

CHANDRA PRAKASH SINGH

v.

REGINAM

[Court of Appeal, 1970 (Gould V.P., Marsack J.A., Tompkins J.A.), 5th, 13th November] A

Criminal Jurisdiction

Criminal law—practice and procedure—Magistrate's Court—shortened procedure authorised by section 212 of Criminal Procedure Code—cases to which applicable—Penal Code (Cap. 11) ss. 28(3), 30(1)(a), 200 (d), 276, 294, 313, 314, 315, 360(1)—Criminal Procedure Code (Cap. 14) ss. 33–36, 42, 154, 184, 197, 211—Court of Appeal Ordinance (Cap. 8) s. 22(6). B

Criminal law—courts—jurisdiction—shortened procedure prescribed by section 211 of Criminal Procedure Code (Cap. 14)—use by Magistrate's Court for trial of offence for which not available—no jurisdiction to convict and sentence—trial a nullity—proviso not applicable on appeal—Penal Code (Cap. 11) ss. 28(3), 30(1)(a), 200(d)—Court of Appeal Ordinance (Cap. 8) s. 22(6). C

In the Magistrate's Court the shortened procedure prescribed by section 211 of the Criminal Procedure Code may (at the request of the public prosecutor) be adopted only in the cases authorised by the section, which include (under paragraph 1 (a) of the section) offences "of which the maximum penalty does not exceed a fine of one hundred dollars or imprisonment for six months or both such fine and imprisonment". The penalty provided for the offence of being drunk and disorderly by section 200(d) of the Penal Code is (for the first offence) a term of imprisonment not exceeding one month. The appellant was tried for such an offence under the shortened procedure and on conviction was fined \$8; he was a first offender. D

Held: 1. By virtue of section 28(3) of the Penal Code a person liable to imprisonment may be sentenced to pay a fine, and by virtue of section 30(1) (a) where no sum is expressed to which a fine may extend, the amount of the fine is unlimited, but shall not be excessive. E

2. The appellant could have been fined a sum in excess of \$100 for the offence of which he was convicted and therefore the procedure prescribed by section 211 of the Criminal Procedure Code was not authorised. F

3. The jurisdiction of the magistrate to convict and sentence, being dependent upon the appellant's having been tried in the manner directed by the Criminal Procedure Code, the trial was a nullity, and it was not therefore open to the Court of Appeal to disallow the appeal on the ground that no miscarriage of justice had occurred. G

A Appeal from a judgment of the Supreme Court sitting in appellate jurisdiction from the Magistrate's Court.

M. S. Sahu Khan for the appellant.

D. I. Jones and Q. Bale for the respondent.

The facts sufficiently appear from the judgment of the Court.

Judgment of the Court (read by Gould V.P.): [13th November, 1970]—

B This is a second appeal from the appellant's conviction by a Magistrate of the first class of the offence of being drunk and disorderly contrary to section 200(d) of the Penal Code (Cap. 11). The appellant was fined \$8 and in default was to be imprisoned for two weeks.

The penalty provision of section 200(d) of the Penal Code is expressed—

C “Any person who is drunk and disorderly in any public place. . . . shall be guilty of a misdemeanour and shall be liable for the first offence to a term of imprisonment not exceeding 1 month and for the second offence to a term of imprisonment not exceeding 3 months and for the third or any subsequent offence to a term of imprisonment not exceeding one year.”

When the case was called before the magistrate a request was made on behalf of the Public Prosecutor that it be taken under section 211 (as amended) of the Criminal Procedure Code (Cap. 14) which so far as relevant, reads:—

D “(1) Notwithstanding any of the other provisions of this Code, a magistrate holding a magistrate's court of the first class may, if so requested by the public prosecution—

(a) try any offence of which the maximum penalty does not exceed a fine of one hundred dollars or imprisonment for six months or both such fine and imprisonment;

E (b) try any offence under the provisions of the Traffic Ordinance, whereunder the endorsement of, or disqualification from holding, a driving licence may be ordered either with or without a fine not exceeding one hundred dollars or imprisonment not exceeding six months or both such fine and imprisonment;

(c) hear any proceedings under the provisions of sections 33, 34, 35, 36 or 42 of this Code;

F (d) try any offence under the provisions of sections 276, 294, 313, 314, 315 or subsection (1) of section 360 of the Penal Code, in the manner provided in this section:

Provided that no person may be so tried if in the opinion of the court he is under the age of seventeen years.

G (2) Upon the trial of hearing of an offence or proceedings to which the provisions of this section apply, the provisions of this Code shall be modified as hereinafter set out.

(3) It shall be sufficient for the purposes of section 184 of this Code relating to the manner of recording evidence if the Magistrate records the names of the witnesses and such notes, if any, on the evidence as he considers desirable.

H (4) Where the accused being charged in terms of section 197 of this Code makes a statement admitting the truth of the charge, the Magistrate may, instead of recording the exact statement in full, enter in the record a plea of guilty.

