A

AMINIO VUKICIGAU AND ANOTHER

v.

REGINAM

B

[SUPREME COURT, 1971 (Hammett C.J.), 30th July, 13th August]

Appellate Jurisdiction

Criminal law—practice and procedure—duplicity—charges of breaking and entering a dwelling house with intent to steal and actually stealing therein may be joined in the same count—on conviction only one sentence may be passed—Penal Code (Cap. 11) ss. 218(2), 303(d), 332(a), 332(b) (ii), 333(a)—Criminal Procedure Code (Cap. 14) ss. 3 (1) (2) (3), 121(2), 123(a) (iv), 245.

C

Criminal law—sentence—charges of breaking and entering a dwelling house with intent to steal and actually stealing therein—correct practice is to pass only one sentence—Penal Code (Cap. 11) ss. 218(2), 302(d), 332 (a), 332(b) (ii), 333(a)—Criminal Procedure Code (Cap. 14) ss. 3(1) (2) (3), 121(2), 123(a) (iv), 245.

D

Though, by an exception to the rule as to duplicity, it is permissble to charge a prisoner with breaking and entering a dwelling house with intent to steal therein and also (in the same count) with the actual stealing, the proper practice in passing sentence on conviction is to pass one sentence only and not separate sentences in respect of each offence.

Cases referred to :

E

R. v. Albury (1951) 35 Cr. App. R. 12.

R. v. Hope (1955) 39 Cr. App. R. 33.

R. v. Adair [1958] 2 All E.R. 629; 42 Cr. App. R. 227.

R. v. Rhodes (1959) 44 Cr. App. R. 23.

F

R. v. Golder [1960] 3 All E.R. 457; (1961) 45 Cr. App. R. 5.

R. v. Manley (1962) 46 Cr. App. R. 235.

R. v. Wilson [1967] 2 Q.B. 406; 51 Cr. App. R. 194.

R. v. Chambers (1967) 51 Cr. App. R. 254.

G

R. v. Taylor (1968) 53 Cr. App. R. 175; 113 Sol. Jo. 52.

R. v. Coleman [1969] 2 Q.B. 468; 53 Cr. App. R. 445.

R. v. Ford [1969] 1 W.L.R. 1703; 53 Cr. App. R. 551.

R. v. Smith [1963] Crim. L.R. 215.

R. v. Langstrath [1964] Crim. L.R. 237.

H

R. v. Baxendale [1964] Crim. L.R. 486.

R. v. Mee-Bishop [1965] Crim. L.R. 446.

R. v. Loundes [1965] Crim. L.R. 615

R. v. Goodfellow [1965] Crim. L.R. 737.

A

R. v. Tobitt [1967] Crim. L.R. 67.

Appeal against sentences passed in the Magistrate's Court; the case is reported on the point of practice only.

Appellants in person.

B

D. I. Jones for the respondent.

13th August 1971

HAMMETT C.J. :

C The two appellants were charged in the Court below with the following offences :—

1ST COUNT

Statement of Offence

D *BURGLARY:* Contrary to Section 332 (a) and Larceny from Dwelling House Section 302 (a) of the Penal Code, Cap. 11.

Particulars of Offence

AMINIO VUKICIGAU, on the 13th day of February, 1971 by night at Tamavua in the Central Division, broke and entered the E dwelling house of *Robert Becker* with intent to steal therein and did steal $15.00 cash, one tin of coco cola valued 20c and one tin pineapple valued 25c all of the total value of $15.45, the property of the said ROBERT BECKER.

2ND COUNT

F

Statement of Offence

CRIMINAL TRESPASS: Contrary to Section 218 (2) of the Penal Code, Cap. 11.

Particulars of Offence

G

BENOA LAGO, on the 9th day of March, 1971 at Tamavua in the Central Division, by night entered the yard adjacent to the dwelling house of PETER ANDREW CHESTERMAN, without excuse.

THIRD COUNT

H

Statement of Offence

HOUSE BREAKING ENTERING AND LARCENY : Contrary to Section 333 (a) of the Penal Code, Cap. 11.

Particulars of Offence

BENOA LAGO and AMENIO VUKICIGAU on the 11th day of March, 1971 at Tamavua in the Cetral Division, broke and entered the dwelling house of PETER ANDREW CHESTERMAN and stole therein one camera valued $142.00, one tape-recorder valued $62.00 and 3 bottles beer valued $1.35, all of the total value of $205.35, the said property of the said PETER ANDREW CHESTERMAN.

They each pleaded guilty to the charges against them and were sentenced as follows:—

1st Accused: 1st Count. Burglary 18 months
Larceny 6 months (concurrent)

3rd Count 18 months
i.e. a total effective sentence of 3 years imprisonment.

