

A

SUCHA SINGH

v.

REGINAM

[COURT OF APPEAL, 1968 (Gould V.P., Hutchison J.A., Marsack J.A.),
8th, 22nd October] B

Criminal Jurisdiction

Criminal law—practice and procedure—amendment of charge—necessity for fresh plea—whether reason for amendment is that charge was defective—Criminal Procedure Code Cap. 14—1967) ss.120, 204(1) (2) (3), 300(1)—Indictments Act 1915 (5 & 6 Geo. 5, c.90) (Imperial) ss.3, 5. C

Criminal law—judgment—no impediment to matters affecting conviction and those affecting sentence being dealt with at different stages—Criminal Procedure Code (Cap. 14—1967) s.154(1) (2)—Penal Code (Cap. 11—1967) ss.279(b), 288, 366(a)—Court of Appeal Ordinance (Cap. 8—1967) s.22(1) (6).

Criminal law—wrongful confinement—meaning of “confinement”—Penal Code (Cap. 11—1967) s.288—Penal Code (India) s.340.

Criminal law—principles of criminal liability—criminal intimidation—proof of intent to create alarm essential—unnecessary to prove actual creation of alarm—Penal Code (Cap. 11—1967) s.366(a). D

The appellant was charged with three offences in counts 4, 5 and 6 of a charge containing in all, six counts. After some evidence had been called the prosecution applied to amend count 5 by deleting the number of a motor vehicle from the particulars. A fresh plea was taken from the appellant to count 5, but not counts 4 and 6. The proviso to section 204(1) of the Criminal Procedure Code requires that when a charge is altered “as aforesaid” the court shall thereupon call upon the accused person to plead to the altered charge. E

Held: (Per Hutchison and Marsack JJ.A.) 1. The words “as aforesaid” in the proviso import that it applies only when (in the words of the earlier part of the section) “it appears to the court that the charge is defective in substance or in form.” F

2. If a charge fulfills the requirements of section 120 of the Criminal Procedure Code it cannot be classed as defective.

3. The present charge gave full particulars both before and after the amendment and was not defective; the amendment did not therefore fall within the ambit of section 204 and the magistrate was not obliged to call upon the accused to plead again to all the counts in the charge. G

4. (Per Gould V.P., dissenting) The appellant should have been called upon to plead again to counts 4 and 6 as well as 5, and the convictions on counts 4 and 6 were therefore invalid. H

Section 154(2) of the Criminal Procedure Code does not require that a judgment may not be given in more than one stage and there is no

objection to an interval between the portion of the judgment containing the conviction and that dealing with sentence.

A There being no definition of "confinement" in the Penal Code, it is, by virtue of section 3 thereof, presumed to be used with the meaning attached to it in English law. A person kept in a motor vehicle, the doors of which are unlocked, but which is being driven at a speed and so manoeuvred that the person could only escape at grave risk to life, is clearly being confined, in relation to the offence of wrongful confinement contrary to section 288 of the Penal Code.

B In the offence of criminal intimidation contrary to section 359(a) of the Penal Code proof of intent on the part of the accused to create alarm in the person threatened is an essential ingredient: it is not incumbent upon the prosecution to prove that the person threatened was in fact alarmed.

C Cases referred to: *R. v. Ali Abdulla Shirazi* (1956) 23 E.A.C.A. 550: *Bird v. Jones* (1845) 7 Q.B. 742; 115 E.R. 668; 15 L.J.Q.B. 82: *Hari Pratap v. Reginam* (1968) 14 F.L.R. 93: *R. v. Hughes* (1927) 20 Cr.App.R. 4; 136 L.T. 671: *Gullidge v. Ram Sharan* (1955) 4 F.L.R. 160: *Fox v. Commissioner of Police* (1947) 12 Selected Judgments of the West African Court of Appeal 215: *Eronini v. The Queen* (1953) 14 Selected Judgments of the West African Court of Appeal 366: *Commissioner of Police v. Bonsu* (1957) 2 W.A.L.R. 334: *Commissioner of Police v. Boakye* (1958) 3 W.A.L.R. 524: *Commissioner of Police v. Williams* (1948) W.A.C.A. Cyclostyled Reports 54: *R. v. Baker* (1912) 7 Cr. App. R. 217; 28 T.L.R. 363: *R. v. Hussey* (1924) 18 Cr. App. R. 121; 41 T.L.R. 205: *R. v. Wallwork* (1958) 42 Cr. App. R. 153.

