EPELI DELAI

v

THE STATE

[HIGH COURT, 1995 (Pain J), 28 July]

Appellate Jurisdiction

Crime-procedure-proceeding to sentence without having formally entered a conviction-whether sentence a nullity-Criminal Procedure Code (Cap 21) Section 206(2).

On an appeal against sentence it was submitted that no conviction having been entered the sentence was a nullity. HELD: Although the better practice is formally to record the entry of a conviction, unequivocal acceptance by the Court of a guilty plea sufficiently constitutes a conviction under Section 206(2).

Cases cited:

Babu Ram v R (Cr. App.36 of 1974)
David Kio v R 13 FLR 21
DPP v Joe Wise (Cr. App. No. 63 of 1993)
DPP v Jone Saumi (Cr. App. No.4 of 1995)
DPP v Ram Sami Naidu. (Cr. App. 34 of 1984)
IRO v R (Cr. App. 11 of 1966)
Joseph v R [1948] AC 215
Manu Taunolo v The State (Cr. App. No.65 of 1993)
R v Manchester Justices [1937] 2 KB 96
S v Recorder of Manchester [1971] AC 481
Siru Luluakalo v R 8 FLR 12,

Appeal against sentence imposed in the Magistrate Court.

Mrs T. Jayatilleke for Appellant
D. Tuiqereqere for Respondent

Pain J:

On the 20th February 1995 the Appellant pleaded guilty in the Magistrates Court to a charge of doing an act with intent to cause grievous harm, contrary to Section 224 of the Penal Code. He was sentenced to two years imprisonment. By Petition of Appeal dated 11th April 1995 the Appellant appealed against the sentence on two grounds namely:

(a) That the sentence was bad in law

and (b) That the sentence is in any event harsh and excessive.

A In support of the first ground of appeal it is submitted by counsel for the Appellant that the sentence cannot stand because no formal conviction was recorded by the Magistrate. It was argued that this is a mandatory requirement under Sections 155 (2) and 206 (2) of the Criminal Procedure Code. Counsel cited the decisions of Manu Taunolo v The State (High Court, Criminal Appeal No.65 of 1993), David Kio v R 13 FLR 21 and Joseph v R [1948] AC 215 as
B authority for this argument.

Counsel for the Respondent submitted that the failure of the Magistrate to formally enter a conviction on the record was not a defect that rendered the sentence a nullity. It was argued that the word *"conviction"* in Section 206(2) of the Criminal Procedure Code merely denotes the acceptance of the Appellant's
C plea of guilty and the record shows that this occurred. The section only requires the words used to admit the charge to be recorded and not the conviction. The further cases of S v Recorder of Manchester [1971] AC 481, DPP v Jone Saumi (High Court Criminal Appeal No.4 of 1995), Siru Luluakalo v R 8 FLR 12, and DPP v Joe Wise (High Court Traffic Appeal No. 63 of 1993) were cited in argument.

D This appeal involves a consideration of Section 206 (2) of the Criminal Procedure Code. Reference has been made to Section 155 of the Code but that section relates to the contents of a judgment that must be delivered by the Court at the conclusion of a trial. This appeal concerns the procedures to be adopted on a plea of guilty in the Magistrates Court.

E Subsections (1) and (2) of Section 206 provide

> " (1) The substance of the charge or complaint shall be stated to the accused person by the Court, and he shall be asked whether be admits or denies the truth of the charge.
>
> F (2) If the accused person admits the truth of the charge, the admission shall be recorded as nearly as possible in the words used by him, and the Court shall convict him and pass sentence upon or make an order against him, unless there shall appear to it sufficient cause to the contrary."

G The issue in this case is whether the Magistrate convicted the applicant in terms of subsection (2) before passing sentence.

The record in the Magistrates Court reads as follows:

> "20th February 1995: For prosecution I .P. Bhawani;
> Accused - Present
> - No counsel

Court	Charge read explained and understood-yes
Plea	Guilty
Facts	On 28/11/94, at 10.15am complainant was washing clothes near tap in village. Her aunty came and they argued. Accused heard them. He came and swore at the complainant. The accused took a piece of timber and hit her repeatedly all over her body. She ran to another house. He followed her. Then hit her again. She screamed and fell down unconscious. He stopped her from going to police. Then later she went. Also to CWM Hospital. Medical report as per the injuries.
Accused	Facts admitted. Previous convictions - admitted.
Mitigation	Seek leniency. Won't do again. 34 years old. No job. Look for a job. Of Lami village. She spoke bad about me. Told I was doing nothing in village. Useless, I am she said. Have family.
Court	Any reconciliation? Complainant: No. Not reconciled. I won't.
Court	2 previous convictions. Has pleaded guilty. Stick (timber) used. Serious offence and deterrent required. Sentenced to two years imprisonment."

