

ATTORNEY-GENERAL

v.

VIJAY PARMANANDAM

[SUPREME COURT, 1968 (Hammett C.J.), 1st, 4th, 15th March]

Appellate Jurisdiction

Criminal law—evidence and proof—using abusive words in a public place—whether words might occasion breach of the peace—whether objective or subjective test to be applied by court—dangerous driving—objective test to be applied—Penal Code (Cap. 8—1955) s.199(r)—Criminal Procedure Code (Cap. 9—1955) s.325—Traffic Ordinance 1965, s.38(1).

Criminal law—principles of criminal liability—dangerous driving—using abusive words in public place—nature of tests to be applied by court in determining whether charge proved—Penal Code (Cap. 8—1955) s.199(r)—Traffic Ordinance 1965, s.38(1).

Criminal law—practice and procedure—dangerous driving—careless driving a minor cognate offence in relation thereto—court's power to convict—Criminal Procedure Code (Cap. 9—1955) s.164(1) (2)—Traffic Ordinance 1965, ss.36, 38.

Evidence and proof—mode of proof of Ordinance and subsidiary legislation—judicial notice—not conditional upon production of Gazette at hearing—Interpretation Ordinance 1967, ss.4, 21, 33, 63—Interpretation and General Clauses Ordinance (Cap. 1—1955) ss.3, 9, 22(1)—Documentary Evidence Act 1868 (31 & 32 Vict., c.37) (Imperial) ss.2, 3—Evidence Act 1905—1934 (Commonwealth of Australia) s.5.

Criminal law—practice and procedure—amendment of charge—plea to altered charge not taken—fatal and incurable defect—Criminal Procedure Code (Cap. 9—1955) ss.198(1) (2) (3), 204(1) (2)—Traffic (Construction and Use) Regulations 1955, reg. 23(2)—Traffic Regulations 1967, regs. s.78, 122, 138(d)—Traffic Ordinance 1965, ss.8, 85. Interpretation—Interpretation Ordinance 1967—construction of section 4—courts—method of proof of Ordinances and subsidiary legislation—judicial notice—Interpretation Ordinance 1967, ss.4, 21, 33, 63—Interpretation and General Clauses Ordinance (Cap. 1—1955) ss.3, 9, 22(1).

On the trial of a charge of using abusive words in a public place, it is not correct to say that when the court is deciding whether the abusive words used were such that a breach of the peace may have been occasioned, the objective test is the sole test which should be applied to the facts.

In considering a charge of dangerous driving the correct test for a court to apply to the facts is the objective and not the subjective test. *R. v. Evans* [1963] 1 Q.B. 979; 47 Cr. App. R. 62, and *R. v. Ball and Loughlin* (1966) 50 Cr. App. R. 266; 110 S.J. 510, applied.

Per curiam: Where there is a charge of dangerous driving and the facts proved do not amount to that offence but do amount to the offence of careless driving, a court may, in exercise of its powers under section 164(2) of the Criminal Procedure Code (Cap. 9) convict the accused of careless driving as a minor offence, although he is not separately and specifically charged with that offence.

The Interpretation Ordinance, 1967, is intended to contain a full and complete statement of the law of Fiji on the subject of the proof of

A Ordinances and subsidiary legislation, and the Documentary Evidence Act, 1868 (Imperial), is not, therefore, in force in Fiji. The proper construction to be placed on section 4 of the Interpretation Ordinance, 1967, is that the courts must, unconditionally, take judicial notice of all Ordinances. Similarly, by virtue of section 21 of that Ordinance judicial notice must be taken of all subsidiary legislation without proof of its publication in the Gazette. Judicial notice must also be taken of the Revised Edition of the Laws Ordinance 1955 and of the Proclamation whereby the Revised Edition of the Laws of Fiji came into effect.

B A charge of driving a motor vehicle with a defective speedometer was ordered, on application, to be amended by replacing a reference to certain revoked regulations by a reference to regulations 78 and 122 of the Traffic Regulations 1967. No amendment was actually made pursuant to the order nor was any new plea taken. It was held that the requirement of the proviso to section 204(1) of the Criminal Procedure Code that a plea to an altered charge be taken, was mandatory, and in the circumstances the failure was a fatal and incurable defect in the proceedings.

C Cases referred to: *Turner v. Patterson* (1908) 27 N.Z.L.R. 207; *Cohen v. Huskisson* (1837) 2 M. & W. 477; 150 E.R. 845; *Jordan v. Burgoyne* [1963] 2 Q.B. 744; [1963] 2 All E.R. 225; *R. v. Scammell* [1967] 3 All E.R. 97; 51 Cr. App. R. 398; *Palastanga v. Solmon* (1962) 106 Sol. Jo. 176; [1962] Crim. L.R. 334; *Duffin v. Markham* (1918) 88 L.J.K.B. 581; 119 L.T. 148; *Tyrell v. Cole* (1918) 120 L.T. 156; 35 T.L.R. 158; *R. v. Ashley* (1967) 52 Cr. App. R. 42; [1968] Crim. L.R. 51; *Wallace-Johnson v. The King* [1941] A.C. 231; [1940] 1 All E.R. 241; *Montreal Street Railway Co. v. Normandin* [1917] A.C. 170; 116 L.T. 162; *Liverpool Borough Bank v. Turner* (1861) 30 L.J. Ch. 379; (1861) 2 De G. F. & J. 502; *Duff Development Co. v. Kelantan Government* [1924] A.C. 813; 131 L.T. 676; *Brenner v. Bruce* (1950) 82 C.L.R. 161.