Appeals from convictions in the Magistrate's Court.

E *R. G. Q. Kermode* for the appellant.

D. McLoughlin (Ag. Attorney-General) and *J. R. Reddy* for the respondent.

The facts appear sufficiently from the judgment of Gould V.P.

F The following judgments were read: [22nd October 1968]

GOULD V.P.:

The appellant was convicted by a Magistrate's Court of three offences (a) Assaulting a Police Officer in the due execution of his duty contrary to section 273(b) of the Penal Code [Cap. 8 Laws of Fiji, 1955 — now s.279(b) (Cap. 11) Laws of Fiji 1967], (b) Wrongful Confinement contrary to section 282 of the Penal Code [supra — now s.288 (Cap. 11)] and (c) Criminal Intimidation contrary to section 359(a) of the Penal Code [supra — now s.366(a) (Cap. 11)], and sentenced to terms of 9 months, 8 months and 18 months' imprisonment on these respective counts to be served consecutively. He appealed to the Supreme Court of Fiji, where the convictions were upheld, but the total term of imprisonment to be served was reduced to 21 months by reducing the 8 months' sentence to one of 3 months and the 18 months' sentence to 9 months.

* For a note on the judgment of the Privy Council on appeal from this decision see footnote to p.93 of this volume — Ed.

The convictions of the appellant enumerated above were based on the fourth, fifth and sixth counts of a charge, counts one, two and three whereof concerned only one Serupepeli Vutolakawa. He was charged, in relation to matters arising out of the same series of events, with being drunk and disorderly, escaping from lawful custody and assaulting a police officer in the due execution of his duty. He was convicted but has not appealed — reference to him is necessary only by reason of the ground of appeal which will be considered finally in this judgment. In view of the question of law which arises on that ground, it has been found convenient that there should be separate judgments in this appeal.

This being a second appeal it is limited (by section 22(1) of the Court of Appeal Ordinance (Cap. 8)) to questions of law. So far as the facts are concerned it is sufficient at this stage to indicate that the offences by the appellant were alleged to have been committed in the appellant's motor car, which was being driven by the appellant, and in which the police constable who was the victim of the offences had started out to convey Serupepeli Vutolakawa to the police station, on the faith of an offer made by the appellant that he would drive them to that destination.

The first ground argued by counsel for the appellant was that the judgment of the learned Senior Magistrate failed to comply with the provisions of section 154 of the Criminal Procedure Code (Cap. 14 — Laws of Fiji 1967) of which subsections (1) and (2) read:

“(1) Every such judgment shall except as otherwise expressly provided by this Code, be written by the presiding officer of the court in English, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it:

Provided that where the accused person has admitted the truth of the charge and has been convicted, it shall be sufficient compliance with the provisions of this subsection if the judgment contains only the finding and sentence or other final order and is signed and dated by the presiding officer at the time of pronouncing it.

(2) In the case of a conviction the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.”

So far as subsection (1) is concerned this ground of appeal is entirely without merit. The judgment of the learned Magistrate is detailed as to fact and discusses, with authorities, the matters of law to be decided. For a magisterial judgment it is in fact a model of industry, and certainly contains the points for determination, the decision thereon and the reasons for the decision. It is signed by the magistrate and his record shows the date on which it was delivered in open court.

