

UNIVERSITY OF LONDON
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 LEGAL STUDIES
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 25 RUSSELL SQUARE
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IN THE PRIVY COUNCIL

10 OF 1969

O N A P P E A L
 FROM THE FIJI COURT OF APPEAL

B E T W E E N :

THE ATTORNEY GENERAL FOR FIJI Appellant

- and -

HARI PRATAP, s/o RAM KISSUN Respondent

CASE FOR THE APPELLANT

Record

- 10 1. This is an appeal from a judgment of the
 Fiji Court of Appeal (Gould V.P., Trainor and
 Knox-Mawer JJ.) dated the 22nd May 1968, which
 had allowed the Respondent's appeal from a
 judgment of the Supreme Court of Fiji, in its
 appellate jurisdiction (Hammett, C.J.) dated the
 22nd March 1968, which had dismissed the
 Respondent's appeal from his conviction by the
 Magistrates' Court at Labasa on the 26th
 September 1967 on three counts of receiving
 money on a forged document contrary to section
 20 374(a) of the Penal Code. The judgment of the
 Fiji Court of Appeal quashed the said
 convictions and the consecutive sentences of
 twelve months imprisonment in respect of each
 offence which had been imposed by the Supreme
 Court.
2. The principal questions which arise in this
 appeal are:
- 30 (a) Whether, when a charge against an accused
 man has been amended during a trial by the
 addition of one or more new counts, section 204
 of the Criminal Procedure Code of Fiji requires
 a fresh plea to be taken upon the whole of the
 counts in the charge or only upon the additional
 counts; and (b) If a fresh plea ought to be
 taken on all the counts, what the effect is of
 a failure to do so upon the subsequent
 proceedings.

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3. The principal statutory provisions involved are:-

Criminal Procedure Code.

120. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with 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.

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121. (1) Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts or form, or are part of, a series of offences of the same or a similar character. (2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.

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200. If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit the accused.

201. (1) At the close of the evidence in support of the charge, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall then again explain the substance of the charge to the accused and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).

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204. (1) Where, at any stage of the trial before the close of the case for the prosecution, it appears to the court that the charge is

defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

10 Provided that - (a) where a charge is altered as aforesaid, the court shall thereupon call upon the accused person to plead to the altered charge; (b) where a charge is altered under this sub-section the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his barrister and solicitor and, in such last mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination.

20 4. The trial of the Respondent together with another man took place at the Magistrates' Court, Labasa, over fourteen days between 22nd May and 18th September 1967. The case for the prosecution was that the Respondent, who was familiar with English and had been a lawyer's clerk, had on a number of occasions introduced illiterate persons to the Bank of New Zealand at Labasa and arranged for them to deposit money there in order to open accounts with the bank; the practice of the bank in relation to
30 illiterate customers was to require a specimen thumb print, and for any cheque drawn on such an account to bear the thumb print of the customer and to be countersigned by a person known to the bank and who knew the customer, and by a bank clerk. Evidence was led to establish that on four occasions cheques so made out were presented and paid against the account of one Mahabir, but on examination they in fact bore the thumb print of the second accused, who had
40 come to the bank with the Respondent who had countersigned the cheques. Mahabir gave evidence that he had not put his thumb print on the cheques in question, and had not received anything in respect of them.

pp. 28-92

5. Originally both accused had pleaded not guilty to a charge containing four counts alleging the receipt of money on forged documents, the particulars under each count

pp. 6-7

Record referring to the payment under each of the
cheques alleged to have been forged. After 4
witnesses had given evidence for the prosecution,
p. 27 counsel for the prosecution applied to amend
the charge by adding four further counts
described as 'alternative', each alleging forgery
of one of the four cheques involved in the
evidence. The Magistrate allowed the addition
of the four alternative counts saying:

p. 27 "Bearing in mind the provision of s.204, C.P.C. 10
11. 19-25 I will grant leave to add these 4 alternative
charges. Every prosecution witness who has
been called must be recalled for cross-
examination if 1st accused or Counsel for 2nd
accused so wishes."

The prosecution then called a police photographer
to prove some photographs of relevant documents.
During his evidence, the Magistrate interrupted
p. 30 1.1 to point out that he had not fully complied with
section 204 in relation to the alternative counts.20
Thereupon the four alternative counts were read
to the two accused, who both agreed to be tried
upon these counts by the Magistrate, and both
pleaded not guilty to the alternative counts.
p.30 11. No reference was made at this stage of the trial
13-21 to the four original counts.

