

**Republic v Edmond
(2008) SLR 304**

Joel CAMILLE for the Republic
Alexia AMESBURY for the accused

Ruling delivered on 28 September 2008 by:

PERERA CJ: The accused was charged with the following offence -

Count 1

Statement of Offence

Sexual Interference with a child contrary to section 135(1) of the Penal Code as amended by Act No 15 of 1996 and punishable under the same.

Particulars of the Offence

Simon Pierre Edmond of Bel-Ombre, Mahe, on 17 March 2004, at Roche Caiman, Mahe, *sexually assaulted* one A, a girl of 6 years of age by inserting his finger in the said A's vagina.

At the stage when the prosecution had called witnesses but not formally closed its case, counsel for the prosecution sought to amend the charge to read as follows -

Count 1

Statement of Offence

An act of indecency towards a child under the age of 15 years contrary to section 135(1) of the Penal Code (amended by Act 15 of 1996) and punishable under the same section.

Particulars of the Offence

Simon Pierre Edmond of Bel-Ombre, Mahe, on 17 March 2004 at Roche Caiman, Mahe, *committed an act of indecency* towards A, a girl under the age of 15 years, by inserting his finger in the said A's vagina.

Mrs Amesbury, counsel for the accused, objected to the amendment on the ground that on the authority of *June Evans Jules v R* (SCA 11 of 2005) there was no offence called "sexual interference" in our law, save that it is only a marginal note for the offence of "an act of indecency" under section 135(1) of the Penal Code. She further submitted that the prosecution evidence was that the accused "sexually assaulted" the complainant as particularized in the charge. She therefore contended that in the proposed charge, it is alleged that the accused committed "an act of indecency" towards the said complainant. Mrs Amesbury submitted that if the amendment is allowed, the Court should order that the prosecution recalls the witnesses to support the charge, as otherwise, the accused would be prejudiced and consequently there would be injustice.

Mr Camille, counsel for the prosecution, submitted that the amendment became necessary in view of the pronouncement by the Court of Appeal in the case of *Jules* (supra) that there is no offence of "sexual interference" as known to law, and that all the amendment seeks to do is to formalize the charge under section 135(1). He further submitted that the substance of the charge has not changed, and consequently the accused will not be prejudiced.

In the case of *Jules* (supra), the accused was unrepresented. In the statement of the offence, the offence was stated as "sexual interference" and the penal provision as section 135(1). The Court to Appeal agreed that the particulars of the offence on the two counts in that case were clearly given. That meant that the accused understood the charges against him. The Court also approved the views of Lord Bridge in the case of *Ayres v R* [1984] AC 447 that –

if the statement and particulars of offence can be seen fairly to relate to and to be intended to charge a known and subsisting criminal offence but plead it in terms which are inaccurate, incomplete or otherwise imperfect, then the question whether a conviction on that indictment can properly be affirmed it can be said with confidence that the particular error in the pleading cannot in any way have prejudiced or embarrassed the defendant.

Although, the Court of Appeal could have dismissed the appeal for those reasons, the Justices of Appeal took into consideration the fact that the accused had been unrepresented and in those circumstances, the trial Judge (Alleear CJ, as he then was) had observed the defect, but proceeded with the trial without amending it. In those circumstances, the Court of Appeal thought it fit to refer the case back to this Court for the purpose of amending the charge in conformity with section 135(1) and for the accused to plead to the amended charge before proceeding with a trial de novo. The accused in that case was charged on two counts of committing an act of indecency and committing sexual intercourse on his own daughter. The trial de novo is still pending.

In the present case, the accused is being represented by counsel from the date of commencement of the trial. Moreover, the evidence of the complainant, an 8 year old girl, was that the accused put his hand inside her vagina and also put his penis. The mother of the child testified that she saw blood and scratch marks on her child's vagina. The medical officer had also noted a scratch mark there.

Hence there is prima facie evidence of an act of indecency as particularized in the amended charge sought to be filed. It cannot therefore be stated that the accused would be prejudiced and that injustice would be caused unless the prosecution witnesses are recalled.

In the case of *Hibonne v R* (1976) SLR 44 the charge was laid under the wrong section of the Penal Code, and also the elements of the offence had not been given in the charge. The Court held that the defects did not render the charge bad in law. So also in

R v Camille (1972) SLR 35. The accused was charged with criminal trespass contrary to section 294 that he entered upon the property in lawful possession of the complainant, and unlawfully remained there with intent to annoy the complainant. The evidence for the prosecution showed that the accused had unlawfully entered upon the property in the lawful possession of the complainant, with intent to intimidate him. The Court held that the defect in the particulars of the offence did not embarrass or prejudice the accused and had not occasioned a failure of justice.

In the case of *R v Teong Sun Chuah* (1991) Crim L Rev 463, appropriate charges were substituted for inappropriate charges at the end of the prosecution case. The Court held that no injustice was caused to the defendant as the substance of the allegation remained unchanged.

In the present case, the position would be the same. The decision of the Court of Appeal in the case of *Jules* (supra) is not inconsistent with the principles set out in the above cases. However it must be distinguished, as a trial de novo was ordered in view of the peculiar circumstances of that case.

Accordingly, the objection is overruled. The amended charge is accepted. However the accused should plead to the amended charge before the trial proceeds.

Record: Criminal Side No 38 of 2004