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[FULL BENCH.]

Present: Ennis, De Sampayo, and Schneider JJ.

EBERT *v.* PERERA.

166—P. C. Colombo, 40,782.

Criminal Procedure Code, ss. 187 and 425—Charge read from report—Is irregularity fatal?—Appearance by accused after summons or warrant was issued, but before service—Charge read from summons.

Where proceedings were instituted under section 148 (*b*) of the Criminal Procedure Code, 1898, on a written report to the Magistrate that the accused had committed an offence punishable with more than three months' imprisonment, and the accused appeared without a summons or warrant being issued, and the Magistrate endorsed on the report "charge read from the report."

Held, that there was an omission to frame a charge, and that the irregularity was not covered by section 425.

DE SAMPAYO J.—An omission in the charge—an omission, for instance, of the necessary particulars in the charge—may be regarded as an irregularity which may be cured by section 425 if no prejudice has been thereby occasioned to the accused. But the entire absence of a charge, when a Magistrate ought to have framed one, is not a mere irregularity which may be overlooked under section 425, but is a violation of the essential principle governing criminal procedure and vitiates a conviction.

ENNIS J.—An appearance in Court by an accused person to show cause against a complaint when a summons or warrant has been issued is an appearance on a summons or warrant, even although the summons has not been served or the warrant executed; and the statement in the summons or warrant could, in such a case, be deemed to be the charge.

THIS case reserved for the consideration of three Judges by Schneider J. by the following order :—

In this case the proceedings in the Police Court were instituted by a printed report made by an Inspector of Excise charging the accused Appu with having sold an excisable article without a license in breach of section 17 of the Excise Ordinance, No. 8 of 1912, an

offence punishable under section 43 (*b*) of this Ordinance. On this report the Magistrate had endorsed: " Charge read from report. He states he is not guilty."

It was stated, and the statement is borne out by the record, that the accused was not brought before the Court on a summons or warrant. Mr. J. S. Jayawardene argued on appeal on behalf of the accused that the omission to frame a charge as required by the provisions of section 187 of the Criminal Procedure Code was an irregularity fatal to the conviction, apart from any question of prejudice to the accused, as the offence disclosed was punishable with more than three months' imprisonment.

As a conflict of decisions has arisen in consequence of the judgment in the case of *Coore v. James Appu*,[1] and as the point raised is of material practicable importance, let this case be submitted to the Honourable the Chief Justice for his order.[2]

Soertsz (with him *J. S. Jayawardene*), for appellant.—Omission to frame the charge is fatal to the conviction. Explaining the charge from the report is not sufficient compliance with section 187 of the Criminal Procedure Code, when the offence is punishable with more than three months or Rs. 50. All the authorities are collected and examined by the Chief Justice in *Coore v. James Appu* (*supra*).

Section 535 of the Indian Criminal Procedure Code provides that a conviction is not to be deemed invalid on the ground that no charge was framed, and section 537 cures irregularities in the charge itself. In the old Ceylon Criminal Procedure Code, No. 3 of 1883, sections 493 and 494, respectively, provided for these irregularities. But in the Criminal Procedure Code, No. 15 of 1898, the old section 493 was left out, and section 494 is retained without any alteration as section 425. By omitting section 493 the Legislature intended to enact that failure to frame a charge was fatal to the conviction.

[DE SAMPAYO J.—Is not section 425 sufficient to cover defects in the charge as well as the omission of a charge ?]

The section cures only error, omission, or irregularity in the charge as the express words indicate, but was never meant to cure the omission of a charge. Section 187 makes it imperative on the Magistrate to frame a charge against the accused, except (*a*) when he appears on a warrant or summons, and (*b*) when the offence is punishable with less than three months' imprisonment or a fine of Rs. 50. These exceptions should be strictly construed, as otherwise the accused may be seriously prejudiced.

[DE SAMPAYO J.—What is the meaning of the words " fatal to the conviction " ?]