Subsection (2) requires that the judgment shall specify the offence of which, and the section of the Penal Code or other law under which the accused is convicted and the punishment to which he is sentenced. I am rather at a loss to understand why, in the Supreme Court, the learned Judge found it was true that the learned Senior Magistrate did not specify in so many words the offence of which and the section under which he

A convicted the accused. The judgment opened with a statement of the offence with which the appellant was charged on each of the three counts he was named in, together with the material sections of the Penal Code. The judgment announced that he was convicted on all three of those counts. Could anything be clearer?

B As to "the punishment to which he is sentenced," the record shows that after delivering his judgment the learned Senior Magistrate heard counsel on the question of sentence and, after a short adjournment, recorded and announced the sentences and his reasons therefor. The record indicates that this was on the same day as the main part of the judgment, though there was of course no necessity that it should have been. The Senior Magistrate's signature again appears after the sentences. This part of the judgment must be read with the earlier portion and the specification of the counts makes it entirely clear in respect of which offences the terms of imprisonment are imposed. It has not
C been suggested that the judgment cannot be delivered in two stages, as was done here; nor could it be, as the effect would be to prevent a magistrate from adopting the very proper course of taking further time and perhaps evidence, before imposing sentence.

D In the Supreme Court, the learned Judge found that what was, in his view, a technical non-compliance with the section, was not a fatal defect and no miscarriage of justice had been occasioned. Had I considered that there was such a non-compliance I would have been of the same opinion, but as I take the view that the judgment fulfils the requirements of the section, the question does not arise. I would add that counsel for the appellant, basing himself upon words used in the judgment of the Court of Appeal for Eastern Africa in *R. v. Ali Abdulla Shirazi* (1956) 23 E.A.C.A. 550, made submissions on questions of pure
E fact and credibility, for the purpose of showing, contrary to the learned Judge's view, that there had been a miscarriage of justice. The decision in that case indicates that such a course might be appropriate in some circumstances but makes it clear that whether an irregularity is curable or not can only be answered by a consideration of the record and of the circumstances in each case. I think it is implicit, and it would in any case be my own view, that the nature of the irregularity itself
F would have an important bearing on the question. However, as I have indicated, I find no irregularity in the present case, and this ground of appeal fails, leaving this Court restricted entirely to questions of law on the appeal.

G Counsel for the appellant next challenged the validity of the conviction of wrongful confinement. Section 288 of the Penal Code merely enacts that "whoever wrongfully confines any person" is guilty of a misdemeanour; there is no definition of confinement, but section 3 provides that expressions in the Code (subject to the context) shall be presumed to be used with the meaning attached to them in English criminal law. Both the learned Senior Magistrate and the learned Judge drew on the description of "Confinement" in the Indian Penal Code section 340 and the learned Judge quoted passages from *Gour* on "*The Penal Law of India*"
H 7th Edition Vol. III p.1698 based, at least to some extent, on the English case of *Bird v. Jones* (1845) 7 Q.B. 742; 115 E.R. 668. While I have no reason to differ from these statements of the law I do not think any nice shades of meaning are in issue here. If a person is locked in a

car by another and has no means of egress he is clearly confined. But here, counsel argues, the car doors were unlocked and a way of escape was open. That may be true, but it was a way of escape which could only be used at grave risk to the life of the police constable; the car was travelling at a very high speed and was so manoeuvred as to ensure that if the constable jumped he would fall onto the hard surface of the road. I would construe the majority judgments in *Bird v. Jones* (supra) which deals with the question of imprisonment, as indicating that actual force to the person is not necessary if other effective means are used, and I imagine that the knowledge that death or grave injury would almost certainly follow upon the use of an avenue of escape, would, to the reasonable person, be a complete deterrent and result in his being effectively confined. I would reject this ground of appeal.

I come now to the conviction of criminal intimidation. The essential words of the section, as relevant to the present case are:

"Any person who without lawful excuse threatens another person with any injury to his person with intent to cause alarm to that person is guilty of a misdemeanour."

