[IN REVISION]

*Present:* Lyall Grant J.

REX *v.* AMERESEKERE

*D. C. (Crim.) Colombo, 7,771*

*Indictment—Amendment of particulars of offence—Motion for enhancement of sentence—Regularity of conviction—Criminal Procedure Code, s. 171.*

Where in a trial before the District Court the indictment was, before the conviction, altered with respect to the particulars of the offence with which the accused was charged,—

*Held*, that the conviction was good, unless the accused was misled in his defence by the error in the particulars of the offence charged.

On a motion for the enhancement of a sentence the accused has the right to show cause against the conviction.

APPLICATION to revise a conviction by the District Judge of Colombo.

*E. W. Jayewardene, K.C.* (with *R. L. Pereira*), in support.

*J. E. M. Obeyesekere, C.C.*, for the Crown.

February 10, 1927. LYALL GRANT J.—

This is an application to the Supreme Court to exercise its powers of revision in respect of a case which was tried before the District Judge of Colombo. The person on whose behalf the application is made was convicted in the District Court of Colombo on January 22, 1926, of the offence of cheating punishable under section 403 of the Ceylon Penal Code.

I am asked in the first place to issue notice of the application on the Attorney-General in order that he may appear and argue any points which may arise. The powers of the Supreme Court in revision are of an extensive and peculiar nature. No party has a right to be heard either personally or by pleader before the Supreme Court in exercising its powers of revision. The Court may, however, if it so desires, hear any party, and if I were of opinion that substantial grounds had been put forward to justify the Court in altering the finding or sentence, I should probably think it advisable that the prosecution should be given an opportunity of appearing.

1927.

LYALL GRANT J.

*Rex v. Ameresekere*

The reason advanced to induce this Court to exercise its powers of revision is that the facts set forth in the indictment were not proved, but that the accused was convicted on proof of facts which materially differed from those set out in the indictment.

From the judgment of the learned District Judge it appears that after the evidence had been recorded at the trial Counsel for the defence took the point that any offence that might have been committed was not either of the offences charged in the indictment.

The District Judge agreed that the indictment was defective, but he was of opinion that no prejudice would be occasioned to the accused by his conviction under the indictment as it stood.

Whether the learned District Judge was right in so deciding is a question to which I shall refer presently, but in the meantime there are one or two preliminary points on which I wish to offer some observations.

If the accused considered that he was improperly convicted, he had a right of appeal. But no appeal was entered. He now explains that he wished to appeal but that he was advised not to do so in view of the fact that the sentence was comparatively light. The accused was a man of good education and position, convicted of a serious offence. He was advised by skilled Counsel, who were quite aware of the possibility of raising the objection which he now seeks to take, and who had already raised it at the trial. It is clear that he acquiesced in the decision of the District Court. Some time later, however, an application was made by the Attorney-General to the Supreme Court for a revision of the proceedings with a view to enhancing the sentence. The case came up before my brother Dalton, and the accused was represented. These proceedings gave him an opportunity to bring before the notice of the Court any inconsistency between the indictment and the facts proved. The result of that application was that the sentence of imprisonment was enhanced.

It was after this enhancement of sentence that the present application for further revision was made. The application was made before my brother Dalton, who thought it better that it should go before another Judge, but he then stated that on the previous application he clearly understood Counsel who appeared for the accused before him to state that he could not question the propriety of the conviction either on the facts or on the law.

It was suggested that on a motion for enhancement of sentence it is not open to the accused to raise the question of the legality of the sentence, and reference was made to *The Emperor v. Mangal Naran.*[1] I do not think that this case supports the contention. The judgment shows that in India the accused has a right to show cause against his conviction on a motion for enhancement of sentence even where an appeal on the merits has already been dismissed.

[1] *I. L. R. 49 Bom. 450.*

It was suggested that this power was only given to the Indian Courts by a recent addition to the Indian Criminal Procedure Code. I am not satisfied that this is the case, nor am I satisfied that prior to the enactment of the addition in question the Indian Criminal Procedure Code was identical with ours. I can find nothing in our Code which debars the Court when exercising its powers of revision from considering anything that may be urged against a conviction.

I was also referred to the case of *The Emperor v. Bankatram Lachiram*,[1] where at page 566 Jenkins C.J. deprecated an interpretation of the law which would tend to limit the appellate or revisionary powers of the Court. With this dictum, if I may respectfully say so, I entirely agree.

Its only application to the present case, however, would be to counteract any suggestion that the Court is limited in exercising its discretion, and so far as I am aware no such suggestion has been made.