[1] (*1922*) *22 N. L. R. 206.* [2] *Section 54A, the Courts Ordinance, 1889.*

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The conviction cannot stand. It must be set aside, and may be sent back. Under section 187 (1) and the proviso the authorities are all one way. When the accused surrenders before the execution of the warrant, absence of a charge was held to be fatal in the following cases: *Shefford v. Arumugam*,[1] *James Appu v. Egonis Appu*,[2] *Inspector of Police v. Elaris*,[3] *Sanders v. Vally Tampan*,[4] *and Silva v. Peiris*.[5]

In *Hendrick v. Pelis Appu*[6] Shaw J. held that there was no irregularity when the charge is actually read from the warrant, though it was not executed. This case was followed by Schneider J. in *Assen Singho v. Pereira*[7] and *Mudiyanse v. Appuhamy et al.*[8]

Charge explained from the report of the peace officer was held to be fatal to the conviction apart from any question of prejudice to the accused in *Goonewardene v. Babun*,[9] *Deonis v. Charles*,[10] *Dunuville v. Sinno*,[11] and *de Silva v. Davit Appuhamy*.[12] Cited also *Subramania Aiyar v. King Emperor*.[13]

Jansz, C.C., for respondent.—Section 171 of the Criminal Procedure Code refers to errors in the charge. Therefore errors referred to in section 425 must be construed to have a wider meaning, *i.e.*, it cures all irregularities in the proceedings relating to the charge.

[ENNIS J.—The words in section 425 are "subject to the provisions hereinbefore contained."]

These words refer to the provisions of section 168. The Police Magistrate by adopting the report *in toto* without any alteration has framed the charge in the exact terms of the report. His copying it over again and reading the same will not make any difference. The proviso applies only to defective reports.

Cur. adv. vult.

July 7, 1922. ENNIS J.—

This is a reference on a point of law. The case was instituted under section 148 (*b*) of the Criminal Procedure Code on a written report to the Magistrate by an Excise Inspector that the accused had sold an excisable article without a license in breach of section 17 of the Excise Ordinance, No. 8 of 1912.

The accused appeared before the Court without a summons or warrant having been issued.

The learned Magistrate endorsed on the report: "Charge read from report," and no formal charge was made.

[1] *(1912) 1 Bal. N. C. 1.*
[2] *(1916) 3 C. W. R. 363.*
[3] *(1916) 6 Bal. N. C. 27.*
[4] *(1914) 1 Cr. App. Rep. 55.*
[5] *(1919) 6 C. W. R. 279.*
[6] *(1915) 1 C. W. R. 194.*
[7] *(1919) 6 C. W. R. 278.*
[8] *(1920) 22 N. L. R. 169.*
[9] *(1908) 1 S. C. D. 84.*
[10] *(1915) 4 Bal. N. C. 53.*
[11] *1915) 3 Bal. N. C. 50.*
[12] *(1919) 7 C. W. R. 19.*
[13] *(1901) 25 Mad. 61.*

The offence disclosed in the report was one punishable with more than three months' imprisonment.

The questions for consideration are whether there has been an omission to frame a charge, and, if so, whether it is an irregularity covered by section 425 of the Criminal Procedure Code ?

The cases on the point were summed up in the case of *Coore v. James Appu* (*supra*), but the point was not decided, as it was not necessary to decide it in the circumstances of that case.

Section 187 of the Criminal Procedure Code enacts (1) that where the accused is brought before the Court otherwise than on a summons or a warrant, the Magistrate shall frame a charge ; and (2) that where he appears on a summons or warrant, the statement of the particulars of the offence contained in the summons or warrant shall be deemed to be the charge. It then enacts that the Magistrate shall read such charge or statement to the accused. Finally, there is a proviso that in cases instituted on a written report under section 148 (1) (*b*) which discloses an offence punishable with not more than three months' imprisonment or a fine of Rs. 50, it shall be lawful for the Magistrate to read such report as a charge to the accused. It is to be observed that in the case of a " charge " under sub-section (1), and in the case of a " statement " under sub-section (2), the charge and statement are each formulated by the Magistrate, and such formulation takes place after sworn evidence has been taken, which discloses a *primâ facie* offence, except where the case is instituted on a report under section 148 (1) (*b*), when, by section 149 (2), it is optional to examine the complainant before issuing process.

In the present case the report of the Inspector of Excise is in the form of a charge. It is not a full account of what happened, leaving it to the Magistrate to formulate the offence, which the facts, in his opinion, disclosed ; it is a bare statement that the accused did at a certain time and place sell arrack without a license in breach of section 17 of the Ordinance No. 8 of 1912. It was argued that the Magistrate had adopted it as his charge, and had so complied with the imperative provision of section 187 (1) to frame a charge. In my opinion the existence and terms of the proviso to section 187 render this argument untenable. The proviso says that the Magistrate may " read the report as a charge," and may do so only when the offence disclosed is punishable with less than three months' imprisonment or a fine of Rs. 50. If " reading the report as a charge " were the same as " framing a charge," it could be done in every case, and the proviso would be unnecessary. The proviso can, in the circumstances, only be regarded as a limitation of the powers of the Magistrate in adopting the work of another. I therefore come to the conclusion that in this case no charge has been framed.