D Appeal by the Attorney-General against acquittals in the Magistrate's Court on three charges. The Supreme Court, in the judgment now reported, convicted the respondent on the second charge, and his appeal to the Court of Appeal against that conviction is reported at page 109 of this volume.

F Justin Lewis Q.C., Attorney-General and G. Mishra for the appellant.

S. M. Koya for the respondent.

The facts sufficiently appear from the judgment.

G HAMMETT C.J.: [15th March 1968]—

The Respondent was charged in the Magistrate's Court sitting at Suva with the following offences:

FIRST COUNT

H *Statement of Offence*

Using abusive words in a public Place: Contrary to section 199(r) of the Penal Code, Cap. 8.

Particulars of Offence

Vijay Parmanandam s/o Kuppsami, on the 25th day of November, 1967, at Suva, in the Central Division, used abusive words in a public place, namely Rodwell Road, whereby a breach of the peace might have been occasioned. A

SECOND COUNT

Statement of Offence

Dangerous Driving: Contrary to section 38(1) of the Traffic Ordinance, No. 11 of 1965. B

Particulars of Offence

Vijay Parmanandam s/o Kuppsami, on the 25th day of November, 1967, at Suva, in the Central Division, drove a private motor vehicle on Rodwell Road, in a manner which was dangerous to the public having regard to all the circumstances of the case. C

THIRD COUNT

Statement of Offence

Driving a motor vehicle with defective speedometer: Contrary to Regulations 23(2) of the Traffic (Construction and Use) Regulations, 1955 and sections 8 and 85 of the Traffic Ordinance, No. 11 of 1965. D

Particulars of Offence

Vijay Parmanandam s/o Kuppsami, on the 25th day of November, 1967, at Suva, in the Central Division, drove a private motor vehicle on Rodwell Road when the said motor vehicle was not fitted with a speedometer maintained in good working order. E

He was acquitted on each Count and the Attorney-General has appealed against each acquittal on a number of grounds. The Grounds of Appeal are signed by the Attorney-General himself who appeared personally to present the appeal.

The case for the prosecution in the Court below was briefly as follows:

On Saturday, 25th November 1967, the Respondent drove his car in Rodwell Road past the 'red' or 'stop' lights at a pedestrian crossing. He drove over the crossing at a time when a number of pedestrians were using it. Some of these pedestrians had to jump out of the way to avoid being run down. F

The first witness for the prosecution was the Constable on duty at the crossing. He called on the Respondent to stop and the Respondent did so. The Constable asked him why he did not stop his car when he saw the red light and the pedestrians on the crossing. The Respondent admitted he had passed the 'red' light and was then asked to produce his driving licence and certificate of insurance. The Respondent replied that they were at home and was told to produce them within 5 days at Suva Police Station. G

Station. To this he replied: H

"You don't have to tell me all these things, I know that Constable. I don't care. You can go to hell."

A The Constable told the Respondent not to swear at him. The Respondent then put his car into gear, raced the engine and his car began to move. The Constable who had not yet obtained the Respondent's name and address or warned him he would be prosecuted, grabbed him by his shoulder and prevented him driving away.

The Respondent then gave his name and address. The Constable took down particulars from the car's licence and told the Respondent that he would be prosecuted.

B To this the Respondent replied with vulgar abuse the precise terms of which are set out in the judgment of the Court below and which I do not intend to repeat.

C The Respondent is a legal practitioner and also, according to the evidence of one of his witnesses, a partner with the witness in a coffee lounge. It is sufficient for me to say that the terms he used not only brought disgrace upon himself but also tended to do so to the profession of which he is a member.

D He accompanied his abuse by threatening words to the Constable and got out of his car. He thereby placed himself in a position where he could, if that had been his intention, have used violence. The Constable thereupon touched him on the shoulder and told him he was arresting him for disorderly behaviour and took him to the Police Station.

The Respondent's car was later examined and it was found that the speedometer was not working.

E In his defence the Respondent gave evidence and called a number of witnesses. He said he was following a stream of traffic and asserted that at the time he entered the pedestrian crossing marked on the road the lights were green and there were no pedestrians on it. He was then obliged to stop, by the traffic ahead of him, with his rear wheels on the crossing.

F He related how first a Fijian Constable — the 3rd W/P—and then an Indian Constable — the 1st W/P — came up to him, told him to park his car and asked him why he had crossed the lights on the 'red'. He said he gave his explanation which was not accepted. He gave his name and address and was told he would be prosecuted. He denied that he abused the Constable. He said he then nodded and turned his ignition on. The Constable then grabbed him by his hair and he turned round and got out of his car. He pointed his finger at the Constable and said "What's the idea of grabbing my bloody head?". On this the Constable G grabbed him by the scruff of his neck and arrested him.

H In the Court below there was a direct conflict of evidence on the facts. In a carefully prepared and reasoned judgment the learned trial Senior Magistrate reviewed the whole of the evidence and the credibility of the witnesses for both the prosecution and the defence with admirable clarity. He came to the conclusion that the 3rd W/P—the Fijian Constable — was a witness of truth and said that in so far as the evidence of the 3rd W/P corroborated that of the 1st W/P he accepted it in preference to the testimony and the version of the incident given by the

Respondent. He stated quite clearly why it was he did not believe the Respondent or accept his evidence where it conflicted with that of the 1st and 3rd witnesses for the prosecution.

On this basis he made and recorded the following specific findings of fact:

On the 1st Count: That the accused on 25.11.67 in Rodwell Road, a public place, used the abusive words given in evidence by the 1st and 3rd witnesses for the prosecution.