6. The trial then proceeded, and the rest of the
prosecution evidence was given. At the close of
the evidence, the Respondent submitted that he
p. 88 had no case to answer, as did counsel for the 30
other accused, but both submissions were
overruled except in relation to one count against
the other accused. The substance of the charge
as it then stood was then explained to the
Respondent, in accordance with section 201 of the
Criminal Procedure Code, and his rights at that
stage were also explained to him. The Respondent
did not give evidence, and the second accused
confirmed from the dock an exculpatory statement
made to the police. On the 26th September 1967 40
the Magistrate delivered a written judgment by
which he found the Respondent guilty on all the
four original counts of receiving money on a
forged document. The Magistrate said that he
accepted the prosecution evidence that the
Respondent had played a leading part in
dishonestly drawing out money from the Bank upon

the four cheques in evidence each of which bore a false thumb-print. The Magistrate also said that although he had no doubts the Respondent was guilty on the alternative counts, he refrained from so finding. The second accused was acquitted as the Magistrate had some doubt that he knew he was taking part in fraudulent transactions. The Respondent was sentenced to 6 months imprisonment consecutively on each count of the four original counts.

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7. The Respondent appealed against his convictions to the Supreme Court. His appeal was dismissed by a judgment of the Supreme Court (Hammett C.J.) dated the 22nd March 1968. Hammett C.J. began his judgment by setting out the eight grounds of appeal which had been relied upon. He held that the evidence relating to the third count had been less strong than that in support of the other counts, depending only upon the evidence of a witness whom the Magistrate had thought unreliable, and that the conviction upon the third count should be set aside. He then dealt with and dismissed a number of other grounds of appeal which are not relevant to this appeal, and finally dealt with the allegation that the trial was a nullity after the alternative counts were added to the charge. After stating what had happened before the Magistrate, and holding that the charge was not in fact amended until the accused were invited to plead to the alternative counts, Hammett C.J. said -

pp. 111-
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"At the hearing of the appeal learned Counsel for the defence took the matter a stage further however. He contended that it was not sufficient merely to read the four additional counts and to take the accused's consent and pleas on these counts alone, and that the learned trial Magistrate should have taken the accused's consents and pleas afresh to the original four counts in addition to the four new counts. This contention is based on the wording of section 204(1) of the Criminal Procedure Code and with special reference to the meaning of the word 'charge' in that section. It is submitted that on a criminal trial in the Magistrates' Court there can only be one charge. In this

p.133. 1.2.
p.135.1.28.

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connection reference is made to section 121 of the Criminal Procedure Code. It seems clear to me that there can only be one charge before the Court at a trial. If more offences than one are charged, whether in the alternative or not, they must be made the subject of separate counts in the charge. It is contended that if there is any alteration in one of several counts in a charge, or if other counts are added to the charge, the charge itself is altered. The altered charge in this case consists of the original counts and the new counts that have been added. It is the case for the Appellant that it is this 'whole' altered charge to which the accused should have been called upon to plead after the additional counts had been added, and not merely the additional counts. At first sight there seems to be considerable substance in this view. When however the words used in section 204(1) of the Criminal Procedure Code are examined critically and in detail, it appears that if so construed curious results, which it is doubtful could ever have been contemplated, ensue. It is contended that the word 'charge' in Criminal Procedure Code section 204(1) means the whole charge and all of the counts in a charge. If that is so the section provides that the original 'whole' charge may be altered, inter alia, by the addition of a 'new charge'. But if the new charge is to be 'added' to the old charge in this sense, it would mean that there would in the result be more than one charge before the Court. This would conflict with the provisions of section 121 which clearly envisages that there may never be more than one charge and that all additional offences averred must be made the subject of separate and different counts in the charge. In my view, therefore, the words in section 204 - 'the court may make such order for the alteration of the charge by way of addition of a new charge' must intend and mean 'the court may make such order for the alteration of the charge by way of addition of a new count to the charge'. In other words in this section the word 'charge' must there be used as and be interpreted as the word 'count' to the charge'., if section 204 is to be construed properly and