The relevant facts are that while driving the car the appellant said that they (he and Serupepeli) would assault the police constable and abandon him on the road and that they were going to kill him. After that the appellant exhorted Serupepeli to attack the constable and he did so, though with no marked degree of success. The appellant then offered Serupepeli a knife telling him in Fijian to strike to kill. The decisions of Fiji courts on the subject of criminal intimidation were discussed by the learned Judge in the Supreme Court and it is not necessary to examine them again. They establish that proof of intent on the part of the accused to create alarm in the person threatened is an essential ingredient of the offence; but that it is not incumbent upon the prosecution to prove that the person threatened was in fact alarmed.

Counsel for the appellant on this ground has submitted that the evidence showed that the police constable, at the time the threat was uttered, took it to be a joke, and he argues from that, and from the evidence of the appellant's previously friendly relations with the police, that it was in fact a joke at the time it was uttered. The learned Senior Magistrate said:

"As to Count 6, I find that the Second Accused threatened to kill P.W. 1 and there is no doubt whatsoever that his intention thereby was to cause alarm to P.W. 1. The fact that at that time P.W. 1 was not alarmed is neither here nor there, it being the intention of the Accused that is relevant, not the effect on the mind of the person threatened."

The learned Senior Magistrate had no doubt as to the appellant's intent and his finding was obviously based on the appellant's subsequent actions. The attack on the police constable urged by the appellant and the later production by the appellant of a knife is surely evidence that the threat immediately preceding those events was uttered in earnest. This is essentially a matter of fact for the trial court, and in this Court, dealing only with questions of law, the appellant cannot succeed on this ground of appeal unless he establishes that there was no evidence upon which

the learned Senior Magistrate could reasonably find that the threat was uttered seriously, with intent to cause alarm. For the reasons I have given, I think that there is such evidence.

A I come finally to a ground of appeal which was added to the original grounds by leave of the Court. It reads :

"6. That the learned trial magistrate failed to comply with Section 204 of the Criminal Procedure Code Cap. 14 in that on making an order for the amendment of the 5th Count in the charge he failed to call upon the accused to plead to the altered charge."

B What happened was that during the examination-in-chief of the first prosecution witness, the police officer who was conducting the prosecution, apparently thinking that he could not establish the registration number of the motor car in which many of the relevant events occurred, applied to the Court to amend Count No. 5 by deleting from the particulars, "No. No. 984." Counsel for both accused having stated that they had no objection, the application was granted and the amendment made. The learned Senior Magistrate made a note, "Plea of Not Guilty maintained by Second Accused." The learned Acting Attorney-General, who appeared to deal with this aspect of the case gave as his understanding, that Count 5 as amended was read again to the appellant and he pleaded again to it, but the fresh plea was limited to that count; I accept this as the position.

D Section 204 of the Criminal Procedure Code reads as follows :

"(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:

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 subsection 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 lastmentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination.

(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under subsection (1) of this section or there is a variance between the charge and the evidence as described in the last preceding subsection, the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary."

Counsel for the appellant, relying upon the judgment of this Court in *Hari Pratap v. Reginam* (1968) 14 F.L.R. 93, submitted that, upon the amendment, a new plea should have been taken to all six counts of the charge and, as that was not done, the proceeding from that time forward were a nullity.

The *Hari Pratap* case was one in which, during the hearing of the prosecution case, four alternative counts were added to the charge. Pleas were taken to the alternative counts but the accused was not called upon to plead again to the original counts. He was convicted upon the original, and not the alternative, counts. The judgment related to two matters. The first was the interpretation of section 204 of the Criminal Procedure Code — it was held that the words “altered charge” in the proviso to subsection (1) meant the whole charge, and it was therefore necessary for the accused to have been called upon to plead again to the original four counts as well as the alternative counts. The second question was whether the proviso to (now) section 300(1) of the Criminal Procedure Code could be applied on the basis that no substantial miscarriage of justice had actually occurred.