On the 2nd Count: That the accused drove through a red traffic light and across a pedestrian crossing which was being used by pedestrians at the time.

On the 3rd Count: That the speedometer of the accused's car was not working.

I have examined the record in the light of all that has been said at the hearing of this appeal and there are no reasons why these basic findings of fact should be disturbed.

The learned trial Senior Magistrate then held on the 1st Count, that whilst the words used were abusive, he was not satisfied that their use was such whereby a breach of the peace may have been occasioned.

In reaching this decision it is contended by the Crown that he applied the subjective test. In the submission of Counsel for the Respondent, he was correct in so applying the subjective test. The Attorney-General has appealed against this part of the decision of the Court below on the ground that the correct test to apply is the objective test.

As I understand it the Crown contends that it was purely fortuitous that no breach of the peace was occasioned and that the use of such abuse in such circumstances generally is such that a breach of the peace may thereby be occasioned, and that this is just the sort of conduct this section is designed to cover.

For the Crown I have been referred to the case of *Turner v. Patterson* 27 N.Z.L.R. 207 in which Cooper J. considered the question of the use of abusive words to a constable in the street. On the authority of *Cohen v. Huskisson* 150 E.R. 845 he held that whilst the mere use of insulting language does not constitute a constructive breach of the peace, a challenge to a fight or a threat of personal violence would be sufficient to make a constable reasonably believe that the person using the insulting language is about to commit a breach of the peace.

For the Respondent I have been referred to the case of *Jordan v. Burgoyne* [1963] 2 Q.B. 744 where it is submitted that the Court applied the subjective and not the objective test.

It appears to me from my study of the record and the judgment in the Court below that the decision was influenced largely by the testimony of both Constables that they did not consider that a breach of the peace was likely to be caused by the Respondent's abuse and behaviour and by the fact that no breach of the peace was in fact occasioned. To this extent it does appear that the subjective rather than the objective test was applied.

A It is submitted by the Crown that the test that should be applied must be whether the use of these abusive words in the circumstances by the Respondent to a reasonable man or in front of an audience composed of a number of reasonable persons was likely to provoke a breach of the peace.

B If this is the proper test to apply then it must follow that even if a breach of the peace had in fact occurred it would have been a good defence for the Respondent to show that the person or persons to whom or in front of whom he uttered the abuse were not reasonable persons. If he could succeed in doing that he would then be entitled to an acquittal even if his abuse had actually occasioned a breach of the peace. Such a resulting position would appear to border on the ridiculous. I cannot, therefore, accept the view that the sole test that must be applied is the objective test.

C Indeed, in *Jordan v. Burgoyne* (supra) this was the defence raised by the accused. In the judgment of Lord Parker C.J. in the Divisional Court this defence was totally rejected. He then said (p.749) :

"If words are used which threaten abuse or insult — all very strong words — then that person must take his audience as he finds them."

D It seems to me that a court of trial must, perhaps, have regard to both the subjective and objective tests in deciding whether or not in its view the abuse used was such that a breach of the peace may have been occasioned. Provided it does not make an entirely incorrect approach this Court, sitting as a Court of Appeal, would be reluctant to interfere by substituting its own views on the matter.

E It is not in every case of a driver ranting and raving at a policeman on duty that a breach of the peace is likely to be occasioned. To the Police Constables and the public at the scene the Respondent must certainly have appeared to be an excitable foul-mouthed person lacking in dignity and restraint. Far from being likely to occasion a breach of the peace, however, he may have looked and sounded both childish and slightly ridiculous.

F Both the Constables concerned said they did not consider that a breach of the peace was likely to have occurred as a result of what happened that morning. There can be no doubt that the Constable who was abused was annoyed, and said so. I think it must be remembered, however, that he did not arrest the Respondent because he considered the abuse was such that a breach of the peace might be occasioned but because of his disorderly behaviour. It may well be that that is what the Respondent's abuse, threat and behaviour generally amounted to in law.

G In these circumstances I have come to the conclusion that on a charge under section 199(r) of the Penal Code of using abusive words in a public place whereby a breach of the peace may be occasioned, it is not correct to say that the objective test is the sole test that should be applied to the facts. I have not been satisfied that the Court below proceeded on any wrong principle and the appeal against the acquittal on the 1st Count must be dismissed.

H

On the 2nd Count the learned trial Senior Magistrate acquitted the Respondent on the charge of Dangerous Driving on the ground that he was not satisfied that the accused's driving produced a dangerous situation in the circumstances then existing on the road. He considered that by ignoring or failing to see the red light and by driving on to the portion of the road which pedestrians were in the process of crossing, the accused was not exercising that degree of care and attention which a reasonably prudent driver would have exercised in the circumstances and was driving without reasonable consideration for the pedestrians using the road. He held that the facts proved amounted in law to careless driving.

After reviewing the legal position he did, however, come to the following conclusions:

- (1) That on a charge of dangerous driving, where only careless driving is proved, it is not open to a Court to convict of careless driving. In his view this was not a "minor offence" to dangerous driving within the meaning of that term in section 164 of the Criminal Procedure Code; and
- (2) That the prosecution had not proved the publication in the Gazette, and the Court could not therefore take judicial notice of, the Traffic Ordinance 1965 under which the 2nd Count was laid nor of the fact that it had been brought into force.

Against both these conclusions the Crown has appealed on the ground that the Court below was wrong in law —

Firstly in acquitting the Respondent on the charge of dangerous driving,

Secondly in holding that it was not open to it to convict of the minor offence of careless driving in these circumstances, and

Thirdly in not taking judicial notice of the Traffic Ordinance 1965 and of the relevant subsidiary legislation by which it was brought into force.