It will be noted that at no stage did the learned Magistrate record that the Appellant was "convicted".

The first matter to be determined is the meaning of the word "convict" in Section 206 (2) of the Criminal Procedure Code. It is a word that is capable of, and has received varying interpretations. However, the authoritative decision is undoubtably S v Recorder of Manchester (supra). In this case the House of Lords held that a Magistrates Court, following a plea of guilty and before imposing sentence, could permit a defendant to change the plea to Not Guilty. In those circumstances the Magistrate was not functus officio when the defendant was 'convicted" on his plea of guilty. The Magistrate would only be functus officio when the case had been finally determined by the imposition of sentence. In the course of their speeches the learned Law Lords noted that difficulties had arisen from the fact that the word "conviction' is commonly used with two different meanings. This was explained by Lord Upjohn in his speech at page 506 as follows:

> "The primary meaning of the word "conviction" denotes the judicial determination of a case; it is a judgment which involves

> two matters, a finding of guilt or the acceptance of a plea of guilty followed by sentence ..... But the word "conviction" is also used in a secondary sense, that is, to express a verdict of guilty or acceptance of a plea of guilty before the adjudication which is only completed by' sentence." (Emphasis added)

Clearly the word "convict" is used in Section 206 (2) of the Criminal Procedure Code in the secondary or narrower sense, namely, the acceptance of a plea of guilty. The section says that the Magistrate "shall convict the defendant and pass sentence upon him" which distinguishes the use of the word "convict" from the primary meaning of final determination of the case by the imposition of sentence. Accordingly, the question in this case is whether the learned Magistrate, accepted the appellant's plea of guilty or, more precisely, in terms of the specific wording of section 206, accepted the Appellant's admission of the truth of the charge.

There is no specific mention of this in the record. Counsel for the Appellant submitted that the Magistrate was obliged to formally record a conviction. She relied on the decisions of David Kio v R (supra) and Joseph v R (supra). However neither of those cases dealt specifically with the obligations of a Magistrate under S.206 of the Criminal Procedure Code when a plea of guilty is entered. Both cases were concerned with a judgment under (what are now) Sections 154 and 155 of the Criminal Procedure Code following a defended hearing. It was held that the trial Judge, in delivering judgment, must make it clear that the court has found the charge to be proved. In other words, a verdict is required. It is to be noted, however, that in David Kio v R (supra) the Court of Appeal said that "no particular form of words is required' (page 22) and "the judgment must state unequivocally that the accused person is convicted or at least that he is found guilty of the offences concerned" (page 23).

A further decision is Babu Ram v R (Cr. App.36 of 1974) which dealt with the judgment of the Court after a trial with assessors. The Court of Appeal noted the change in legislation since the case of David Kio v R (supra). Previously the judgment had to be written and signed by the trial judge at the time it was pronounced. By amendment, only the decision of the Court needed to be written down. The Court held that a "decision" is only a concluded opinion and not a judgment or order. Use of such words as "convicted", or "found guilty", although desirable in the interests of clarity, were not essential. The issue and decision of the Court was expressed thus:

> "The assessors unanimously expressed the opinion that the appellant was guilty of the offence charged; the learned Judge stated, and wrote down, that he fully concurred. *It was thus made clear that his concluded opinion was that the appellant was guilty of the*

offences. That is what he had decided. Accordingly it can properly he held that he had written down the decision of the Court. That being so, he was entitled to pass sentence without any further formalities."

(Emphasis added)

This present appeal is not concerned with the judgment, verdict or decision of the Court. It concerns the statutory obligations of a Magistrate under Section 206 of the Criminal Procedure Code when a defendant admits the truth of (or pleads guilty to) a charge. In terms of the section and authorities these are:

1. The substance of the charge shall he stated by the Court to the defendant. (See DPP v Ram Sami Naidu. Cr. App.34 of 1984 - as to "substance"). A prudent practice that is regularly followed is to also have the defendant acknowledge that he understands the charge.

2. The defendant should be asked if he admits or denies the truth of the charge. If admitted the admission shall be recorded as nearly as possible in the words used by the defendant.

3. If the defendant admits the offence (pleads guilty) the Court shall convict him (accept the admission or plea of guilty) unless there shall appear sufficient cause to the contrary. This could be, for instance, if the plea of guilty is equivocal. The Court has a duty to exercise the greatest vigilance in the interests of an unrepresented defendant (Iro v R, Cr. App. 11 of 1966) and it may be prudent to treat the plea as provisional only and defer final acceptance until the facts have been fully outlined (DPP v Ram Sami Naidu - supra).

4. If the plea of guilty is accepted, the Magistrate shall pass sentence upon the defendant unless there shall appear sufficient cause to the contrary (eg. a discharge under Section 44 of the Penal Cede is appropriate).