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The terms of section 425 so far as necessary for consideration in this case are:—

> "Subject to the provision hereinbefore contained no judgment . . . . shall be reversed or altered on appeal . . . . on account of any error, omission, or irregularity in the . . . . charge."

An omission of the charge altogether is not covered by this section, which relates to omissions "in" the charge. Moreover, the section is expressly made subject to the earlier provisions of the Code, among which is the provision in the proviso to section 187 allowing a report to be read as a charge within the limits set out by the proviso.

I would add that the formulation of the charge or statement in a summons or warrant on a review of the facts by an independent person is, in my opinion, a fundamental principle in our criminal procedure as now laid down in the Code of 1898, and the proviso in section 187 was necessary to make the slightest departure from it lawful.

I would also add that the case of *Hendrick v. Pelis Appu* (*supra*) was apparently one falling within sub-section (2) of section 187. An appearance in Court to show cause against a complaint when a summons or warrant has been issued is, in my opinion, an appearance on a summons or warrant, even although the summons has not been served or the warrant executed, the issue of the summons or warrant in such a case being the occasion of the appearance. If this be so, the statement in the summons or warrant could, under sub-section (2), be deemed the charge.

In the present case the omission to frame a charge is, in my opinion, fatal to the conviction. I would accordingly quash the conviction, and send the case back for further proceedings.

DE SAMPAYO J.—

I agree with the judgment of my brother Ennis on the point referred to this Bench for decision, and I wish only to add a few words.

What is the reason for the distinction made in section 187 of the Criminal Procedure Code between a summons and warrant on the one hand and a report under section 148 (1) (*b*) on the other? The reason does not appear to be that in the one case the process is served on the accused, who, therefore, has an opportunity beforehand of informing himself accurately of the nature of the charge, whereas he has no knowledge, before he comes to Court, of what is contained in the report, for a warrant is not served, and the accused does not ordinarily see it. The distinction is, I think, based on the fact that it is the Magistrate himself who states the charge in the summons or warrant, and there is, therefore, no practical object in requiring the Magistrate to record the charge over again. This explains

and justifies the decision in *Hendrick v. Pelis* (*supra*), though in that case the accused came to Court before the warrant was executed. The same strictness is thought not to be necessary in the case of a small offence punishable only with three months' imprisonment or a fine of Rs. 50, and so the Magistrate is allowed in such a case, by the proviso to section 187, to read the report made to him under section 148 (1) (*b*) as a charge to the accused, any want of accuracy or particularity in the report being remedied by the Magistrate amending it if necessary. The fundamental principle is that there should be a definite charge which the law imposes on the Magistrate the duty of framing and, in the exceptional case, of adopting from the report.

The other question is whether the absence of a charge, where one is required, is covered by the provisions of section 425 of the Criminal Procedure Code. The old Code of 1883 contained a special section, namely, section 493, expressly providing that the absence of a charge shall be no ground for reversing or interfering with a conviction, unless there was a miscarriage of justice. That section is not repeated in the present Code of 1898. All that we have now is section 425 corresponding to section 494 of the old Code. In *Coore v. James Appu* (*supra*), Bertram C.J. broached the question whether the old section 493 was not dropped, because section 425 was sufficient to cover the case of omission of the charge. But that cannot be, because what section 425 provides is not for the case of omission of the charge, but of omission in the charge. That is to say, an omission, for instance, of the necessary particulars in the charge may be regarded as an irregularity which may be cured by the application of section 425 if no prejudice has been thereby occasioned to the accused. But the entire absence of a charge, where the Magistrate ought to have framed one, is not a mere irregularity which may be overlooked under section 425, but is a violation of the essential principle generally governing criminal procedure and vitiates a conviction.

SCHNEIDER J.—

I have had the advantage of reading the judgment of my brother Ennis before I could make even a commencement with my judgment. I am unable to add anything to what he says. I agree with his reasoning and conclusions and the order he directs to be made in regard to the appeal.

Set aside.