A

VIJAY SINGH

v.

REGINAM

B

[COURT OF APPEAL, 1967 (Mills-Owens P., Gould J.A., Bodilly J.A.), 14th, 23rd February]

Criminal Jurisdiction

C *Appeal—second appeal—limited to grounds involving questions of law only—question of weight to be attached to evidence of witness—involves no question of law—Court of Appeal Ordinance (Cap. 3) s.17A.*

Criminal law—charge—defective particulars—whether charge a nullity—Criminal Procedure Code (Cap. 9) ss.120, 123(a) (i), 123 (a) (iii), 325—Explosive Substances Act 1883 (46 & 47 Vict., c.3) (Imperial) s.4(1).

Criminal law—traffic offences—failure to stop after an accident—duration of stop—must be sufficient for purpose for which stop required—Traffic Ordinance 1965 ss.29, D *43(1) (a), 43(2), 85.*

The weight to be attached to the evidence of a witness is a matter for the trial magistrate or judge and his assessment of it involves no question of law open to challenge on a second appeal under section 17A of the Court of Appeal Ordinance.

E The appellant was convicted of failing to stop after an accident and failing to report an accident both under section 43 of the Traffic Ordinance. The findings of the magistrate were that the appellant hit a pedestrian while his vehicle was still moving, that he may have come to a momentary physical halt but then proceeded, and that the momentary stop was not an effective stop for the purposes of section 43(1) (a) of the Traffic Ordinance.

F The particulars set out in the charges in each case referred to the appellant as being the driver of a "vehicle" whereas section 43 refers to a "motor vehicle"; each of these terms is defined in section 2 of the Ordinance, the "motor vehicle" being a vehicle with certain characteristics or complying with certain requirements.

G *Held*: 1. The stop required by section 43(1) (a) of the Traffic Ordinance is for the purpose of giving certain particulars (if required) and must therefore be a stop of a duration which will enable that purpose to be accomplished. The finding of the courts below to that effect was correct.

2. Nobody was misled, deceived or inconvenienced in the courts below H by the inaccuracy in the particulars of the charges, which gave reasonable information as to the nature of the offences alleged; the charges, though defective, were not a nullity, and in the absence of any miscarriage of justice the proviso to section 325 of the Criminal Procedure Code was rightly applied in the Supreme Court.

Cases referred to: *R. v. McVitie* [1960] 2 Q.B.483; [1960] 2 All E.R. 498: *R. v. Yule* [1964] 1 Q.B.5; 47 Cr.App.R. 229: *Police v. Wyatt* [1966] N.Z.L.R. 1118: *North v. Gerrish* (1959) 123 J.P. 284. A

Appeal from a judgment of the Supreme Court upholding convictions in the Magistrate's Court under section 43 of the Traffic Ordinance.

J. N. Falvey and *S. M. Koya* for the appellant.

J. R. Reddy for the respondent. B

The facts sufficiently appear from the judgment of the court.

Judgment of the Court (read by GOULD J.A.): [23rd February 1967]—

The appellant was convicted by a magistrate at Lautoka on the 9th August, 1966, upon four charges under sections of the Traffic Ordinance, 1965. His appeal to the Supreme Court against his conviction on two of the charges (to which he had pleaded not guilty) was dismissed on the 31st October, 1966, and the appellant has now brought a second appeal to this Court under s.17A of the Court of Appeal Ordinance (Cap. 3). An appeal under that section is limited to any ground which involves a question of law only. C

The convictions which the appellant seeks to challenge are in respect of charges worded as follows:— D

FIRST COUNT

Statement of Offence

FAILED TO STOP AFTER AN ACCIDENT: Contrary to section 43(1) (a) and 85 of the Traffic Ordinance No. 11/65.

Particulars of Offence E

VIJAY SINGH s/o Jothi Singh on the 30th day of April, 1966 at Lautoka in the Western Division, being the driver of vehicle and owing to the presence of the said vehicle on Drasa Avenue, an accident occurred causing injury to Jonetani Latenacolo, did fail to stop.

SECOND COUNT F

Statement of Offence

FAILED TO REPORT AN ACCIDENT: Contrary to section 43(2) and 85 of the Traffic Ordinance No. 11/65.

Particulars of Offence

VIJAY SINGH s/o Jothi Singh, on the 30th day of April, 1966 being the driver of vehicle at Lautoka in the Western Division, and when owing to the presence of the said vehicle on Drasa Avenue an accident occurred causing injury to Jonetani Latenacolo did fail to report as soon as reasonably practicable the accident at the nearest Police Station or to a Police Officer. G

The three grounds set out in the Notice of Appeal read:— H

"(a) *THAT* the charge does not disclose an offence known to law having regard to the provisions of Section (2) and Section 43 of the Traffic Ordinance 1965.