consistently with section 121. The first proviso to section 204 appears to me to cover, as it stands, the case where a charge, consisting of one count charging one offence, is altered. In such a case the accused must be called upon to plead to this altered 'charge'. Where, however, a charge contains several different counts, I construe the word 'charge' in the first proviso to section 204(1) to mean and have reference to 'a count in a charge'. After giving this matter careful consideration and bearing in mind the cardinal principles that the Court must apply to the construction of statutes, I cannot think of any other construction to which this proviso can be open, if it is to be construed consistently both with itself and with section 121 of the Code. In my view the additional alternative counts which were added to the charge in the Court below should have been numbered 5, 6, 7 and 8, respectively. They all formed a part of the original charge, which was amended, not by the addition of a new 'charge' but the addition of these four new counts. It was sufficient compliance with the provisions of the first proviso of section 204(1) for the Appellant's pleas to be taken to these four additional counts, as was done in the Court below. It was not, in my view, necessary for the Appellant's plea to be taken again to the first four original counts. Even if I am wrong in this view, no conceivable miscarriage of justice can have occurred by only taking the Appellant's pleas to the additional counts. In my view, in these circumstances, if it was an irregularity, it was one of procedure and not substance and did not go to the jurisdiction. In that event I would, therefore, apply the proviso of section 325(1) of the Criminal Procedure Code."

The conviction on the third count would therefore be set aside, and those on the other three counts confirmed. On a review of the sentences the Chief Justice increased the sentences on the three counts to twelve months consecutive on each.

8. The Respondent appealed to the Fiji Court of

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Appeal. By a judgment dated the 22nd May 1968, the Fiji Court of Appeal (Gould V.P., Trainor and Knox-Mawer J.J.A.) allowed the appeal and set aside the convictions on the remaining three counts. The only ground of appeal considered in the judgment was that relating to the failure to take a plea to the original counts when the additional counts were added to the charge. The judgment of the Court of Appeal related the events at the trial when the counts were added, and summarised the conclusions of the Chief Justice, with which however the Court of Appeal did not agree. The question raised was whether the word 'charge' could be construed as 'count' where it appeared in proviso (a) to section 204 of the Criminal Procedure Code. The Court of Appeal did not think that such a construction was acceptable, and went on -

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p.152,1.4,
- p.153,
1.11.

"Where there is only one offence contained in a charge it may be amended by a change in its own wording, the substitution of another offence or the addition of one or more counts. We feel that where the learned Chief Justice referred to 'a charge, consisting of one count charging an offence' he visualizes it being amended only in its particulars or by substitution. Then the direction to call upon the accused person to plead to the 'altered Charge' can only mean plead to the resultant varied or new charge. But where it is amended by the addition of another count surely the 'altered charge' is the original charge as altered by the addition. We do not see that any difference arises whether there is only one offence contained in the original charge or whether there are two or more. Section 204 clearly embraces in the concept of alteration, variation, substitution and addition. Whichever course is taken, it is the original charge which is altered. When you add material to an existing object it is the existing object which is altered - it is not the new material. When you add a count to an existing charge it is not the new count which is altered, but the existing charge. We see no escape from the plain meaning of the words 'altered charge' in proviso (a) and do not find anything that can be drawn from the one anomaly in the earlier part of the section, of sufficient weight to

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10 affect what we consider to be the only possible construction of the proviso. It is idle to speculate upon the underlying reason for the provision. Where an accused person has pleaded not guilty to a number of counts in a charge he is at liberty to change his plea to 'guilty' at any time so the provision offers him no advantage. On the other hand it does appear to afford him the opportunity, where he has pleaded 'guilty' to some counts and 'not guilty' to others of reversing his plead of 'guilty'. That is just. If an accused person has pleaded guilty to counts (a) and (b) and not guilty to counts (c) and (d) of a charge, he is surely entitled to reconsider his position if the prosecutor then proposes to add two new counts."

20 The result of the failure to take a plea upon the whole charge after the amendment was that the proceedings had thereafter become a nullity; such a conclusion had been reached on similar legislation in Nigeria. The case could not be considered as one in which no valid amendment of the charge had ever been made. Contrary to what the Chief Justice had held, the case was not one to which the proviso to section 325 of the Criminal Procedure Code could be applied, and the appeal dismissed on the ground that no miscarriage of justice had occurred. The proceedings were null and void after the failure to take the pleas in accordance with section 204, and the defect was a fundamental one, which could not be cured by an application of the proviso.