In the circumstances set out above the Court will be very slow to reopen the question of the correctness of the original decision, unless it be shown that an irregularity has occurred which has seriously prejudiced the accused.

I now proceed to inquire into the alleged irregularity. The charges set forth in the indictment are—

(1) That on or about May 14, 1925, at Colombo he did deceive the Government Agent, Western Province, by falsely representing to him that the petitioner was the owner of the land called "Tekkewatte" situated at Hanwella, and thereby dishonestly induced the said Government Agent to purchase the said land and to deliver to the petitioner a sum of Rs. 4,102.49, and that thereby he committed the offence of cheating, punishable under section 403 of the Ceylon Penal Code ; and

(2) That at the time and place aforesaid the petitioner did deceive the said Government Agent, Western Province, by falsely representing to him that the petitioner was the person interested in the said land "Tekkewatte," and thereby dishonestly induced the said Government Agent to acquire the said land under the Land Acquisition Ordinance of 1876 and to deliver to the petitioner a sum of Rs. 4,102.49, and that he thereby committed the offence of cheating, punishable under section 403 of the Ceylon Penal Code.

After the evidence had been led the District Judge came to the conclusion that the accused had not induced the Government Agent either to purchase the land or to acquire it under the Land Acquisition Ordinance.

[1] *I. L. R. 28 Bom. 533.*

1927.

LYALL GRANT J.

*Rex v. Ameresekere*

The District Judge then suggested to Crown Counsel that the indictment should be amended by the omission in count one of the words " to purchase the land and," and in count two by the omission of the words " to acquire the said land under the Land Acquisition Ordinance of 1876 and." Crown Counsel, however, did not agree to the proposed amendment, and Counsel for the defence stated that he would object to any amendment in the indictment.

The Distict Judge found as a fact that the accused had not induced the Government Agent to purchase the land or to acquire it under the Land Acquisition Ordinance, but he convicted the accused " in that he did on or about May 14, 1925, at Colombo deceive the Government Agent by falsely representing to him that he was the owner of the land in question, and that he thereby dishonestly induced the said Government Agent to deliver to him the sum of Rs. 4,102.49 and that he thereby committed the offence of cheating, punishable under section 403 of the Ceylon Penal Code ;" and he found the accused guilty under the second count of the indictment with a corresponding amendment.

On the view of the evidence taken by the District Judge (from which I see no reason to differ), it is clear that an error was made in stating the particulars required to be stated in the charge.

Section 171 of the Criminal Procedure Code provides that " no error in stating either the offence or the particulars required to be stated in the charge . . . . shall be regarded at any stage of the case as material, unless the accused was misled by such error . . . . "

In the present case there was no error in stating the offence. The accused was charged with cheating, and the only question is whether the accused was misled by the error in stating the particulars. Nothing has been put forward to show, or even to suggest, that the accused was misled.

On the question of an accused person being prejudiced by defects in the charge made against him Counsel quoted several cases. The first was the case of *The Empress v. Vaimbilee*.[1] The question in that case was whether a prisoner who pleaded guilty to a charge of murder clearly understood the meaning of the word " murder " as used in the Indian Penal Code. The Court followed the principle that before a plea of guilty is accepted a Judge should be satisfied that the prisoner clearly understands the nature of the plea.

In *Coore v. James Appu*,[2] it was held by Bertram C.J. that where a charge is contained in a warrant or in a report, failure to have a separate written charge may amount to nothing more than a mere irregularity, and " it is the duty of the Appeal Court to inquire whether in any particular case the irregularity has led to a failure

[1] *I. L. R. 5 Cal. 826.* [2] *22 N. L. R. 206.*

of justice; and anything which is proved prejudicial to the interests of the accused in the trial should be considered to have led to a failure of justice."

Wood Renton J. in *Gunewardene v. Pakeer Lebbe* [1] held that a formal charge was necessary in all cases in which the Criminal Procedure Code requires it.

The only bearing these cases have on the present application is that they are examples of the principle that the accused must not be prejudiced either by the total lack of a formal charge or by an error or omission in the charge.

If one were of opinion that the accused had been prejudiced in any way by the fact that he was proved to have committed the offence of cheating in a rather different way from that set forth in the indictment, it would be necessary to order a new trial on an amended indictment.

The facts proved have not been seriously disputed, and no evidence was led for the defence. There is nothing to suggest that if the accused were retried on an amended indictment he would have any defence to offer.

I think the District Judge acted correctly in treating the error in the particulars as immaterial.

No sufficient reason has been adduced to convince me that the Court should institute any proceedings by way of revision in this case, and the application is accordingly refused.

*Application refused.*

[1] *15 N. L. R. 183.*