The gravamen of the Crown's complaint against the acquittal on the charge of Dangerous Driving is that the Court was incorrect in applying the subjective test instead of the objective test to the proved facts.

It is clear to me from my study of the judgment of the learned trial Senior Magistrate that he did apply the subjective test to the facts in this case. He held that although both the Constables at the scene, the 1st and 3rd W/P, whom he had already said he believed on this issue, stated that some pedestrians were placed in danger because they had to jump out of the way to avoid being run down by the car, these pedestrians were inconvenienced rather than endangered in the particular circumstances of this case.

It is well established, and the cases of *R. v. Evans* 47 Cr. App. R. 62 and *R. v. Ball and Loughlin* 50 Cr. App. R. 266 are in point, that the correct test to apply to the facts on a charge of dangerous driving is the objective and not the subjective test. If I had been satisfied that the correct test had been applied in the Court below, I would have been

hesitant to disturb the decision of the court of trial. Where, as here, however, a Court of Appeal is satisfied that the incorrect test has been applied in the Court below it is its duty to apply the correct test to the facts found by the Court below.

A

The facts found showed that the accused drove his vehicle at about 10 to 15 m.p.h. into a body of pedestrians as they were crossing the road on a pedestrian crossing at a time that a traffic light showed 'red' and was indicating to the on-coming traffic that it should stop.

B In *Evans'* case 47 Cr. App. R. 62, 64, Fenton Atkinson J. said:

"The question therefore for the jury was, viewed objectively, did the course on which and the speed at which the appellant drove his car in the particular circumstances prevailing at the time involve danger to another road user and if the answer to that question was yes, then the proper verdict was one of guilty (of Dangerous Driving)."

C

He went on to cite, with approval, the direction to the jury of the trial Judge (at p.66):

"Are you satisfied that he drove in fact in a manner dangerous to the public? If he did so then it is no answer to say 'Well this is only a very slight degree of negligence'."

D

It has been well said that dangerous driving is careless driving that puts people in danger.

In *R. v. Scammell* [1967] 3 All E.R. 97 Sachs L.J. said:

"Careless driving may well be dangerous though all careless driving is not necessarily dangerous driving."

E

In the Court below the defence was that the accused did not drive into the pedestrians crossing the road. The defence maintained that the facts alleged by the witnesses for the prosecution were untrue. The defence did not contend that if those facts were true, they did not amount to dangerous driving. In fact in the Court below, in his final address, learned Counsel for the Respondent said:

F

"If the defendant drove into a pedestrian crossing causing persons to jump out of the way and touching the Constable's sulu it would create a dangerous situation."

Again in this Court, learned Counsel for the Respondent said that if the accused saw the light was showing stop for on-coming vehicles (as the 1st W/P said the Respondent, at the scene, admitted to him was the case) and that evidence was accepted, this was a clear case of dangerous driving.

G

In the Court below the evidence that the Respondent drove past a red light and into the pedestrians crossing the road on the pedestrian crossing in front of him, was accepted, and the Respondent's version of the facts was not believed. There are no grounds for me to disregard such findings which were amply justified.

H

I find it difficult to imagine a situation which, when the facts found by the Court below are considered objectively, could more clearly show

that people were put in danger by the Respondent's driving. Any pedestrian who did not see the on-coming car or who by reason of infirmity, age, frailty or the like, was unable to jump out of its way or avoid it would undoubtedly have been run down. If a car continues to travel at even 10 to 15 miles an hour and a pedestrian in front of it does not get out of its way and it does not stop he will undoubtedly be knocked down by it.

In my view there was an abundance of evidence, namely that given by the 1st and 3rd W/P, which was accepted by the Court below upon which, if the objective test had been applied, a conviction for dangerous driving would have been inevitable. I do, therefore, allow the appeal against the decision of the Court below acquitting the Respondent on the 2nd Count.

Since it has been raised in this case, however, I feel I should deal with the further point raised, both in the Court below, and at the hearing of this appeal. This is the question of whether on a charge of dangerous driving it is open to a trial court to find an accused Not Guilty of Dangerous Driving but Guilty of Careless Driving by virtue of the provisions of section 164 of the Criminal Procedure Code.

The provisions of section 164 of the Criminal Procedure Code read as follows:

"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

As was indicated by the learned trial Senior Magistrate these two subsections are not easy to construe, and, as so rightly pointed out by him, the term, "minor offence" is nowhere defined.

Many statutory offences are described as "petty" offences. In this sense such offences are at times somewhat loosely called "minor offences." I do not consider that in section 164 the term "minor offence" means a "petty offence." It means a "less" or a "lesser" offence in relation to the offence charged. The term "less offence" instead of the term "minor offence" is in fact used in this connection in the Codes of some territories, e.g. in the Seychelles.

Section 164 of the Criminal Procedure Code appears to have been taken from the Indian Criminal Procedure Code and a large number of decisions upon it are cited in "*Sohoni's Code of Criminal Procedure*". These are decisions of different Courts in India from which, whilst some decisions unfortunately appear to be in conflict, a certain pattern can be seen.

I do not intend to review all these decisions, or those of the Eastern Africa Court of Appeal which are set out in the Digest of such cases.

A In my view an offence cannot be regarded or treated as a "minor offence" under section 164 of the Criminal Procedure Code of Fiji unless it has at least the two following characteristics:

Firstly — That it is an offence of a cognate character to the offence actually charged, and

Secondly — That it is a less grave offence than the offence actually charged, in the sense that it carries a lower maximum punishment upon conviction than that carried by the offence actually charged.

