*Privy Council Appeal No. 10 of 1969*

**The Attorney General for Fiji** – – – – – *Appellant*

*v.*

**Hari Pratap S/O Ram Kissun** – – – – – *Respondent*

FROM

**THE FIJI COURT OF APPEAL**

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# JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED 25TH JUNE 1970

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*Present at the Hearing:*

LORD MORRIS OF BORTH-Y-GEST
LORD GUEST
LORD DIPLOCK

[*Delivered by* LORD DIPLOCK]

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The respondent, Hari Pratap, was tried in the Magistrate's Court at Labasa in Fiji upon a charge which contained four separate counts of obtaining various sums of money upon forged cheques. Each count was a joint one against him and another defendant. At the beginning of the hearing he elected to be tried summarily and pleaded "Not guilty" to each of the four counts seriatim. As the prosecution's case proceeded it became apparent from questions put to the witnesses by the magistrate himself that although there was direct evidence of Pratap's participation in the forgeries of the cheques there was no direct evidence that the monies paid out on them had been actually received by him. This would be a matter of inference only although, having regard to the provisions of section 21 of the Penal Code then in force which enabled accessories to be charged as principal offenders, the inference would be very strong. The prosecution, however, thought it prudent to apply to the magistrate for leave to add to the charge four new counts as alternatives to the original counts. Each of these charged Pratap and his co-defendant with the actual forgery of the cheque referred to in the corresponding original count. The magistrate temporarily overlooked the need to call upon the accused to plead to the altered charge; but this omission was soon corrected and Pratap was called upon to elect whether or not he would be tried summarily upon the new alternative counts also. He and his co-defendant elected to be tried summarily and thereupon he was called upon to plead to the new alternative counts. He pleaded "Not guilty" to all of them. He was not called upon to plead again to the original counts to which he had already pleaded "Not guilty" at the outset. The trial then proceeded. The evidence which had been given in the interval between the allowance of the amendment and the defendant's pleas to the new alternative counts was repeated and it is not contended in this appeal that anything turns upon the delay between the allowance of the amendment and the taking of the pleas. At the conclusion of the trial

the magistrate found Pratap guilty upon each of the original counts of obtaining money upon forged cheques. In view of the fact that they were alternative, he refrained from making any finding on the counts which had been added to the charge by amendment.

On his appeal to the Supreme Court of Fiji which was heard by the Chief Justice many points were taken and the respondent was successful in having his conviction upon one of the counts set aside upon the ground that it had not been proved satisfactorily that the cheque to which that count related had been forged. The only point with which their Lordships are concerned on this appeal relates to the other three counts upon which the convictions were upheld by the Supreme Court. It was contended for the respondent that under section 204 of the Criminal Procedure Code, the magistrate upon granting leave to amend the charge by adding four new alternative counts was required to call upon Pratap to plead not only to the new counts added by the amendment but also to the original counts to which he had already pleaded at the beginning of the trial. His omission to do this, it was contended, made the trial a nullity. The Chief Justice rejected this contention and held that the requirements of the section were satisfied by calling upon a defendant to plead to the new counts which had been added by amendment and that there was no need to call upon him to plead again to the original counts. He accordingly upheld the convictions upon the three original counts.

On appeal from his decision to the Fiji Court of Appeal, that court unanimously took the contrary view. They held that the omission to call upon Pratap to plead again to the original counts made the trial a nullity and they accordingly quashed the three convictions. The only question for their Lordships in the instant appeal to Her Majesty in Council is whether they were right in doing so.

The answer to that question depends upon the true construction of section 204 (1) of the Criminal Procedure Code which is in the following terms:

> "204. (1) Where, at any stage of the trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:
>
> Provided that:
>
> (*a*) where a charge is altered as aforesaid, the court shall thereupon call upon the accused person to plead to the altered charge;
>
> (*b*) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his barrister and solicitor and, in such last-mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination."

In particular the answer depends upon the meaning of the expression "the altered charge" at the end of the first proviso.

