

IN THE SUPREME COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA

Appellate Jurisdiction

Criminal Appeal No. 34 of 1980

Between:

RAJENDRA DEO
s/o Bach Raj

Appellant

- and -

R E G I N A

Respondent

Messrs. Sahu Khan & Sahu Khan
for the Appellant
Director of Public Prosecutions
for the Respondent

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 Liaqat 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

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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.

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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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."

However I have been referred by counsel for the appellant to the case of Attartou v Browne (1944) 1KB 122 where particulars of the offence in a summons were defective. Although Section 1 of Jervis' Act (Administration of Justice (No.2) Act 1948 provided that "no objection should be taken to any information, complaint or summons or any alleged defect therein in substance or in form" it was held that this 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.

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

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"the owner" of a newly constructed building and the conviction was quashed. Though no argument was raised in that 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.

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

(G.O.L. Dyke)
JUDGE

LAUTOKA,
29th July, 1980