B In addition to this, however, it is essential to note the two different classes of case which are covered by sub-sections (1) and (2) of section 164 respectively, with reference to "minor offences".

C Under subsection (1) a person can only be convicted of a "minor offence" not charged where a combination of some only of the several particulars, which go to make the offence charged, are proved, and the combination of the particulars which are proved constitutes the complete minor offence.

D Under subsection (2) however there is the distinction that if the facts which are actually proved reduce the offence charged to a minor offence the accused can be convicted on the minor offence although he was not charged with it.

E As I understand the reasoning of the learned trial Senior Magistrate in the Court below from his judgment the view he adopted is this. Recent English decisions have held that "Dangerous Driving" is an offence of absolute liability, in which proof of negligence is not an essential ingredient. On the other hand, on a charge of "Careless Driving" it has been held that it is necessary to prove negligence as an essential ingredient in that offence. On this basis he has reasoned that since the proof of negligence is not an essential ingredient on a charge of Dangerous Driving, but it is on a charge of Careless Driving, a person charged with Dangerous Driving cannot be convicted of Careless Driving by calling in aid the provisions of section 164. He holds this view because although Careless Driving may be a "minor offence" to Dangerous Driving in the sense that it carries a lower maximum punishment, it is not constituted merely by a combination of some of the ingredients which go to make up the offence of Dangerous Driving, because, in addition to some of those ingredients, negligence must also be proved.

F I appreciate the thought behind this reasoning. When, however, the provisions of subsection (2) of section 164 are studied those considerations do not apply. I say this because what has to be taken into account under sub-section (2) are the "facts" which have actually been proved.

G A Court must first decide whether the facts proved amount to the offence of Dangerous Driving that is charged. In this case the learned trial Senior Magistrate considered these facts did not amount to the offence of Dangerous Driving. He did, however, specifically state in his judgment that in his view the facts proved amounted to and constituted the offence of Careless Driving.

H In these circumstances, whilst he did not consider it was open to him to convict of Careless Driving in this case where Dangerous Driving had

been charged, on his reasoning and in view of subsection (1) of section 164, it is clear that it was open to him to pray in aid the provisions of subsection (2) to do so.

I am of the opinion that the offence of Careless Driving contrary to section 36 of the Traffic Ordinance 1965 is a "minor offence" to the offence of Dangerous Driving contrary to section 38 of that Ordinance. In my view where Dangerous Driving is charged and the facts proved do not amount to the offence of Dangerous Driving but do amount to the offence of Careless Driving, a Court may in exercise of its powers under section 164 (2) of the Criminal Procedure Code convict the accused of the offence of Careless Driving, as a minor offence, although he is not separately and specifically charged with that offence.

The further point raised in this appeal concerns the question of whether or not there must be proof of publication in the Gazette before a Court must take judicial notice of ordinances and subsidiary legislation.

Mr. S. M. Koya appeared for the accused in the Court below and also in this Court. He submitted, in the Court below, in his final address after the close of the case for the defence, that the Court could not take judicial notice of subsidiary legislation unless the Gazette in which it was published was at least produced, or the publication therein proved. In support of this submission he quoted a passage in "*Phipson on Evidence*" 10th Ed. at page 428 which reads:

"Gazette will be judicially noticed on its mere production."

In the course of his judgment the learned trial Senior Magistrate reviewed the relevant provisions of the Interpretation Ordinance 1967 and other relevant ordinances in Fiji and made reference to the position in England at Common Law. He finally came to the conclusion that since there had been no proof given before him of the publication in the Gazette of any of the ordinances or subsidiary legislation relevant to all of the three counts in the charge in this case, he was neither compelled nor able to take judicial notice of them. He held that this was a further ground upon which the accused was entitled to be acquitted on all three counts.

In paragraphs Nos. 4, 5, 6 and 7 of the Grounds of Appeal, which it is not necessary to set out in detail, the Attorney-General complains that in taking this view the Court below erred in law.

I have listened with interest to the arguments before me on this matter.

A similar point was taken in the case of *Palastanga v. Solman*, in England, a brief report of which appears at page 334 of the Criminal Law Review in 1962. In that case the justices upheld the submission and dismissed the summons and the prosecutor appealed.

A Queen's Bench Divisional Court presided over by Lord Parker C.J. allowed the appeal and the report reads:

"Held, allowing the appeal, that it was a disgraceful point to make, and the court would reserve the question whether the regulation was so notorious that the justices could take judicial cognizance of it. The justices should have adjourned the matter, if the submission was persisted in, to allow the prosecutor to obtain a Stationery Office

A copy of the regulations, and should then have ordered the defendant to pay all the costs. The failure to produce the Stationery Office copy did not justify the dismissal of the summons. It was lamentable that the justices had been induced to give effect to a submission utterly without merit, and the case should be sent back with a direction to hear and determine it."

B It is only fair to point out (as does the Commentary on this case) that although a similar view was taken by Darling J. in the Divisional Court in *Duffin v. Markham* (1918) 88 L.J.K.B. 581, the same judge took a different view in *Tyrrell v. Cole* (1918) 120 L.T. 156. This was also the case in *R. v. Ashley* of which a brief report appears at page 51 of the Criminal Law Review in 1968.

C With these authorities in mind I have considered whether I should myself exercise the ample powers of this Court either to take additional evidence or to remit the case to the Court below for this to be done. I have, however, come to the conclusion that this course is not desirable. It is in the public interest that there should be an unequivocal and authoritative decision on this issue.