The expression "charge" is not the subject of express definition in the Code. In section 79 it is used to describe the formal document signed by a magistrate containing a statement of the offence with which the accused is charged. Its issue is a condition precedent both to the trial of an accused person before a magistrate's court and to a preliminary inquiry before a magistrate's court with a view to the committal of an accused person for trial before the Supreme Court. In the latter case the "charge" is superseded by an "information", signed by the Attorney-General, for the purposes of the trial before the Supreme Court itself.

Although section 79 refers to a charge as containing a statement of an "offence" in the singular, it is evident from sections 120 to 123 which contain provisions applicable to both charges and informations, that a "charge" as well as an "information" may state more than one offence and that, if it does, the description of each offence must be set out in a separate numbered paragraph of the "charge" which is called a "count". In these sections the expression "charge" is used to mean the document which contains descriptions of all the offences, whether one or more with which a person is accused and "count" is used to mean the description of a single offence contained in a charge.

The expression "count" appears again in the Code in three sections only. Two of these (sections 257 and 259) relate to trials before the Supreme Court. They deal respectively with separate trials of counts in an information containing more than one count and with the mode of trial upon information containing a count of an exceptional kind charging an accused person with having been previously convicted of an offence. Section 198 applies the provisions of section 259, *mutatis mutandis* to trials before Magistrates Courts.

Directly germane to the present appeal, however, is the use of the expression "charge" in Part VI of the Code itself which relates to Procedure in Trials before Magistrates Courts. Section 197 deals with pleas of guilty and not guilty. Sub-section (1) provides: "The substance of the charge . . . shall be stated to the accused person by the court and he shall be asked whether he admits or denies the truth of the charge". Sub-sections (2) and (3) respectively provide that if he "admits the truth of the charge . . . the court shall convict him . . . ." and that if he "does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided".

It is not disputed that if the accused is being tried for more than one offence in the same trial, *i.e.*, if he is being tried upon more than one "count", he is required to plead separately to each count and the court is bound to afford him an opportunity of doing so. He may plead guilty to some counts and non-guilty to others: and if he pleads "guilty" to some the case is heard under the subsequent sections, viz., sections 198 to 207 upon those counts only to which he has pleaded "not guilty". It is therefore evident that in the context of section 197 the expression "charge" is used as meaning any count contained in the document signed by the magistrate under section 79 and not that document itself unless it contains one count only.

The provisions of section 197 in their Lordships' view also dispose of the only reason suggested by the Court of Appeal as to any useful purpose which could be served by giving the accused an opportunity to plead again to counts to which he had already pleaded and in which no change had been made. They accepted that the accused could withdraw a previous plea of "not guilty" at any time but considered that the proviso to section 204 (1) was intended, *inter alia*, to give him an opportunity to withdraw a previous plea of "guilty" to counts to which no change had been made. But this overlooks the fact that those are counts on which he will have already been convicted under section 197 (2) and form no part of the counts upon which he is tried under sections 198 to 207.

No other reason has been suggested why the accused should be required to plead again to counts left unchanged by alterations in the charge, nor is it suggested that any similar requirement is imposed by the corresponding section, section 257, dealing with the amendment of informations in more serious cases which are tried before the Supreme Court. If the words of section 204 (1) are susceptible of a construction which avoids so pointless a requirement in the case of summary trial their Lordships would be strongly inclined to adopt it.

In section 204 (1) the word " charge " is used four times in the substantive part of the sub-section and twice more in the first proviso. The Chief Justice in the Supreme Court and the Court of Appeal itself recognised that it is not used in the same meaning on each occasion on which it appears in the substantive part of the sub-section and that, where it is used for the fourth time in the context of " a new charge " it can only mean a " count " however equivocal its meaning may be on the other occasions.

In attempting a verbal analysis of the sub-section in its application to cases where the document drawn up by the magistrate contained statements of more than one offence it is convenient to call that document itself " the formal charge " and any statement of a distinct offence contained in it " a count ".

