SIRU LULUAKALO

v.

REGINAM

[COURT OF APPEAL, 1962 (Hammett P., Marsack J. A., Knox-Mawer J. A., 12th, 13th, 23rd February]

Criminal Jurisdiction

Criminal law—judgment—accused found guilty—no statement by judge that he was convicted—not incurable defect—Larceny Act 1916 (6 & 7 Geo.5, c.50) (Imperial) ss.25(1)(6), 27(1)—Criminal Procedure Code (Cap 4-Laws of Fiji 1945) ss.156,157—Pacific Order in Council 1893 (Schedule) rr.101,102.

After the trial of the appellant before a judge alone, the judge, in his formal judgment, specified that the charge being considered was one under section 27 (1) of the Larceny Act 1916, and concluded by finding the appellant guilty on that charge. He then proceeded to sentence the appellant, but at no time did he say that the appellant was convicted, or use words to that effect. Rule 101, made under the Pacific Order in Council, 1893, provides that, "after hearing the evidence the Court considers the whole matter, and either convicts the accused or dismisses the charge".

Held: 1. There was no irregularity or informality in the judgment, except possibly the failure to use the actual word "convict".

2. The essence of the matter is that there should be a judgment of the court pronouncing the accused person guilty and when that has been done the accused person has properly been convicted.

3. It is more usual to employ the actual word "convict," but failure to use that word in a judgment which finds the accused person guilty is not an incurable defect and does not vitiate the verdict of the trial judge.

Cases referred to: *Joseph v. R.* [1948] A.C.215: *Maharaj v. R.* (Privy Council Appeal No. 94 of 1946—unreported; see [1948] A.C. 219—note): *R. v. Rabjohns* [1913] 3 K.B. 171; 109 L.T. 414: *R. v. Udo Unwa Ekpo* (1947) 12 W.A.C.A. 153.

Appeal from a conviction by the High Commissioner's Court for the Western Pacific at Honiara.

A. I. N. Deoki for the appellant.

K. C. Gajadhar for the respondent.

Judgment of the Court: [23rd February 1962]—

This is an appeal against a conviction for entering a dwelling house with intent to commit a felony therein contrary to section 27(1) of the Larceny Act 1916. The original notice of appeal is based upon the general ground that the evidence was insufficient to prove the charge. At the hearing of the appeal leave was granted to amend the notice of appeal by adding an additional ground. This reads :

> "The learned trial Judge erred in law in as much as he did not convict the appellant nor did he convict him of any specific offence under any specific section.

The record discloses that the charge originally brought against the appellant was laid under section 25(1) (6) of the Larceny Act 1916, but that at the close of the prosecution case the learned trial Judge held that there was no evidence of breaking and entering and accordingly amended the indictment by substituting a charge under section 27(1) of that Act. In his formal judgment the trial Judge specifies that the charge being considered was one under section 27(1) of the Larceny Act 1916, and he concludes by saying: "I find the accused guilty of the charge as amended". It is clear, therefore, that the offence of which the appellant was found guilty is specifically stated, and no objection can be taken to the judgment on the ground that the actual offence is not stated therein.

It appears, however, from the record that at no stage before sentencing the accused to six months' imprisonment did the learned trial Judge say "the accused is therefore convicted" or words to the same effect. Counsel for the appellant relies strongly on the judgment of the Privy Council on appeal from the Supreme Court of Fiji: *Joseph v. The King* [1948] A.C. 215 and a similar decision of the Privy Council in the unreported case *Maharaj v. The King* (No. 94 of 1946) which is referred to in the judgment in Joseph's case. In each of those cases, however, the reason for the quashing of the conviction on appeal was not that the trial Judge had failed formally to convict, but that he did not pronounce judgment as required by sections 156 and 157 of the Criminal Procedure Code. As was said in Joseph's case by Sir John Beaumont:

> "The learned Chief Justice does not appear to have brought his own mind to bear on the question of the guilt or innocence of the accused. He left the appreciation of evidence to the assessors and accepted their conclusion as the verdict of the Jury which bound him, instead of regarding it merely as an opinion which might help him in arriving at his own conclusion. The appellant was entitled to be tried by the Judge, and he has not been so tried; and in the circumstances the only course open to the Board was to advise His Majesty to allow the appeal and quash the conviction and sentence."