D At the outset I would like to refer to the quotation from *Phipson on Evidence* which was relied on by the defence in the Court below, which reads:

"Gazette will be judicially noticed on its mere production."

This statement of the law is based on the provisions of section 2 of the English Documentary Evidence Act 1868 of which the material part reads:

E "Prima facie evidence of any proclamation, order or regulation may be given in all courts of justice (1) by the production of a copy of the Gazette purporting to contain such proclamation order or regulation"

F Section 3 of the same Act provides that this Act shall be in force in any colony subject to any law that may from time to time be made by the legislature of the colony.

G In Fiji the legislature enacted its own Interpretation and General Clauses Ordinance many years ago, which in 1967 was replaced by the Interpretation Ordinance 1967. This Ordinance clearly intends and purports to contain a full and complete statement of the law in Fiji on the subject. The Documentary Evidence Act 1868 is not therefore in force in Fiji.

H The construction of such an enactment as the Interpretation Ordinance 1967 is a matter of the precise words of the enactment. It must be construed in its application to the facts of a case free from any glosses or interpolations derived from any expositions, however authoritative, of the law of England. (See *Wallace-Johnson v. The King* [1940] 1 All E.R. 241).

In these circumstances it does not appear to me to be either helpful or even permissible to have recourse to the English law on the subject. The local ordinance must be construed according to its own tenor save,

of course, where the general rules of the construction of statutes or the meaning of specific words used in the Ordinance are concerned.

The point in issue arises in this way: Section 4 of the Interpretation Ordinance 1967 reads as follows: A

"4. Every Ordinance shall be published in the Gazette, shall be a public Ordinance and shall be judicially noticed."

The Court below has held that on a proper construction of this section judicial notice of an Ordinance — including the Interpretation Ordinance 1967 itself — cannot be taken unless and until it is first proved that the Ordinance has been published in the Gazette, on the grounds that until publication has been proved the Court does not know the Ordinances of which it is required to take judicial notice. B

For the Crown it is contended that this is not so. It is submitted that the proper construction of section 4 is that the Courts must take judicial notice of all Ordinances passed by the legislature and for this purpose can refer to either their publication in the Gazette or to their original source, or any other sources properly open to the Court. C

This particular point has never been taken before in Fiji in respect of its Ordinances because in the previous Interpretation Ordinance in Fiji, which was originally passed in 1929 as the Interpretation and General Clauses Ordinance (No. 20 of 1929) and which was reproduced, as amended, as Chapter 1 in the 1955 Revised Edition of the Laws, the relevant section, section 3, made no reference to the need for publication of Ordinances in the Gazette. D

Section 3 of that Ordinance reads:

"Every Ordinance shall be a public Ordinance and shall be judicially noticed as such unless the contrary is expressly provided by the Ordinance." E

It would certainly appear therefore, at first sight, that by the change specifically made in section 4 of the Interpretation Ordinance 1967 requiring that all Ordinances shall be published in the Gazette, the legislature intended something different from the former provision that did not require publication in the Gazette. F

In section 4 of the Interpretation Ordinance 1967 the word "shall" appears three times. One view is that the word "shall" is used in a mandatory, imperative or compulsory sense in respect of the publication of Ordinances in the Gazette. In view of this and the position of this phrase in the section it is contended that there must be not only publication, but proof of publication, before a Court knows what must be judicially noticed. G

The word "shall" is open to several different interpretation. It may, inter alia, be used in a discretionary sense, in a directory sense or in a mandatory sense. Where as in section 4 the legislature has enacted that "Every Ordinance shall be a public statute," the word "shall" appears to be used in none of these senses. It is a statement of the definitive characteristic which the legislature has assigned to all Ordinances. It is clearly intended to give every Ordinance the distinctive H

character and characteristics of a "public statute" as opposed to those of a "private statute." These are, of course, well known and include the distinction that judicial notice will be taken of the one but not of the other.

A

The word "shall," in the term "Every Ordinance shall be published in the Gazette" appears to me to be open to at least two possible constructions. It could, for example, be "mandatory" in its effect or it could be "directory" in its effect.

B

In *Montreal Street Rly. Co. v. Normandin* [1917] A.C. 170, Sir Arthur Channell in delivering his opinion in the Privy Council said:

"The question whether the provisions in a statute are directory or imperative has frequently arisen in this country, but it has been said that no general rule can be laid down and that in every case the object of the statute must be looked at"

C

With reference to the same point Sir Charles Odgers in "*The construction of Deeds and Statutes*" 4th Ed. at page 263 writes:

"It is often a difficult question in construction as to whether a provision is to be considered as one or the other The whole scope and intention of the statute must be considered and there is no cut and dried rule by which the distinction between discretion and obligation can be drawn."

D

The judgment of Lord Campbell L.C. in *Liverpool Borough Bank v. Turner* (1861) 30 L.J. Ch. 379 is also very much in point when he said, at page 380:

"No universal rule can be laid down for the construction of statutes as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try and get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed."

E

With these general considerations in mind I now return to section 4 of the Interpretation Ordinance 1967.

F

It appears to me that the portion of the section under consideration is only open to two possible constructions, namely, that an Ordinance must be judicially noticed either —

(1) after proof that it has been published in the Gazette or,

(2) without proof that it has been published in the Gazette.

G

The term "judicial notice" is stated in "*Phipson on Evidence*" 9th Ed. at page 4 to be "the cognisance taken by the Court itself of certain matters which are so notorious or clearly established that evidence of their existence is deemed unnecessary."