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40 9. The Appellant respectfully submits that the judgment of the Fiji Court of Appeal should be reversed. The principal question which arises is the appropriate meaning to be given to the word 'charge' in proviso (a) to section 204(1) of the Criminal Procedure Code. It is submitted that the view taken by the Court of Appeal is unnecessarily restrictive, and that the proper interpretation of the statutory provision in question is that it may, where appropriate, be read as meaning 'count' in a case where the counts originally charged remain unaltered. Section 204 is drafted to deal, in the first place, with a charge containing a single count

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which requires amendment, either to the count itself or 'by the substitution or addition of a new charge'. It is inherent in the scheme of the statute that a person can only be tried upon one charge at a time, which may contain one or more counts. It is submitted that the word 'charge' is not used throughout the Code to mean only the whole charge in distinction to the counts contained in it. In a number of provisions in the Code, the word 'charge' is used in a context where it must be intended, in certain circumstances, to mean 'count' in order to give a proper meaning to the provision in question. It is therefore consistent with the interpretation given in the statute generally that the expression 'charge' may bear different meanings in different provisions, so as to give proper effect to the purpose of the provisions.

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10. Section 204(1) is intended to provide for the alteration in a number of different ways of the single charge against an accused person. It is accepted that when the whole of an original charge is altered, then the section, and the proviso (a), require that the accused should be given an opportunity to plead to the amended charge. Where, as in the present case, the alteration consists only of adding new counts to an existing charge, such an alteration is not properly described, in the language of section 204(1), as 'an addition of a new charge', unless in that phrase 'charge' is taken to mean 'count'. In such a case it follows that the requirement, in proviso (a) to section 204(1), that the accused should plead to the altered charge, should be taken to refer to a plea to the counts so added, and not to the whole of the counts in the charge, including those to which a plea has already been taken and which remain unaltered. In this respect, the Appellant seeks to rely upon the reasoning of the Chief Justice set out in paragraph 7 above.

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11. In reaching its conclusion the Fiji Court of Appeal relied upon two West African cases, Fox v. Police (1947) 12 W.A.C.A.215 and Eronini v. The Queen 14 W.A.C.A. 366. In both those cases the issue turned on the failure to take the plea of an accused man upon an amended count upon which he had been convicted. The Court of

Appeal was not, in the present case, referred to other authorities in West Africa and in East Africa upon the consequence on a conviction on an original count of a failure to take a plea upon an added count in the same charge. Such further comparative authorities were considered in a later case in the Fiji Court of Appeal, *Sucha Singh v. The Queen* (Gould V.P. Marsack & Hutchison J.J.A.) decided on the 22nd October 1968. It is respectfully submitted that the judgment of Gould V.P. in the *Sucha Singh* case is inconsistent with the decision in the present case. The African cases not referred to in the present case show a principle that, where additional counts have been added to a charge, the courts concerned do not require pleas to be taken again on original counts which have remained unamended in the charge.

12. The appellant further submits that even if section 204(1) required fresh pleas to be taken to all the counts in a charge even if some of such counts were unaffected by an amendment, the failure to do so does not necessarily make the whole trial a nullity, as the Court of Appeal has held. The Court, in reversing the ruling of the Chief Justice, relied upon the two West African cases referred to above, but did not consider the further West and East African cases cited in *Sucha Singh v. The Queen* (supra). The effect of such further cases is that a failure to take a plea on amended counts in a charge does not necessarily make the whole proceedings a nullity, but should only be considered fatal to a conviction when the failure has resulted in a miscarriage of justice. In the present case the Chief Justice held that there were no grounds for accepting that a miscarriage of justice had occurred, a view with which the Court of Appeal sympathised, and, it is submitted, the case was a proper one for the application of the proviso to section 300(1) of the Criminal Procedure Code.

13. The Appellant accordingly respectfully submits that the judgment of the Court of Appeal of Fiji is wrong and should be reversed and this appeal should be allowed, for the following, among other

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R E A S O N S

1. BECAUSE Section 204 of the Criminal Procedure Code was correctly applied.
2. BECAUSE Section 204 requires a fresh plea by an accused person only upon counts in a charge which have been altered or added by amendment.
3. BECAUSE the Court of Appeal adopted too restrictive an interpretation of section 204.
4. BECAUSE the proviso to section 325 of the Criminal Procedure Code should have been applied. 10
5. BECAUSE the Respondent suffered no miscarriage of justice.
6. BECAUSE of the other reasons in the judgment of Hammett C.J.

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