(b) *THAT* the learned trial Magistrate erred in not evaluating the evidence of the defence withness *JAGJEET SINGH* and thereby the learned trial Magistrate disabled himself from considering the case for the defence fully. Consequently there has been a substantial miscarriage of justice.

(c) *THAT* inasmuch as the Appellant had reported the matter to a Police Officer on the day in question at an interview at the Appellant's house within 24 hours of the occurrence of the alleged offence under second count, the learned trial Magistrate erred in disregarding the provisions of sub-section (2) of Section 43 of the Traffic Ordinance 1965."

At the commencement of his argument, however, Mr. Falvey, for the appellant, abandoned ground (c) and we will therefore set out only such of the facts found by the learned magistrate as are necessary for the consideration of the remaining two grounds. It was never in dispute and was part of the appellant's own evidence that on the date in question he was driving his own van, a motor vehicle, when it came into contact with a Fijian on the road and inflicted on him some minor injuries. The magistrate found that the appellant hit the pedestrian while his vehicle was still moving, that he may have come to a momentary physical halt, but then proceeded on. He rejected the defence evidence that there had been threats of interference from by-standers. It is a matter of necessary inference from the judgment that the magistrate also rejected the defence evidence that the appellant alighted from his vehicle. The magistrate found that the momentary stop which the appellant made was not an effective stop for the purposes of section 43 (1) (a) of the Traffic Ordinance; in this he was upheld on appeal to the Supreme Court where the learned judge said : —

> "As the learned trial Magistrate indicated, the stop which the driver is required to make under this sub-section is a stop of sufficient duration to enable any person having reasonable ground for so doing to require the driver to give his name and address and also the name and address of the owner and the registration number."

The basis of this finding becomes readily apparent from a perusal of section 43 (1) which reads : —

> "43. (1) If in any case, owing to the presence of a motor vehicle on a road —
>
> (a) an accident occurs whereby personal injury is caused to a person other than the driver of that vehicle; or
>
> (b) damage is caused to a vehicle other than the motor vehicle or or a trailer driven thereby or to an animal other than an animal in or on that motor vehicle or a trailer driven thereby.
>
> the driver of the motor vehicle shall stop and if required so to do by any person having reasonable ground for so requiring, give his name and address and also the name and address of the owner and the registration number.

It will be convenient to deal first with the ground of appeal set out under letter (b) above. The Jagjeet Singh referred to was a witness called by the appellant, who gave evidence that the appellant alighted from the

vehicle and that he was threatened by a number of Fijians. The complaint, put forward under the guise of a question of law, is that the magistrate did not "evaluate" this evidence. It is obvious from his judgment that the magistrate did evaluate it and found it lacking in credibility. The weight to be attached to evidence is a matter for the trial magistrate or judge and his assessment of it involves no question of law which could be challenged on this appeal. Even where an appeal does lie on a question of fact (and we desire to emphasize that it does not in the present case) it is only in very rare instances that a Court of Appeal would interfere in such a matter, and in the present case we would have seen no reason whatever to adopt such a course had it been open to us. There is no merit in this ground of appeal.

The main argument for the appellant under ground (a) was that neither of the charges disclosed any offence because the particulars in each case referred to a "vehicle" whereas both the relevant sub-sections specifically related the offences to a "motor vehicle". Each of these terms is defined in section 2 of the Ordinance, though they are not defined so as to be mutually exclusive. A "motor vehicle" is a "vehicle" having certain characteristics or complying with certain requirements. Mr. Falvey submitted that in view of these definitions the framers of the charges had elected to use a term statutorily defined and its defect went beyond mere misdescription; the offences were not offences known to the law. The fact that the evidence related to a motor vehicle and that nobody had been misled, could not cure the defect.

This question was raised for the first time in the appeal to the Supreme Court, but the appellant was not legally represented in the Magistrate's Court. The form of a charge is regulated by the Criminal Procedure Code, section 120 of which provides :—

> "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."

By virtue of section 123(a) (i) and (iii) the statement of the offence is to be set out first and the particulars follow. A proviso to section 325 enacts that, on an appeal to the Supreme Court, notwithstanding that the Court is of the opinion that the point raised in the appeal might be decided in favour of the appellant, it may dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred. Similar provision is made in respect of second appeals to this Court by section 17A (6) of the Court of Appeal Ordinance.

It cannot be suggested in the present case that any substantial miscarriage of justice in the ordinary sense of that phrase occurred by reason of the use of the word "vehicle" instead of "motor vehicle". No one was misled, deceived or inconvenienced on that account. But if Counsel for the appellant is correct in saying that the charges were rendered a nullity there would be such a miscarriage, for a nullity is something which cannot be cured and cannot support a conviction.