Again at page 19 the learned author states:

H

"Generally matters directed by statute to be judicially noticed or which have been so noticed by the well established practice or precedents of the courts must be recognised by the Judges."

In *Duff Development Co. v. Kelantan Govt.* [1924] A.C. 797 at 813, Viscount Finlay in the House of Lords said:

"In all matters of which the Court takes judicial cognisance the Court may have recourse to any proper source of information."

If the proper construction to be placed on section 4 of the Interpretation Ordinance 1967 were that judicial notice could not be taken of any Ordinance unless it was first formally proved in evidence that it had been published in the Gazette it appears to me that the section contains contradictory terms. Such a construction would render the section self defeating in certain respects. The expression "shall be judicially noticed" would be rendered virtually of no effect, and the essential implication arising from the use of the expression "shall be a public Ordinance" would be entirely negated. They would in fact be reduced thereby to the status of a "Private Ordinance."

The reason for this is that an Ordinance must by its very nature, be reduced to writing in some form or another. If it were first necessary to prove the publication of a copy of that writing in the Gazette, there would be no need or purpose whatever for the addition to the section of the words "and shall be judicially noticed." This is especially so in view of the provisions of section 63 of the Interpretation Ordinance 1967. This section reads as follows:

"63. All printed copies of the Gazette, purporting to be printed by the Government Printer, shall be admitted in evidence by all courts and in all legal proceedings whatsoever without any proof being given that such copies were so published and printed and shall be taken and accepted as evidence of the written law, appointments, notices and other publications, therein printed and of the matters and things contained in such written law, appointments, notices and publications respectively."

If it were necessary under section 4 to prove the publication in the Gazette of an Ordinance by the production of the Gazette the terms of the Ordinance itself would thereby be proved and would be before the Court as a matter of evidence. There would then be nothing left unproved of which judicial notice could be taken. The words requiring the Court to take judicial notice of an Ordinance would, therefore, be rendered devoid of any effect.

In the Court below it was considered that the provisions of section 63 of the Interpretation Ordinance 1967, whereby a simple method of the proof of the Gazette and its contents was provided, reinforced the view that section 4 should be construed to mean that publication of an Ordinance must be proved before it could be judicially noticed.

This very point was taken and was fully considered in almost exactly similar circumstances by the High Court of Australia in *Brebner v. Bruce* 82 C.L.R. 161. In that case, at page 168 Latham C.J. referred to the Commonwealth Evidence Act 1905-1934, section 5, which provided, inter alia, that evidence of any proclamation etc. made by the Governor-General may be given in all Courts (b) by the production of a

document purporting to be a copy thereof and purporting to be printed by the Government Printer or by the authority of the Government of the Commonwealth. He then said:

A "It was argued that this provision showed that a regulation must be proved in a manner stated in the section before it could be regarded by a court. But this provision for means of proof does not mean that the documents to which it applies cannot be taken into account by a court unless they are proved in the manner specified in the section"

B I have for these reasons come to the conclusion that the construction placed upon the section by the Court below is not correct. I am of the opinion that the only construction that can properly be placed on section 4 of the Interpretation Ordinance is that the Courts must, quite unconditionally, take judicial notice of all Ordinances. It was unfortunate and perhaps a little misleading that the wording of the relevant section in the C previous Interpretation Ordinance, i.e. section 3 of the Interpretation and General Clauses Ordinance (Cap. 1 of the 1955 Revised Edition of the Laws) should have been altered by inserting the provision requiring Ordinances to be published in the Gazette in this way. It did not, however, in my view alter in any way the effect of the provision in both D the former and the present Ordinance requiring Ordinances to be judicially noticed.

E If the intention had been that the Courts should not take cognisance of Ordinances until there had been proof of their publication, this would have been a fundamental change in the law in this respect of a radical nature. I would have expected to find much clearer words than those employed if that had been the intention of the legislature. In the absence of words and phrases far more cogent and compelling than those used in the present section 4, I am not persuaded that the legislature has evinced any intention of effecting any change in the law that required the Courts under the previous Interpretation and General Clauses Ordinance to take judicial notice of all Ordinances.

F For similar reasons I hold that the proper construction of section 21 of the Interpretation Ordinance 1967 is that all Courts are required to take judicial notice of all subsidiary legislation, without proof of its publication in the Gazette. The words in that section requiring publication in the Gazette are directory and, in my view, cannot properly be construed as constricting or limiting the requirement that judicial notice must be taken of them. To construe this section otherwise would, in my G view, be to construe the section as self defeating in what appears to me to be its manifest intention.

H Before the passing of the Interpretation Ordinance 1967, on 1st September 1967, the relevant law was contained in the Interpretation and General Clauses Ordinance, Cap. 1 of the 1955 Revised Edition of the Laws. Section 3 of that Ordinance required that judicial notice be taken of all Ordinances. The Interpretation Ordinance 1967 was passed on 1st September 1967 and by its own section 4 judicial notice was also required to be taken of all Ordinances.

Section 1 of the 1967 Ordinance provided that it would come into force on a date to be notified by the Governor. This date was so notified in the Fiji Royal Gazette on 1st September 1967 at page 378. By virtue of section 22(1) of the Interpretation and General Clauses Ordinance (Cap. 1 of 1955 Revised Edition of the Laws), this notification was lawfully signified under the hand of an Assistant Secretary. Similar provisions are contained in section 33 of the Interpretation Ordinance 1967. By virtue of section 9 it was required to be judicially noticed and similar provisions are contained in section 21 of the Interpretation Ordinance 1967.

