commit a felony."

It is obvious that this is not a case in which although an offence known to the law has been described shortly in the statement of offence as prescribed by section 114(a)(ii) of the Criminal Procedure Code (Cap.54 : 1991 Ed.), all the essential elements of the offence have not been stated. Rather, it is a case in which the offence described in the

statement of offence in the first count is not one created by section 293(b) of the Code which had not created any offence of "being armed with intent to cause a felony by night." This is a case in which the observation of Lord Bridge in Ayres (1984) A.C.447 seems apt. He said at pp.460-461"

> "If the statement and particulars of the offence in an indictment disclose no criminal offence whatever ..... in which case the indictment could fairly be described as a nullity, it is obvious that a conviction under that indictment cannot stand."

For the sake of completeness, it is appropriate to express the view that even if this were regarded as a case in which the statement and particulars of offence had pleaded the offence in terms which were inaccurate, incomplete or otherwise imperfect, such inaccuracy, incompleteness and imperfection had in this case not been cured by the evidence. In the circumstances, the prejudice and embarrassment that had been inherent in the defect in the charge had persisted up to the conviction of the appellant on the first count. Put otherwise, even if the charge can be said to have been properly laid under section 293(b) of the Code in the first count, the evidence led by the prosecution was insufficient to support a conviction under that count.

The evidence accepted by the learned Chief Justice in regard to both counts and the fact found by him are as follows: In the early hours of 3rd July 1995 at around 02.45 a.m. Claude Fred a national security guard and Benjamin Leon, the Chief Security Officer employed by the Berjaya Praslin Beach Hotel while on duty at the premises of the said hotel saw two persons coming at a distance about 50 metres towards them in a surreptitious and stealthy manner that aroused their suspicion. The two persons were masked and wore hats that reached down their ears. One of them had an AK47 and

the accused had a knife in his right hand. When the two persons had come close as 10 metres from the two guards, Claude Fred fired one shot in the hope to scare the intruders. The appellant stumbled and fell. On Claude Fred moving closer to him where he had fallen, he found that the appellant was wearing a pair of white gloves and a black leather head gear which reached down his ears. A large knife was found at about 10 metres from where the appellant lay. The faces of the appellant and his partner had been masked at the material time.

From these facts, the learned Chief Justice had concluded that the intention of the appellant had been to commit a felony, namely, theft or grievous harm and theft. He went on further to say that : "Theft is a felony and the intention of the acccused at the time of the night and the manner and the way he was armed all indicate that he had gone there to commit a felony." These inferences and conclusions follow reasonably from the uncontroverted evidence by the prosecution witnesses and the facts found. However they fall short of what is required to sustain a convictioon on a charge under section 293(b) of the Penal Code for the simple reason that there was neither evidence nor, consequently, finding of an intent to break or enter any building and to commit a felony therein. For these reasons the conviction of the appellant on the first count must be quashed.

In regard to the second count, however, the evidence and the facts found amply support the appellant's conviction on that count. The inference drawn by the learned Chief Justice on the facts found are reasonable and justifiable. He rightly convicted the appellant on the second count of an offence contrary to section 293(e) of the Penal Code.

'In the result, the appellant's appeal from his

conviction on count 1 is allowed. His conviction and sentence on that count are set aside. The appellant's appeal from his conviction on count 2 is dismissed. His conviction on that count is affirmed. The case is now remitted to the Chief Justice to pass sentence on the second count.

Dated this 1st day of ~~February~~ March, 1996.

..... PRESIDENT
(H.GOBURDHUN)

..... JUSTICE OF APPEAL
(A.M. SILUNGWE)

..... JUSTICE OF APPEAL
(E.O. AYOOLA)