It will be noted that the only statutory requirement for recording is in relation to the defendant's plea. His admission shall be recorded as nearly as possible in the words used. However a Magistrate has a duty to keep a record of proceedings for each hearing. It is not expected that this should be a verbatim report of everything that is said and done but the essential and important matters should be noted. For the purposes of an appeal, the Magistrates Court is required to forward the record of the proceedings to this Court (Section 312 Criminal Procedure Code). That has been done in this case. As that record contains no specific note of the Magistrate having accepted the appellant's plea of guilty or

convicted him it must be accepted for the purposes of this appeal that no such
A pronouncement was formally made.

However, in my view, the use of the word "convict" in Section 206(2) of the Criminal Procedure Code does not require some ritualistic pronouncement or recording of the specific word "conviction" or "convicted". All that is required is that the Magistrate shall accept the defendant's plea of guilty or admission of the charge. No particular formula or recording is required for that, but in
B the interests of clarity, it would be preferable for some note to be made. If, however, the Magistrate has in fact accepted the admission or plea he is entitled to proceed and sentence the defendant.

In the present case the record shows that the charge was read and explained to the appellant who acknowledged that he understood it. He then pleaded
C guilty and the facts were outlined by the prosecutor. The accused acknowledged the truth of those facts and admitted his list of previous convictions which were produced to the Court. The appellant was then invited to address the Court in mitigation which he did. The learned Magistrate then enquired about reconciliation. He then proceeded to sentence the appellant and, in doing so, noted that the appellant had pleaded guilty. All these procedures, including the
D submissions in mitigation, acknowledgment of the guilty plea and with the imposition of sentence, clearly show that the learned Magistrate did accept the appellant's plea of guilty. If it were otherwise he would not have proceeded with the hearing in this way. There is nothing in the record to indicate, nor was it suggested on behalf of the appellant that there was some sufficient cause why the Magistrate would not or should not or did not accept the plea of guilty.
E His actions unequivocally show that he did accept the plea and this constitutes a conviction under Section 206 (2) entitling him to proceed to sentencing.

Support for this view that no formal pronouncement is necessary can be found in the case of S v Recorder of Manchester (supra). The Court considered Section 13 (3) of the Magistrates Courts Act 1952 which provided that: "If the
F accused pleads guilty, the Court may convict him without calling evidence". It was held that conviction in the terms of this section meant acceptance by the Court of the plea of guilty. Lord Morris said at page 501:

> "Though reference is often made to the 'acceptance' of a plea *there is no necessity for any formal pronouncement.* All that is
G noted by such an 'acceptance' is that a court is proceeding to consider what is the appropriate course to take in regard to a person who, as the court thinks, with full appreciation of what he is doing and with adequate understanding of what is involved in and what are the ingredients of a charge preferred against him, has fully and freely acknowledged and confessed to the court that he is guilty of the charge." (Emphasis added)

Siru Luluakalo v R (supra) is authority for the proposition that the use of the word 'conviction' in a statute does not require the Court to use that precise word. In that case the Rules for trial provided that "after hearing the evidence, the Court considers the whole matter, and either convicts the accused or dismisses the charge" and that "in the cases of conviction the Court enters on the minutes the conviction and the sentence (if any)". In his decision the trial judge concluded: "I find the accused guilty of the charge as amended". He then proceeded to sentence the appellant. The Court of Appeal held that "conviction" was the finding of guilt by the trial judge and when that had been done the accused was properly convicted. By analogy, in this present case the appellant was convicted when the learned Magistrate accepted his plea of guilty and proceeded to sentence even though the word "convicted" was never used.

In R v Manchester Justices [1937] 2 KB 96 a defendant who had been duly served failed to appear in Court on traffic charges. The Justices heard formal evidence and imposed fines on both charges. The Court held that the defendant had been convicted, even though a memorandum of the conviction had not been entered in the register and signed by the Justices as required by statute. The conviction itself was complete and all that remained to be done was to perform a formal act of entry in the register. By analogy, in this case, the appellant was convicted when the Magistrate accepted his plea of guilty by proceeding to sentence, even though no record was made of this.