It reads :

“Provided that the Supreme Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.”

That proviso applied to the Supreme Court in its appellate jurisdiction but the powers of this Court on second appeal, as expressed in section 22(6) of the Court of Appeal Ordinance (Cap. 8), are the same, except that the final words are “has in fact occurred” instead of “has actually occurred.” No point was made then, or in this case, on this difference. On the second question then, this Court held (following two West African case which will be referred to later) that the proceedings following the amendment were a nullity and that the evidence given thereafter could not be regarded. In those circumstances the Court was unable to say that no miscarriage of justice was involved in the conviction of the accused person.

I do not propose to re-examine the reasoning of the judgment in *Hari Pratap* in relation to the interpretation of proviso (a) to subsection (1) of section 204 of the Criminal Procedure Code. The Court was informed that leave to appeal to the Privy Council was being sought by the Attorney-General so final pronouncement on the matter may be forthcoming. I will, however, deal with the submission of counsel for the appellant that the whole six counts of the present charge were vitiated by the fact that a fresh plea was taken only to Count 5. It would be quite wrong to say that Counts 1, 2 and 3 which concerned only Serupepi Vutolakawa were affected in any way. He was being tried on three separate offences, in counts to which he had pleaded and to which there was no requirement of law that he should plead again. That is how I would construe proviso (a) to section 204(1) where it says, “call upon the accused person” to plead to the altered charge. Though “person” could be construed in the plural where appropriate, I take the view that in circumstances such as the present it can only mean the accused person in relation to whom the charge has been altered.

In argument before this Court the Acting Attorney-General first questioned whether the amendment actually made was an amendment within section 204 of the Criminal Procedure Code. He based his submission on *R. v. Hughes* (1927) 20 Cr. App. R. 4 in which reference was made to the power to amend given by section 5 of the Indictments Act, 1915, "where . . . it appears to the Court that the indictment is defective." It was contended that the charge with which the Court is now concerned was not defective. The case of *R. v. Hughes* in fact does nothing to assist this argument. What the Court of Criminal Appeal said then was that the function of section 5(1) was to enable the Court to remedy a defect in the indictment and not (as was done in that case) to revise and alter the substance of what is charged. That distinction does not have to be made in the present case as section 204 in terms gives power to amend when the charge is defective "either in substance or in form." I am satisfied that the amendment was made under the provisions of section 204 of the Criminal Procedure Code (particularly as no other section under which it could have been made was quoted to the court) and, that being so, it is difficult to see that the requirements of section 204 are affected in any way by the degree of materiality of the amendment. It was an amendment of particulars only, but the prosecution considered it sufficiently material to make the application. In *Gullidge v. Ram Sharan* (1955) 4 F.L.R. 160 it was said that the number of a motor car (in which driving offences were alleged) though surplusage, had to be established if it remained in the charge. I would find it difficult to accept that if, in the present case, no amendment had been made, the conviction of the appellant could have been upset by reason of the failure only to prove the car number. Nevertheless, as the power to amend ceases at the close of the prosecution case, it may be more difficult to say that such a defect can be cured by the judgment. I do not pursue this further as I take the view that the amendment cannot be regarded as a nullity and that it was made under section 204.

The Acting Attorney-General next referred to two West African cases which had not been brought to the notice of the Court in the *Hari Pratap* case, as bearing on the question whether the proviso could or should be applied in such cases. It will be convenient first to mention the two which are referred to in the *Hari Pratap* judgment. The earlier is *Fox v. Commissioner of Police* (1947) 12 Selected Judgments of the West African Court of Appeal 215. An amendment to a date in a charge having been allowed the trial proceeded without a fresh plea having been taken — the appellant had pleaded not guilty to the original charge. Later in the trial it was Crown Counsel who pointed out that as the appellant had not pleaded to the amended charge the whole proceedings were a nullity and suggested that the trial should start *de novo*. This was done. On appeal the question was whether the Magistrates' Court had power to declare its own proceedings a nullity, which is not here material, but at p.219 there is this passage in the judgment:

"We are of the opinion that the failure to charge the appellant rendered the whole proceedings null and void, that it would have been improper for the Magistrate to have delivered a judgment in a case that he knew was improperly before him, and that it was competent for him to commence the hearing *de novo*. The appellant not having been charged and not having pleaded was never in fact in jeopardy."