Similar questions have been considered in a number of cases. We were referred to *R. v. McVitie* [1960] 2 All E.R. 498, in which the statement of offence was "Possessing explosives contrary to s.4(1) of the Explosive Substances Act 1883" which makes it a felony "knowingly" to

have in a person's possession explosive substances in particular circumstances. The word "knowingly" was omitted from the particulars of the offence but the Court of Criminal Appeal, consisting of five judges held that the omission did not make the indictment bad but only defective or imperfect. It was therefore lawful, no substantial miscarriage of justice having occurred, to apply the proviso. McVitie's case was followed in *R. v. Yule* (1963) 47 Cr.App.R.229.

The New Zealand Court of Appeal very recently decided a second appeal in a somewhat similar case — *Police v. Wyatt* [1966] N.Z.L.R. 1118 — in which it was argued that merely to charge careless driving was not enough, and that particulars of the negligence must be set out. The argument was rejected and Turner J. said, at p.1129 — "Plainly if the information is defective the proper course is to require the prosecution to give further particulars, and only if the necessary particulars are refused should dismissal be contemplated." McCarthy J. pointed out (p.1132) that though the relevant legislation gave no express power to order further particulars it was conceded that the Court had that power inherently and also power to dismiss should its directions be ignored.

We have no doubt that the present case is one which falls within the principle enunciated in the McVitie case. The statements of the offences, "Failed to stop after an accident" and "Failed to report an accident" followed in each case by reference to the relevant section, state the offences alleged with sufficient accuracy. The use of the word "vehicle" in the particulars was a defect, but it was nevertheless a term which, as defined, included motor vehicles; it was not something which could not possibly fall within the section such as (to resort to an extreme example) a bullock. Section 123(a) (iii) of the Criminal Procedure Code requires only that the particulars be set out in ordinary language so as to give "reasonable information as to the nature of the offence charged". If the appellant desired further information he could have applied for further particulars, but, in fact, he was under no misapprehension. We are accordingly satisfied that this argument cannot prevail and was rightly rejected in the Supreme Court.

Counsel's next submission was that the Court below erred in construcing the word "stop" in the relevant section as meaning "a stop of sufficient duration to enable any person having reasonable ground" to make relevant inquiries. Counsel very fairly called attention to a footnote in *Dixon's Road Traffic Laws of New Zealand* (3rd Edn.) p.61 which refers to a South Australian decision which was contrary to his submission, but the report is not available here. We have noticed the case of *North v. Gerrish* (1959) 123 J.P. 284 in which it was held that a driver must stop and give his name and address (presumably if required to do so) immediately. If he fails to stop, but later and elsewhere gives his name and address to an authorised person an offence is committed. Conversely if he stops but fails to give his name and address when required, he also commits an offence. This case is not precisely in point but tends to show the absurdity which would arise if a driver having stopped momentarily and driven away before anyone could communicate with him, could plead (a) that he had stopped and (b) that no one required him to give his name and address.

In our view the approach of the Court below was the correct one as being in accordance with the intention of the legislature as set out in

the section. When a stop is required for a certain purpose it must surely be one which will enable that purpose to be accomplished. Questions of degree may arise in some cases but, on the findings of fact of the learned magistrate they do not obtrude in the present instance. A

For the reasons we have given the appeal against conviction fails and is dismissed. There is, however, a matter not raised by Counsel but by the Court, relating to sentence. The powers of the Court as to sentence are contained in s.43 of the Traffic Ordinance, 1965, as amended by the Traffic (Amendment) Ordinance, 1965; the power to disqualify from holding a driving licence is in section 29 of the Traffic Ordinance, also as amended. Under the amended s.43 the Court is empowered, in respect of a conviction under s.43(1) when personal injury has been caused, to impose a fine not exceeding £200 or imprisonment not exceeding two years, but not both. In this case the learned magistrate imposed, on the first charge, a fine of £50 and three months' imprisonment; he also imposed a period of disqualification. B C

The sentence imposed on the first charge was therefore unlawful as including both imprisonment and fine. No second appeal lies to this Court against severity of sentence but an unlawful sentence is an error in law and can be corrected under s.17A(3) of the Court of Appeal Ordinance. It is therefore necessary for this Court to impose a lawful sentence; we agree with the Courts below that a second offence of this nature is a serious one and we do not differ from the learned magistrate in his view that it merited imprisonment. As, however, we are correcting an unlawful sentence at a late stage, we think it is more appropriate to eliminate the imprisonment but to inflict an increased monetary penalty. On the first charge therefore we impose a fine of £100 (or in default three months' imprisonment) and (in case it may be thought that the unlawfulness of part of the sentence might vitiate the whole) re-impose the disqualification from holding or obtaining a driving licence for three years from the date of the conviction. D E

Appeal against conviction dismissed.