In *Maharaj v. Reginam* the judgment proceeds:

> "In the result the appellant was convicted by assessors who have no power to convict him and sentenced by a Judge who had not convicted him."

In the instant case the trial Judge directed his mind to the question of the guilt or innocence of the appellant and did try the appellant. He also gave judgment in which he found the accused guilty and gave his reasons for so finding.

Counsel for the appellant has drawn our attention to Rules 101 and 102 made under the Pacific Order in Council 1893, Rules which determine the procedure in cases heard before the Court in which appellant was tried.

These Rules read:

> "101—Decision. After hearing the evidence, the Court considers the whole matter, and either convicts the accused or dismisses the charge.
>
> 102—Conviction and Sentence. In cases of conviction the Court enters on the minutes the conviction and the sentence (if any), together with any order which the Court may make ordering the person convicted to give security for future good behaviour, or to be deported, or to pay damages or costs."

It is contended for the appellant that the learned trial Judge did not either convict the accused or dismiss the charge, and therefore he was not entitled to pass sentence, which can only follow a conviction. Counsel for the respondent urges that the action taken by the trial Judge was tantamount to a conviction and that his failure to say specifically "the accused is convicted" is an irregularity or informality only, not leading to any substantial mis-carriage of justice.

The question then arises as to the precise meaning of the word "convicts" in Rule 101. In Stroud's Judicial Dictionary 3rd Ed. at p.634 the word "convicted" is thus defined:

> "The word 'convicted,' or the 'conviction' of a person accused, is equivocal. 'In common parlance no doubt it is taken to mean the verdict at the time of trial; but in strict legal sense it is used to denote the judgment of the Court' (per Tindal, C.J., *Burgess v. Boetefeur*, 13 L.J.M.C., 126)."

There is no question that in this present case the trial Judge made it perfectly clear to the appellant that he found him guilty of the charge under section 27(1) and that this was in the course of the judgment of the Court. There was no irregularity or informality in that judgment, which concluded by the imposition of sentence, except possibly the failure to use the actual word "convict".

In *R. v. Rabjohns* [1913] 3 K.B. 171 at 174 Bankes J. says :

> "There has in the opinion of the Court been a conviction within the meaning of section 4 of the Penal Servitude Act 1864 whenever a prisoner has been found guilty on indictment by a jury or on his own confession."

From this it would appear that it is the finding of guilty by the appropriate authority — in the instant case the trial Judge—that constitutes the conviction. The essence of the matter is that there should be a judgment of the Court pronouncing the accused person guilty, and when that has been done the accused has properly been convicted, whether or not that precise word is used in the judgment.

This exact point was considered by the West African Court of Appeal, Nigeria, in *Rex v. Udo Unwa Ekpo and Ors.* (1947) XII W.A.C.A. 153 in which it was held that the statement in a judgment
A that an accused person is guilty of murder is tantamount to the recording of a conviction of murder against him.

In our opinion the failure of the trial Judge to use the word "convict" is not, as counsel for appellant contends, a fatal error, and we can find no grounds for quashing the judgment of the Court and the sentence imposed upon the appellant. The learned trial
B Judge heard the evidence, considered the whole matter, and found the accused guilty in the course of his judgment. That, in our view, is a substantial compliance with his obligations under Rule 101. It is certainly more usual to employ the actual word "convict", but failure to use that word in a judgment which finds the accused guilty of the offence charged is not an incurable defect and does not, in our opinion, vitiate the verdict of the trial Judge and the
C sentence imposed after that verdict.

We can find no substance in the ground of appeal based upon the insufficiency of the evidence. We find that there was ample evidence to justify a finding of guilty and that ground also fails.

In the result the appeal will be dismissed.

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Appeal dismissed.