Again in *Eronini v. The Queen* (1953) 14 Selected Judgments of the West African Court of Appeal 366 it appears to have been conceded that the result of failure to plead on an amendment is that proceedings, thereafter were null and void. There were in fact two amendments in that case, no plea having been taken on the first occasion. Though on the second amendment a new plea was taken and evidence given thereafter was regarded as validly given, that did not revive the evidence given in the period between the two amendments.

I pass now to the two cases which were brought to this Court's attention. The new cases now put before the Court are *Commissioner of Police v. Bonsu* (1957) 2 W.A.L.R. 334 and *Commissioner of Police v. Boakye* (1958) 3 W.A.L.R. 524. In the first of these a charge upon which an accused person was acquitted had been amended, no fresh plea being taken, though he was convicted upon another count. The Court of Appeal for Ghana said that no miscarriage of justice had occurred. They distinguished their case from *Eronini v. The Queen* on the basis that in *Eronini's* case there had been a conviction on the amended count whereas in the case before them there had been an acquittal. But the Court went on to say that in any event *Eronini's* case was in conflict with *Commissioner of Police v. Williams* (1948) W.A.C.A. Cyclostyled Reports, 54, from which they quoted the following passage (p.339):

"Notwithstanding that counsel for the accused in the trial court stated that he had no objection to the amendments in question, we think that it would have been a wise precaution, in the circumstances, if the District Magistrate had caused the amended charges to be read to the hearing of the accused, and if he had then asked their counsel if he wanted an adjournment, or any witnesses to be recalled. However, he was not asked to do either of these things by counsel for the accused. We have already indicated our opinion that the amendment was lawful. We go further and say that we have detected no irregularity in the procedure adopted by the District Magistrate with regard to it, and also that we are satisfied that it occasioned no miscarriage of justice."

With all respect, this case is not in conflict with *Eronini's* case because as the Editorial Note to *Bonsu's* case points out, the section of the Criminal Procedure Code which was relevant in *Williams' case* did not require the Court to call upon the accused to plead to the amended charge. This is apparent also from the passage quoted. In such circumstances the Court in *Williams' case* was able to apply the miscarriage of justice test, without being concerned with any question of the nullity of proceedings in the lower court. *Commissioner of Police v. Boakye* (supra) was decided by a single judge. No plea had been taken when a charge was amended from one of stealing to one of aiding and abetting stealing. The learned Judge was at first inclined to regard *R. v. Eronini* as unanswerable, but, having been referred to *Bonsu's case* and what was considered to be the conflict between *Eronini* and *Williams*, he rejected the appeal on the ground that there was no conceivable miscarriage of justice.

I do not think these cases do anything to impair the reasoning behind the *Eronini* and the *Fox case*, which are based on the view taken by those courts of the effect of the failure to take a plea, where one is directed

A by a Criminal Procedure Code. Regarding that failure as resulting in the proceedings in the lower court being a nullity, they do not appear to have been considered applying the "miscarriage of justice" proviso which is presumably present in all the Codes. This Court, having considered the question in Hari Pratap, for the reasons then given, found it was unable to apply the proviso. If the basis of that reasoning, the nullity of proceedings in the Magistrates' Court in the events that happened, is not the correct view of the law, then the decision on the point is wrong. The position appears to me to bear some relation to those cases where a man has been sentenced on a defective or ambiguous plea and a *venire de novo* has been ordered; *R. v. Baker* (1912) 7 Cr. App. R. 217; *R. v. Hussey* (1924) 18 Cr. App. R. 121, though of course in those cases there was no trial.