2nd Accused: 2nd Count 3 months
3rd Count 18 months
i.e. a total effective sentence of 21 months imprisonment.

They have each appealed against the sentences passed on the ground that they are excessive.

The first point to which I wish to refer concerns the passing of two sentences on the 1st Appellant on the 1st Count of 18 months and 6 months in respect of the burglary and larceny elements therein respectively.

This is a practice that has recently been adopted in some Magistrates Court which differs from the practice that has been followed in the Courts in Fiji in the past. It is a practice that has never been followed by the Supreme Court. It is most desirable that a uniform practice be followed in such matters. I have therefore examined the basis upon which it is founded.

The first Count charges, in the one Count, two offences, namely the offence of Burglary contrary to Section 332(a) of the Penal Code and that of Larceny contrary to Section 302(a) of the Penal Code. On the fact of it, this Count is bad for duplicity. It does apparently offend the provisions of Section 121(2) of the Criminal Procedure Code which reads as follows:—

> "Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count."

The offence of burglary is set out in Section 332 of the Penal Code in the following terms:—

"Any person who in the night —

A

(a) breaks and enters the dwelling-house of another with intent to commit any felony therein; or

(b) breaks out of the dwelling-house of another, having —

(i) entered the said dwelling house with intent to commit any felony therein; or

B

(ii) committed any felony in the said dwelling-house,

is guilty of the felony called burglary, and is liable to imprisonment for life."

C To constitute the offence of burglary under Section 322(a), it is sufficient to prove the breaking and entering of the dwelling house with intent to commit a felony therein without averring or proving the actual commission of any felony therein.

By long established practice, however, an exception to the rule as to duplicity is permitted in indictments for burglary. As is stated in *Archbold's Criminal Practice and Procedure* 36 Ed. at page 47 —

D

"An exception to the rule as to duplicity is to be found in indictments for burglary, in which it is usual and proper to charge the prisoner with having broken and entered the house with intent to commit a felony, and also with having committed the felony intended."

E Statutory provision for this well-known exception to the rule as to duplicity is specifically made in Fiji by Section 123(a) (iv) of the Criminal Procedure Code. This section requires charges to be framed in the form set out in the 2nd Schedule to the Code of which Form No. 9 reads as follows :—

BURGLARY

F

Statement of Offence

Burglary, contrary to Section 332 (a), and larceny, contrary to Section 302 of the Penal Code.

Particulars of Offence

G A.B. in the night of the day of 19 , in the Division, did break and enter the dwelling-house of C.D. with intent to steal therein, and did steal therein, one watch, the property of S.T., the said watch being of the value of £10."

H No specfic provisions are, however, made in the Criminal Procedure Code on the question of whether one or two sentences should be imposed on a single count that charges the two offences of burglary and larceny.

In these circumstances the general provisions of Section 3(3) and 245 apply. Section 3 reads as follows :—

"3. (1) All other offences under the Penal Code shall be inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be inquired into, tried, and otherwise dealt with according to the same provisions, subject, however, to any enactment for the time being in force regulating the manner or place of inquiry into, trying, or otherwise dealing with such offences.

(3) Provided, however, and notwithstanding anything in this Code contained, the Supreme Court may, subject to the provisions of any law for the time being in force in Fiji, in exercising its criminal jurisdiction in respect of any matter or thing to which the procedure prescribed by this Code is inapplicable, exercise such jurisdiction according to the course of procedure and practice observed by and before Her Majesty's High Court of Justice in England at the date of the coming into operation of this Code."

I should perhaps first say that the second word in Section 3(1), i.e. the word "other", appears to be redundant. It did not appear in Section 3(1) of the Crimnal Procedure Code in the 1955 Edition of the Laws of Fiji. There has been no subsequent amending Ordinance inserting the word "other" in this section. It is not possible to place any logical meaning on this word, where it is used in this context. I can therefore only assume that it is a printer's error in the printing of the 1966 Revised Edition of the Laws of Fiji.

Section 245 reads as follows :—

"The practice of the Supreme Court in its criminal jurisdiction shall be assimilated as nearly as circumstances will admit to the practice of Her Majesty's High Court of Justice in its crimnal jurisdiction and of Courts of Oyer and Terminer and General Gaol Delivery in England."

It is therefore necessary to ascertain the practice followed in the High Court in England when passing sentences on convictions of burglary in these circumstances, to determine what practice should be followed in the Supreme Court in Fiji.

An examination of the English authorities over the past 20 years makes it clear that in all such cases, only one sentence is passed.

