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**RAJENDRA DEO**

v.

**REGINAM**

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[SUPREME COURT, Lautoka—Dyke J—29 July, 1980]

## Appellate Jurisdiction

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*Criminal Trespass S.218(2) charge and particulars omitted "at night"—essential element—though evidence supported the occurrence "at night"—fundamental defect.*

*Sahu Khan* for Appellant

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*D. Williams* for Respondent

Appeal against a conviction imposed by Magistrate in respect of offence of Criminal Trespass, provided for by Penal Code (Cap. 11) S.218(2) which read:

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"Any person who enters by night any dwelling—house, or any verandah or passage attached thereto, or any yard, garden or other land adjacent to or within the curtilage of such dwelling-house, without lawful excuse, is guilty of a misdemeanour, and is liable to imprisonment for 1 year."

Both the charge as laid and particulars which were supplied in support of it omitted the words or similar reference "at night".

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The appellant pleaded not guilty to the offence and evidence was given including his own sworn testimony. The magistrate convicted him and imposed a penalty.

**The appellant appealed upon the basis stated namely:**

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"That the prosecution evidence failed to establish that a criminal offence as charged was committed by the appellant.

The intent if not the wording of this became clear: it was the charge as drafted which disclosed no offence, in that it did not contain a reference to an essential element therein namely "at night".

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The evidence given before the learned magistrate made it clear that the incident complained of did in fact occur at night. No objection to the wording of the charge was made in that court, nor did the Magistrate refer to the omission in any way. In entering his verdict the magistrate stated that appellant was being convicted "as charged".

The learned appellate judge pointed out that in other words he convicted the appellant of an offence not known to the law. The learned judge referred to *Smith v. Moody* (1903) KB 56. He said it could be argued that Criminal Procedure Code S.323 applied to preclude this ground of appeal. However he referred to *Atterton v. Browne* (1945) KB 122 and *Ram Hit v. Lautoka Rural Local Authority* (137 of 1977). No argument was raised in the latter case as to the effect of S.323 above.

*Held:* Conviction quashed.

There were fundamental defects in the charge i.e. in its failure to include a fundamental element, "at night".

Cases referred to:

*Smith v. Moody* (1903) KB 56

*Atterton v. Browne* (1945) KB 122

*Ram Hit v. Lautoka Rural Local Authority* (Lautoka Criminal Appeal No. 137 of 1977).

DYKE, J.

Judgment

The appellant was charged in the following terms—

"Statement of offence

Criminal Trespass contrary to Section 218(2) of the Penal Code Cap. 11.

Particulars of Offence

Rajendra Deo s/o Bach Raj on the 11th day of January 1980 at Lautoka in the Western Division entered the yard adjacent to the dwelling house of Liaquat Ali s/o Azmat Ali without lawful excuse."

He pleaded not guilty to the offence, but after hearing evidence, including the appellant's own sworn evidence the magistrate convicted him as charged and fined him \$40 or 1 month in default and ordered him to pay \$30 costs.

The appellant now appeals against his conviction and sentence. Counsel for the appellant had clearly prepared his brief very thoroughly and produced well reasoned arguments and a large number of authorities, whilst Crown Counsel had nothing to say at all. I'm not sure whether that means that the appeal was unopposed, but it does mean that I am left to decide the appeal solely on the material supplied by appellant's counsel.

Perhaps I should deal first with the ground 4 of the appeal namely—

"That the Prosecution evidence failed to establish that a criminal offence as charged was committed by the appellant."

There is no doubt that the wording of this could be much improved, because what counsel for the appellant argued was that the charge as drafted disclosed no offence, but it does not require very careful study to see that the particulars of the offence lack an essential element of the offence under section 218(2) of the Penal Code.

- A The offence of entering onto premises without lawful excuse is only actionable under Section 218(2) when committed at night and the words "at night" should be included in the particulars of the offence.

The evidence given in court makes it clear that the incident complained of did occur at night, and it is also a fact that no objection to the wording of the charge was made in the magistrate's court. Nor did the magistrate refer to the omission in any way. But the absence of the words "at night" is a fundamental flaw in the wording of the charge and it is to be noted that in convicting the appellant the magistrate stated that he was being convicted "as charged". In other words he convicted the appellant of an offence not known to the law. This brings the case very much in line with the case of *Smith v Moody* (1903) 1KB 56.

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- C It might be argued that Section 323 of the C.P.C. precludes this ground of appeal being raised in this Court since no objection was raised in the lower court. Section 323 reads as follows—

"No finding, sentence or order passed by a magistrate's court of competent jurisdiction shall be reserved or altered on appeal or revision on account of any objection to any information, complaint, summons or warrant for any alleged defect therein in matter of substance or form or for any variance between such information, complaint, summons or warrant and the evidence adduced in support thereof, unless it be found that such objection was raised before the magistrate's court whose decision is appealed from, nor unless it be found that, notwithstanding it was shown to the magistrate's court that by such variance the appellant had been deceived or misled, the magistrate's court refused to adjourn the hearing of the case to a future day."

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- E However I have been referred by counsel for the appellant to the case of *Atterton v Browne* (1945) KB 122 where particulars of the offence in a summons were defective. Although Section 1 of Jervis' Act (Administration of Justice (No. 2) Act 1848 provided that "no objection should be taken to any information, complaint or summons or any alleged defect there in substance or in form" it was held that his provision would not apply where the defects were fundamental—e.g. where the particulars of the offence did not disclose any offence or were so defective or inaccurate as to be misleading.

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- G I was also referred to the case of *Ram Hit v Lautoka Rural Local Authority* Lautoka Criminal Appeal No. 137 of 1977 where particulars of the offence omitted to state that the accused was being charged as "the owner" of a newly constructed building and the conviction was quashed. Though no argument was raised in the case as to the effect of section 323 of the C.P.C. I have no doubt that the Court approached the case in the same way that I have approached this case.

In view of the fact that I find fundamental defects in the charge and in the conviction in this case I have no option but to quash the conviction and sentence passed and the order for costs. It is not necessary for me therefore to consider the other grounds of appeal

- H The fine and costs, if already paid, must be returned to the appellant.

*Appeal Allowed.*