A

B

I hold that the present position is that the Interpretation Ordinance 1967 is in force and that judicial notice must be taken unconditionally both of it and of all other Ordinances and also of all subsidiary legislation as defined by section 2(1) of the same Ordinance.

I hold that judicial notice must be taken of both the Revised Edition of the Laws Ordinance 1955 and the proclamation whereby the 1955 Revised Edition of the Laws of Fiji came into effect on 1st January 1958 as a complete statement of the Laws of Fiji which were in effect on 16th April, 1955.

C

The last point for consideration concerns the legal effects that flowed from the amendments to the 3rd Count that were made during the course of the trial in the Court below.

D

The 3rd Count as originally laid charged the accused with driving a vehicle with a defective speedometer on 25th November, 1967 contrary to regulation 23(2) of the Traffic (Construction and Use) Regulations 1955.

In fact the Traffic (Construction and Use) Regulations 1955 were revoked on 2nd February 1967 by regulation 138(d) of the Traffic Regulations 1967. On the 25th November 1967 the 1955 Regulations were therefore no longer in force.

E

The pleas in this case were taken on 28th November, 1967.

The record of the proceedings at the adjourned hearing on 18th December 1967 shows the following exchanges:

F

"Mr Puran (Prosecutor): Apply to amend statement of offence in Count 3 to read "Regs. 78 and 122 of Traffic Regulations 1967.

Mr. Koya (Defence Counsel): No objection.

Order: Application granted."

G

Although the application to amend the 3rd Count was granted, there was in fact no formal order made that the 3rd Count be amended, nor was the 3rd Count actually amended on the charge in the Court file. No actual amendment has ever been made or entered on the charge. Further, the amended charge was never read to the accused, nor was the accused's plea taken to an amended charge according to the original record of the proceedings at the trial which I have personally and carefully scrutinized.

H

A The trial proceeded, and in the opening paragraphs of his judgment delivered on 27th January 1968, the learned trial Senior Magistrate specifically stated that the accused was charged on the 3rd Count contrary to regulation 23(2) of the Traffic (Construction and Use) Regulations 1955, i.e. he referred to the 3rd Count in its original and unamended form. Towards the end of his judgment he acquitted the accused on the 3rd Count in respect of a charge which he again referred to as having been laid under the Traffic (Construction and Use) Regulations 1955. It is clear that the accused was acquitted on the 3rd Count in respect of the charge as originally laid and not in its amended form.

B It is apparent that it was not until two days after he had given judgment that the learned trial Senior Magistrate realised the position. He then, endorsed the record with a corrigendum, which he very properly dated 29th January, 1968, referring to the matter and pointing out that this made no difference to the reasons for his decision. It is quite clear that in doing this the learned trial Magistrate acted perfectly correctly and with the greatest propriety at a time when he was, as he quite clearly appreciated, "functus officio."

C It is abundantly plain that the omission to take the accused's plea to an amended 3rd Count was simply an oversight by both the Prosecutor and Defence Counsel and the Court in the Court below. It also passed D unnoticed by both Counsel in this Court.

I did, however, feel it was essential that I should draw attention to this matter, in order that I could have the benefit of the assistance of both Counsel in deciding how to deal with the situation which in fact exists. Whatever might be the merits of the grounds of appeal that have been so fully and ably argued before me, I cannot totally disregard E this aspect of the trial.

The relevant provisions of the Criminal Procedure Code are contained in section 204(1) which read as follows:

F "204(1). Where, at any stage of a 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:

G Provided that where a charge is altered as aforesaid, the court shall thereupon call upon the accused person to plead to the altered charge:"

It appears to me from the first proviso to this subsection that where a charge is altered it is mandatory for the Court to call upon the accused to plead to the altered charge. The procedure to be followed in taking a plea is laid down in section 198 of the Code, of which subsections (1), (2) and (3) read as follows:

H "198(1). The substance of the charge or complaint shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.

(2). If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there shall appear to it sufficient cause to the contrary.

(3). If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.
.....

The taking of the plea includes the reading over and the explanation, if need be, of the charge and asking the accused if he admits or denies the truth thereof. It also includes the recording of his plea, which, if he admits the truth of the charge, must be recorded as nearly as possible in the words used by him.

In this case this procedure was not followed. No plea to the amended 3rd Count was ever taken.

I am extremely doubtful if there ever was, in this case, an effective or even an actual amendment to the 3rd Count. In this event the accused was entitled to be acquitted on the 3rd Count because it is common ground that the enactment which it was charged he contravened had been revoked before the date of the alleged offence.

If however the 3rd Count was in fact amended, I am of the opinion that the failure to take the accused's plea to the amended charge was a fatal and incurable defect in respect of the 3rd Count in the proceedings in the Court below in these circumstances.

In either event, therefore, the appeal against the acquittal on the 3rd Count cannot succeed.

In the result I dismiss the appeal against the acquittals on the 1st and 3rd Counts, but I allow the appeal against the acquittal on the 2nd Count.

The learned trial Senior Magistrate from whose decision this appeal has been brought is not at present sitting in Suva where this case was originally tried. I shall not, therefore, return the case to the Court below to bring these proceedings to completion, but in exercise of the powers of this Court under section 325 of the Criminal Procedure Code shall do so myself.

I find the accused Guilty on the 2nd Count and accordingly convict him of the offence of Dangerous Driving as charged therein contrary to section 38(1) of the Traffic Ordinance 1965. After giving both sides the opportunity of being heard I shall pass an appropriate sentence.

Appeal on second count allowed.