In this connection I refer to the following cases :

R. v. Albury 35 Cr. App. R. 12

R. v Hope 39 Cr. App. R. 33

R. v. Adair 42 Cr. App. R. 227

R. v. Rhodes 44 Cr. App. R. 23

R. v. Golder & ors. 45 Cr. App. R. 5

R. v. Manley 46 Cr. App. R. 235

A

R. v Wilson and anor. 51 Cr. App. R. 194

R. v. Chambers 51 Cr. App. R. 254

R. v. Taylor 53 Cr. App. R. 175

B The Criminal Law Review also contains a number of similar examples, namely :—

R. v. Smith [1963] Crim. L.R. 215

R. v. Langstrath [1964] Crim. L.R. 237

C *R. v. Baxendale* [1964] Crim. L.R. 486

R. v. Mee-Bishop [1965] Crim. L.R. 446

R. x. Loundes [1965] Crim. L.R. 615

D *R. v. Goodfellow* [1965] Crim. L.R. 737

R. v. Tobitt [1967] Crim. L.R. 67

R. v. Coleman [1969] Crim. L.R. 384

R. v. Ford [1969] Crim. L.R. 499

E

It must, of course, be borne in mind that where the offence of burglary, simpliciter is referred to in these cases, and its particulars are not stated, it is not possible to say whether these cases involved either —

(a) Breaking and Entering with intent to commit a felony and having actually committed the felony or,

F

(b) Breaking out after having entered and actually committed a felony.

What is significant in a study of these cases, however, is that in each of those in which it can be seen that Breaking and Entering and actually G committing a felony were charged, only one sentence was, in fact, passed. Similarly, in none of the other cases were two sentences passed. It is manifest that the practice in England is that even if both the breaking and entering and the actual commission of a felony, e.g. larceny are charged in the one count, on conviction, only one sentence should be passed.

H This is not as illogical as it may perhaps sound. I say this because it avoids the situataion which would otherwise arise, in which on a conviction under Section 332(a) two sentences would be passed, whereas on a conviction under Section 332(b) (ii) only one sentence would be passed.

I have set this matter out at some length because it has been suggested that in some of the Courts of Eastern Africa, where there are similar provisions in the local Criminal Procedure Code and Penal Code, a different practice is followed. I have been shown no authority for this and can find none in any of the reports of the Court of Appeal for Eastern Africa.

The practice that has, in fact, been followed in the Supreme Court of Fiji is to pass only one sentence for the offence of burglary, even where the count also includes a charge of larceny. This follows the practice of the High Court in England. It is most desirable that the Magistrates Courts in Fiji should, on the principle of comity at least, also follow this same practice.

On the 1st Count I do therefore set aside the sentence of 6 months passed in respect of the larceny element therein.

I now turn to the appeals of each appellant against the quantum of the sentences passed upon them. Offences of burglary have been of increasing prevalence in the last 9 months or so. The number of such cases in the Returns of Magistrates Courts shows this, as does the numbers that are heard on appeal. Sentences of 18 months Imprisonment for burglary are, by no means, of themselves, disproportionate to the gravity and prevalence of this offence. Indeed, in many cases, more severe penalties are merited.

There are therefore no merits in the appellant's complaint that the sentences passed in the Court below are inherently excessive for this offence where committed by adults. In this case, however, both the appellants are youths and I have felt it desirable and expedient to call for reports on them by a Probation Officer.

The 1st Appellant is aged 19. In the Court below he admitted one previous conviction for Robbery for which he was sentenced to 9 months Imprisonment. The Probation Officer in his report points out that in addition to that conviction, the 1st appellant has on two other previous occasions been convicted of offences for which he was on each occasion placed on Probation. In view of this and his behaviour whilst on Probation, he is not of the opinion that the 1st appellant would benefit from or respond to a further period of Probation. He is, of course, too young really to be incarcerated in a Prison intended for adults. If there were a Borstal type institution in Fiji, he should have been sent there. In these circumstances, I have come to the conclusion that in his case there is no practical alternative to a sentence of imprisonment. In view of his age, however, I consider a total of 3 years Imprisonment to be longer than is appropriate or necessary. I shall therefore order the sentence of 18 months Imprisonment on the the 3rd Count to run concurrently with, instead of consecutive to, the sentence of 18 months passed on the 1st Count. To this limited extent the appeal of the 1st appellant does therefore succeed.

The 2nd appellant is aged 17. He has no previous convictions and the report of the Probaton Officer indicates that he may well respond to this treatment. Since this has not yet been tried in his case, I am, in view of his age, of the opinion that he should be given the opportunity afforded by being placed on Probation.

I do therefore allow the appeal of the 2nd appellant. I set aside the
A sentence of imprisonment passed on him on the 2nd and 3rd Counts and in lieu thereof I place him on Probation for 18 months, subject of course to the provisions of Section 2 of the Probation of Offenders Ordnance.

Appeals allowed in part.