B I do not find sufficient in the additional cases now before the Court to influence me to depart from the views expressed in Hari Pratap's case, and applying those principles to the present case it appears that the appellant should have been called upon to plead again to counts 4 and 6 as well as count 5. He did plead again to count 5 and that count was properly before the Court. The fact that there was no plea to the other two counts did not mean that proceedings in the Magistrates' Court in relation to count 5 were a nullity so as to impede the application of the proviso, if that were technically necessary. As to counts 4 and 6, I find that the decision in the Hari Pratap case is applicable to them and the convictions thereon cannot be sustained. I would, however, order a new trial of those counts.

C It would seem appropriate to quote the final passage from the judgment in *Eronini* at p.369:

E "We have reached this conclusion with great reluctance for we fear that it may result in a miscarriage of justice, but nevertheless so long as the provisions of the Criminal Procedure Ordinance remain the law effect must be given to them and non-compliance therewith must carry its inevitable consequences. The fact that this Ordinance is particularly rich in traps for the unwary cannot affect its force nor its consequences. Under more usual forms of enactment in such matters the present position could not have arisen. It is to be regretted that Crown Counsel felt it desirable to apply for the entirely unnecessary amendment of the 28th July, it is regrettable that the learned Judge inadvertently failed then to call upon the appellant to plead to the altered charge, and it is equally regrettable that this omission not having been observed the proceedings were not thereupon commenced de novo. This Court has on a number of occasions in the last few years drawn attention to the defects of this Ordinance and the dangers arising therefrom. Until such time as it may be found possible to revise its provisions we can do no more than warn "those who are obliged to comply therewith to approach their task with the utmost caution lest as in this case its peculiarities lead to miscarriage of the proceedings and perhaps of justice."

H I regard it as fortunate for the ends of justice that, while I have felt myself constrained to take what may be thought an unduly legalistic view on this ground of appeal, my opinion is a minority one. Both the

other members of the Court, for the reasons given in their judgments, being satisfied that the appeal should be dismissed in its entirety, the order of the Court is that the appeal is dismissed accordingly.

MARSACK J.A.:

I have had the advantage of reading the full and carefully reasoned judgment of the learned Vice President and find myself in complete agreement with what he has said in that judgment on the original five grounds of appeal. I do not find it necessary to add anything to what he has said on those grounds.

With regard to the additional ground, No. 6, which was added by leave, I regret that I have to differ from the views expressed by the learned Vice President. A careful examination of the wording of section 204, for the purpose of ascertaining if the learned Magistrate did in fact fail to comply with its provisions, leads me to a different conclusion from that set out in his judgment.

Section 204, subsection (1) (a), makes it clear that the obligation on the Court to call upon the accused person to plead to the altered charge arises only "where a charge is altered *as aforesaid*." That is to say, altered pursuant to the provisions of subsection (1), which provides for the alteration of the charge, by way of amendment or substitution or addition, when "it appears to the court that the charge is defective either in substance or in form."

Accordingly, it is, I think, necessary to decide, in the first place, whether the alteration which was made here was so made because it appeared to the Court that the charge was defective. There is, no doubt, inherent power in the Court to make minor alterations — such as corrections of spelling or the deletion of unnecessary words — without invoking the authority of the specific section in the Criminal Procedure Code. Recourse to section 204 is to be had, in my opinion, only when the condition referred to in subsection (1) applies, namely that it appears to the Court that the charge is defective.

The requirements of a charge are set out in section 120 of the Criminal Procedure Code, which reads:

"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."

