

1940

Present : Howard C.J.

MEERA NATCHIYA v. MARIKAR.

638—*M. C. Puttalam, 26,736.*

Charge—Omission to state particulars—Power of Court to amend—Reference in charge to offence—Sufficient notice—Powers of Supreme Court in appeal—Criminal Procedure Code, ss. 167 (2), 172, 347 (Cap. 16).

Where a charge does not contain proper particulars a Magistrate has the power under section 172 of the Criminal Procedure Code to amend the charge so as to make it conform to the evidence led in the case.

In view of the provisions of section 167 (2) of the Criminal Procedure Code a reference in the charge to the name of the offence as specified in the Penal Code is sufficient to give an accused notice of the matter with which he is charged.

Where a Magistrate has convicted an accused person under a wrong section, the Supreme Court in appeal has power under section 347 of the Criminal Procedure Code to convict him of the right offence.

A PPEAL from a conviction by the Magistrate of Puttalam.

H. V. Perera, K.C. (with him *C. X. Martyn*), for the accused, appellant.

L. A. Rajapakse, for the complainant, respondent.

Cur. adv. vult.

February 13, 1940. HOWARD C.J.—

This is an appeal by the accused from his conviction and sentence of six weeks' rigorous imprisonment by the Magistrate of Puttalam on September 6, 1939, on a charge of using criminal force otherwise than on grave and sudden provocation under section 343 of the Penal Code. The appellant was originally charged with (1) criminal trespass, (2), voluntarily causing hurt under section 314 of the Penal Code, (3) insulting the complainant. The learned Magistrate after reviewing the evidence acquitted the appellant of the first and third charges. The second charge was framed as follows:—

“At the same time and place aforesaid did voluntarily cause hurt to the complainant Sego Meera Natchiya by striking her with a wooden sandal”.

The Magistrate has found that the act of striking the complainant with a wooden sandal has not been established but on the other hand there is adequate evidence to prove that the appellant assaulted the complainant by kicking and with hands and a stick. The Magistrate holds that owing to the omission to mention explicitly in the summons the assault by kicking and with hands and a stick, he is unable to convict the appellant on the charge under section 314. He considers, however, that there is sufficient evidence to maintain a charge of using criminal force otherwise than on grave and sudden provocation and in these circumstances convicts the appellant under section 343.

The judgment of the learned Magistrate who is a civil servant and not a professional lawyer reveals great confusion of thought. If the evidence with regard to the kicking and assault by hands and a stick was to be accepted, an offence under section 314 had been committed. If the Magistrate considered that a conviction under section 314 was not

possible by reason of the failure to give the proper particulars in the charge, the same objection could be taken to a conviction under section 343. The particulars in the charge could have been made to fit in into the evidence, if the Magistrate had amended the charge under the powers vested in him by section 172 of the Criminal Procedure Code. In view, however, of the provisions of section 167 (2) of the Criminal Procedure Code, I think a reference in the charge to the name of the offence as specified in the Code was sufficient to give the appellant notice of the matter with which he was charged. In the circumstances of this case, moreover, the omission to state the proper particulars was not material inasmuch as the accused could not be said to have been misled by such omission. In these circumstances the Magistrate should have convicted the appellant under section 314 and I, therefore, propose to employ the powers vested in the Supreme Court under section 347 of the Criminal Procedure Code so as to convict the accused of the right offence. It is clear from the commentary on the corresponding section of the Indian Criminal Procedure Code at pp. 471-472 of Woodroffe's *Criminal Procedure in British India* that the facts of this case warrant the employment of such powers. In view of this decision it becomes unnecessary for me to consider whether the Magistrate had under the Criminal Procedure Code any power to convict the appellant of an offence under section 343 of the Penal Code.

Counsel for the appellant has in addition to various submissions with regard to the finding contended that in the circumstances of this case which was in the nature of a family quarrel a sentence of six weeks' rigorous imprisonment was too severe a penalty. Counsel for the complainant has not maintained that this assault merited a term of imprisonment. I am of opinion that justice can be met without sending the appellant to prison.

The conviction of the appellant under section 343 of the Penal Code and the sentence of six weeks' rigorous imprisonment are set aside and I convict him under section 314 and sentence him to a fine of Rs. 50 or one month's rigorous imprisonment in default.

Conviction varied.