I have gone to some lengths to express my decision in this case and the reasons and authorities for it. This has been done because I am conscious of other decisions of this Court where the failure of the Magistrate to formally record a conviction on a plea of guilty has been accepted as a substantive defect rendering the sentence a nullity. I refer to Manu Taunolo v The State (supra), DPP v Joe Wise (supra) and DPP v Jone Saumi (Supra). However in Manu Taunolo v The State the present issue does not appear to have been argued and the case was decided on a different ground. The learned Judge merely "noted that no formal conviction had been recorded and referred to the decision of David Kio v R (supra). However the decision of the Court was that the conviction be quashed as the plea of guilty in the Magistrates Court was equivocal. The case was remitted back to the Magistrates Court for re-trial. In DPP v Joe Wise counsel for the respondent conceded that the sentences imposed by the Magistrate were a nullity by reason of his failure to enter a conviction on the plea of guilty of the defendant". The learned judge gave a decision which referred to the decision of David Kio v R but the matter was never argued and the present issues were not considered. In DPP v Jone Saumi a similar concession was made before me. In view of this concession, which appeared to have some support from the case of David Kio v R, I quashed the sentence and remitted the case back to the Magistrates Court. However I stressed that the matter had not been argued and referred to the issues raised by such cases as S v Recorder of Manchester (supra). I surmise that these latter remarks

provided the genesis for the respondent's arguments on this appeal.

A In this case, for the reasons already given, I am satisfied that the learned Magistrate "convicted" the appellant in accordance with the provisions of Section 206(2) of the Criminal Procedure Code, by accepting the appellant's plea of guilty. He then proceeded to sentence. It would have been preferable and a much better practice if the learned Magistrate had made a note on the record to the effect that the plea had been accepted or the appellant convicted.
B However the failure to do so does not invalidate the learned Magistrate's acceptance of the plea.

The second ground of appeal is that the sentence of two years imprisonment was harsh and excessive.

C Counsel for the appellant's very brief submission on this issue was that the sentence is too harsh because such offending is normally punished by a suspended prison sentence, binding over or fine. Counsel conceded that in some cases an immediate prison sentence is imposed but said that it is normally suspended. No specific sentences in comparable cases were cited.

D Counsel for the Respondent submitted that an immediate custodial sentence of 2 years was appropriate for this serious assault upon a woman with a weapon. Particular reference was made to the injuries suffered by the victim and the maximum sentence prescribed for this offence.

The Appellant pleaded guilty to a charge under Section 224 (a) of the Penal Code of doing an act intended to cause grievous harm which is punishable by
E a maximum of life imprisonment. This offence is in Chapter XXIII of the Code "Offences Endangering Life and Health and Section 224 covers many different acts including such grave matters as deliberately maiming or causing bodily injury that endangers life. In terms of Section 224 (a), the definitions in Section 4 and the charge itself, the gravamen of the offence committed by the appellant was that, with intent to cause bodily hurt that was likely to seriously or
F permanently injure the victim, he caused such bodily hurt to the victim by striking her with a stick. This particular offence and the facts of the case where only marginally serious harm was actually caused are far less culpable than other offences under the section for which a maximum sentence of life imprisonment would be more appropriate.

G The facts are that the appellant attacked the victim with a piece of timber. In terms of the offence he must have intended to cause harm that was likely to seriously injure her. According to the summary he "hit her repeatedly all over her body. She ran to another house. He followed her. Then hit her again. She screamed and fell down unconscious".

The victim, a 30 year old woman suffered injuries which are detailed in the

medical report as a deep laceration 1% inches long on the back of her head, multiple bruising on both shoulders and right side of her neck and a long bruise on the back of her left leg. She was observed to be limping, distressed, feeling weak and in pain. X-rays did not show any definite bone injuries. The wound at the back of her head was stitched and she was given medication that included sedatives and analgesics.

Such a deliberate and prolonged attack with a weapon upon a defenceless woman who suffers these injuries must attract condign punishment. The learned Magistrate rightly observed that this was a serious offence and deterrence was a consideration. The Court must play its part in ensuring that women in the community are protected and the sentence must reflect the disapproval of society to such conduct. For these reasons an immediate prison sentence is appropriate.

There are some mitigating circumstances. This was not a random assault upon a stranger. The appellant was angered by what the victim had said about him. That explains his reason for the assault but it was not substantial provocation. The appellant should be regarded as a first offender for a crime of this nature. He pleaded guilty to the charge. He is 34 years of age and has a family. The victim did not suffer any permanent or really serious injury.

Having regard to sentences imposed in other cases of assault where serious injury and even death has been caused, the sentence of two years imprisonment, on the facts of this case, is at the top end of the acceptable range. In my view it does not give appropriate allowance for the mitigating circumstances. The learned Magistrate did note the plea of guilty. However he also mentioned that the appellant had two previous convictions. These were for offences of a different nature committed some time previously. They should not have been taken into account against the appellant on the present charge.

This regard for the respondent's previous convictions and the failure to properly take the mitigating factors into account has resulted in a sentence that is excessive. Some moderate reduction should be made. A sentence of 18 months imprisonment would give proper allowance for the mitigating circumstances but still reflect the gravity of the offending and the need for deterrence.

The appeal is allowed. The sentence of 2 years imprisonment imposed in the Magistrates Court is quashed and a sentence of 18 months imprisonment is substituted.

(Appeal against sentence allowed; sentence varied.)