If a charge fulfils these requirements then, in my opinion, it cannot be classed as defective. In *Wallwork* (1958) 42 Cr. App. R. 153 at p.156 the Court of Criminal Appeal considered section 3 of the Indictments Act 1915, the wording of which is identical with that of section 120 of our Criminal Procedure Code. It was there held that the words "in the County of Sussex or elsewhere" did not vitiate the indictment on the ground of uncertainty, in that all the particulars necessary to inform the accused person of the offence with which he was charged appeared in the indictment as drawn. That is the position here. In fact counsel for the appellant conceded that the amendment asked for by the police was a minor one. Both before and after the amendment the indictment

gave full particulars of the offence with which the appellant was charged, and the essential particulars were not varied by the amendment. I therefore conclude that the amendment was not one within the ambit of section 204, as it was not consequent upon the opinion of the Court that on the face of it the original charge was defective.

There was no suggestion that the appellant had been in any way prejudiced by the amendment, and the Court could not have been expected to do any more than was done when the appellant was called on to plead again to the amended count.

The nature of the amendment, in my opinion, differentiates the present case very materially from that of *Hari Pratap v. R.* (Criminal Appeal No. 12 of 1968), the judgment in which was strongly relied on by the appellant. In that case the amendment unquestionably came within the scope of section 204. Counsel for the present appellant, while conceding that in *Hari Pratap's* case the amendment was much more substantial than that in question here, submitted that all that is necessary to bring the matter within section 204 is any amendment at all. I find myself unable to accept this argument, and am of opinion that the obligation on the Court to call upon the accused person to plead to the altered charge arises only in the case of an amendment made when it appears to the Court that the original charge is defective.

If this view is correct it is not necessary to consider the effect of the West African cases cited to us and considered at some length by the learned Vice President in his judgment. It is, however, of some interest to refer to the words of the Lord Chief Justice in *Wallwork* (supra) referring to the Indictments Act 1915, section 3 of which, as has been pointed out, is identical with section 120 of the Criminal Procedure Code. At p.156 Lord Goddard says:

"One of the objects of that Act was to do away with various technicalities which had no bearing on the case and did not cause the prisoner any embarrassment or difficulty."

If the effect of a similarly worded section in Fiji were that the conviction must be quashed in a case such as that before this Court, on what I regard as the merest technicality having no bearing on the case, and when neither embarrassment nor difficulty had been caused to appellant, then it would seem that one object of the Act referred to by the Lord Chief Justice had definitely not been achieved. In my view the section in question cannot be so interpreted as to lead to such a result.

Accordingly, I am of opinion that the learned Magistrate did not grant such an amendment as is covered by section 204, subsection (1), in that the amendment made was not for the purpose of curing what appeared to the Court to be a defect in the charge; and that consequently he was not obliged to call upon the accused person to plead again to all the counts of the charge as amended. That being so, there was, in my opinion, no irregularity in the conduct of the trial on that ground.

For these reasons I would hold that no ground of appeal has succeeded and I would dismiss the appeal.

HUTCHISON J.A. :

I agree with the judgment of the learned Vice President on the first five grounds of appeal.

On the sixth ground, besides having the opportunity of reading his judgment, I have had the opportunity of reading that of Marsack J.A., whose opinion is to the contrary of that of the Vice President.

Coming as I do from a different jurisdiction, I have approached with diffidence the need of my rejecting the view of one of them, each so much more familiar with this legislation than I am. However, I have firmly come to the view that I support my brother Marsack and for the reasons which he has given.

Further, an additional or alternative view which I hold is this. In the absence of compelling authority, by which I mean that of a decision of the Judicial Committee, I would think that a failure to call upon an accused person under the first proviso to section 204(1) of the Criminal Procedure Code to plead again to a whole charge when an amendment is made in one count only is an irregularity only and cannot make the subsequent proceedings a nullity. As an irregularity only, the seriousness or importance of it in the trial would be a most important consideration. Here the amendment was trivial and there can be no question of a miscarriage of justice being caused by appellant's not being called on to plead to the whole charge; and, if it were technically necessary, I would apply the proviso to section 300(1) of the Criminal Procedure Code.

For these reasons I would dismiss the appeal.

Appeal dismissed.