(5) It shall be sufficient compliance with the provisions of section 154 relating to the contents of the judgment if the Magistrate's judgment consists only of his finding and sentence or other final order: A

Provided that the Magistrate may be required by a Judge of the Supreme Court to state in writing the reasons for his decision;

(6) The Magistrate shall if requested by the accused or his barrister or solicitor or by the public prosecutor record a sufficient note of any question of law or any relevant evidence relating thereto which may arise during the trial or hearing of an offence or proceedings under the provisions of this section; B

(7) The maximum penalty which may be imposed on the trial of an offence under the provisions of this section shall be a fine of £10 or 1 month imprisonment in lieu thereof. "

It will be seen that in cases to which it relates, this section authorises a shortening of the normal procedure, particularly as to the requirements of taking notes of evidence and giving full judgments contained in sections 184 and 154 of the Code. The application of the section is limited generally by subsection 1(a), but subsection 1(d) in particular extends it to a number of cases in which heavier penalties than six months' imprisonment may be imposed. C

The case was heard without objection under section 211, but after he was convicted the appellant lodged an appeal to the Supreme Court on a number of grounds of which the only one which continues to be relevant on the second appeal to this court is that the Magistrate erred in hearing the case under section 211. In both courts it was the submission of the appellant that because section 200(d) of the Penal Code provided for a penalty of up to twelve months' imprisonment in the case of a third offence, the maximum of six months' mentioned in section 211(1) (a) was exceeded and there was therefore no jurisdiction under the section. It was common ground that the appellant was a first offender, though this was not stated to the Magistrate when the application to take the proceedings under section 211 was made. D

In the Supreme Court the learned Judge held that the criterion for jurisdiction is clearly the maximum punishment to which the accused is liable in law for the offence with which he is charged. With that we are in entire agreement. The learned Judge said also that the accused, being a first offender, was properly tried under the provisions of section 211 of the Criminal Procedure Code as in law his liability to punishment under section 200(d) of the Penal Code was limited to a maximum of one month's imprisonment. On the basis upon which the argument was presented to the Judge this was a justifiable conclusion and if that were all, this appeal would have to be dismissed. E

It seems to have been unnoticed or disregarded in the courts below that, though section 200(d) mentions only imprisonment as a penalty, the Magistrate actually imposed a fine. As the availability of section 211 of the Criminal Procedure Code is limited (under subsection (1) (a)) by reference to a fine of \$100 as well as to imprisonment for six months, it appeared to this court that it was relevant to consider what maximum fine the Magistrate could have imposed upon the appellant. As a question of jurisdiction might well be involved, this court raised the point and granted an adjournment to enable it to be considered more fully by Crown Counsel. F

It appears that under the provisions of sections 28(3) and 30(1) (a) of the Penal Code the magistrate had power to inflict a fine in relation to an offence under section 200(d). The provisions read as follows:— G

H

"28(3) A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or instead of imprisonment.

A 30(1) (a) Where no sum is expressed to which the fine may extend, the amount of the fine which may be imposed is unlimited, but shall not be excessive."

B From these sections it follows that the Magistrate could in the present case impose a fine, limited in amount only by the provision that it shall not be excessive. The question being whether, under the jurisdiction so conferred, a magistrate could impose upon a first offender a fine exceeding \$100, we are unable to hold as a matter of law that he could not. It may be very unlikely that such a case could arise, and the whole matter has a flavour of artificiality, but it is not impossible that a case might occur in which both magistrate and accused might find a fine exceeding \$100 to be preferable to a month's imprisonment.

C As the prerequisites for hearing under section 211 were not fulfilled, in as much as the maximum fine which might be imposed under section 200(d) of the Penal Code exceeds \$100, the appellant is entitled to succeed on this appeal. Counsel for the Crown submitted that we should nevertheless disallow the appeal on the ground that no miscarriage of justice has occurred. From a purely factual point of view we would be disposed to accede to this, but if the defect in the proceedings goes to jurisdiction the trial was a nullity and no question of applying the proviso to section 22(6) of the Court of Appeal Ordinance (Cap. 8) can arise.

D We have considered counsel's submission that it was not a question of jurisdiction but merely a procedural matter, as the Magistrate clearly had jurisdiction to try the particular offence under the general provisions of the Codes. This argument is attractive, though no authority has been quoted in support of it. Apart from the provisions of section 211 the absence of a full note of evidence might perhaps be cured by the application of the proviso; it might be only rarely that the absence of findings and reasons in a judgment could similarly be cured. E But we think that the position in law is that the accused has not had the trial to which he was entitled. Section 211 is directed towards a shortened procedure and, whether or not in practice the absence of a full note and the necessity for giving written reasons for the judgment would be likely to render magisterial consideration of the case less full, the appellant was entitled to be tried under provisions of the Code which eliminated that risk. Thus, we take the view that the Magistrate's jurisdiction to convict and sentence never arose, as his power F to do so was dependent upon the appellant's having been tried in the manner directed by the Code. Instead he was tried under an unauthorised procedure.

For those reasons we consider that the question of applying the proviso cannot arise, as the trial was a nullity. The appeal is therefore allowed, and the conviction and fine imposed by the Magistrate are respectively quashed and set aside.

Appeal allowed.