To deal first with the substantive part of the sub-section: on the first and second occasions on which the expression " charge " appears it is used to denote the written matter which is defective and to which " alterations " are to be made; on the third and fourth occasions on which it appears it forms part of the description of alterations which may be made to that defective written matter in order to cure the defects. The fourth occasion on which it is used provides the initial clue to the meanings to be attributed to it on each of the three other occasions. As already pointed out, in the context of " a new charge " to be added to the defective matter it can only mean " count ", since it cannot form more than part of a " formal charge " which would result from its addition to the count or counts contained in the previously existing defective written matter. For the converse reason it is possible to say that the written material denoted by the expression " charge " on the first and second occasions on which it is used must be the " formal charge " and not merely one of the " counts " contained in it, since the mere addition of a new count, though it would be an " alteration " of the " formal charge " would not be an " alteration " of any individual count contained in the " formal charge ". One thus reaches the conclusion, reached also by the Chief Justice and by the Court of Appeal, that on the first and second occasions on which it is used in the operative part of the sub-section " charge " means " formal charge " but on the fourth occasion means " count ". On the third occasion on which it appears it is in the context of " amendment to the charge " descriptive of a kind of alteration of the " formal charge " which is an alternative to, and not inclusive of, the substitution or addition of a new count. But any addition of a new count would itself always be an " amendment of the charge ", if in this context " the charge " meant a " formal charge ". This points to the conclusion that the meaning of the expression " charge " on the third as well as on the fourth occasion on which it is used is a " count ".

The dual sense in which the draftsman has used the word " charge " in the substantive part of the sub-section shows that he has ignored the ordinary rules of legal draftsmanship and, in their Lordships' view, negatives any presumption that on both the occasions on which it is used again in the first proviso to the sub-section it is used in one and the same sense only. It appears first in the introductory part of the proviso which refers to the circumstances already described in the substantive part of the sub-section in which the mandatory part of the proviso which follows comes into operation. In this context, viz. " Where a charge is altered as aforesaid " the word " charge " denotes the defective written material to which alterations were made under the substantive part of the sub-section and the appropriate meaning to be attributed to it is the " formal charge ". The words " as aforesaid " import the description of the alterations which may be made to the

formal charge under the substantive part of the sub-section and the whole introductory phrase may be expanded to read:

> " Where the formal charge has been altered by the amendment of any count contained in it or by the substitution of a new count for any count contained in it or by the addition of any new count."

Where " charge " appears again, in the mandatory part of the proviso, it is qualified by the adjectival participle " altered " and is used in the context of something to which an accused person is required to plead. In such a context " charge ", as in sections 197 and 199 is *prima facie* to be understood as meaning " count ", and " the altered charge " as meaning any count to which an alteration authorised by the substantive part of the sub-section has been made, *i.e.*, any count which has been amended or substituted or added to the original defective formal charge. So construed the proviso reflects the same shift in meaning of the word " charge " from " formal charge " where it is used to denote the defective written material to " count " where it refers to alterations made in the defective written material to cure the defects, as occurs in the substantive part of the sub-section.

This construction of the words " the altered charge " gives to the mandatory part of the proviso a meaning consonant with the requirements of justice and of common sense and gives to the accused upon the alteration of the " formal charge " in a summary trial rights similar to those of an accused upon the alteration of the information in a trial before the Supreme Court. Though it departs from the ordinary canon of construction that *prima facie* an expression is used in the same sense wherever it appears in a statute and particularly where it is used more than once in the same sentence, this canon is of no assistance in ascertaining the meaning intended by the draftsman if it is apparent that he has paid no attention to it himself. The meaning which their Lordships, in agreement with the Chief Justice, attach to the expression " the altered charge " in the proviso to section 204 (1) of the Code of Criminal Procedure is consistent with the shifting meanings in which the draftsman has used the word " charge " in the substantive part of the sub-section and is in their view to be preferred to that adopted by the Court of Appeal.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed. The appellant has undertaken to pay the respondent's costs of the appeal which must be taxed if not agreed.

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**In the Privy Council**

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**THE ATTORNEY GENERAL FOR FIJI**

*v.*

**HARI PRATAP S/O RAM KISSUN**

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DELIVERED BY

LORD DIPLOCK

Printed by HER MAJESTY'S STATIONERY OFFICE
1970