1930

Present : **Lyall Grant J.**

DE SARAM *v.* WAAS.

P. C. Chilaw, 29,867.

Revision—Application to re-open case—Failure of accused to put forward real defence—Judgment per incuriam.

An accused person is not entitled to have a conviction revised on the ground that he had neglected to bring forward a defence which would have been a complete answer to the charge.

APPLICATION to revise a conviction affirmed by the Supreme Court.

R. L. Pereira, K.C. (with him *Gratiaen*), for appellant.

September 4, 1930. LYALL GRANT J.—

This is an application made in revision that I should reverse a judgment which I made a month ago. On that date I dismissed an appeal from a conviction for voluntarily causing hurt. The hurt charged was committed by an assault on a young boy with a cane. The charge gave the date of the offence as January 7, 1930, but the complainant, a young boy, gave in evidence, as the date of the assault, Wednesday, January 8. There was other evidence to show that about that date the boy had been severely assaulted by the appellant.

The only evidence called for the defence was for the purpose of proving an *alibi* on January 8.

The Magistrate disbelieved the *alibi* and convicted the accused ; but the conviction was one of an assault on January 7, in accordance with the charge.

The case was argued before me in appeal, and so far as I can remember no special point was taken in regard to the date. It was certainly not pressed and no reference was made to January 10.

In my judgment I commented on the fact that the boy had undoubtedly received a very severe beating, that there was evidence to show that the beating occurred about the date charged, and that the accused had failed to go into the witness-box to deny the evidence against him.

I said that I did not think that the accused was at all prejudiced by the slight confusion as to dates which occurred in the course of the case and I dismissed the appeal.

It is not suggested that the order which I made was a wrong order or was made *per incuriam ;* but it is submitted that owing to bad advice given by the accused's proctor the true defence was not put forward at the trial and, I may add, was not suggested at the appeal. That true defence, according to the affidavits which have been now placed before me, was that the accused thrashed the boy on the night of January 10, that this thrashing was a comparatively light one and that the severe flogging which was the cause of the boy's injuries was in reality inflicted by the boy's aunt.

I know of no provision in the law which would entitle me to re-open a case once disposed of on the ground that the accused neglected to bring forward a defence which would be a complete answer to the charge. In the present case the accused was content to rely upon a quibble and on an *alibi* which did not even relate to the date charged against him ; and even on appeal—after his conviction—he did not alter his attitude.

Apart from the fact that one is bound to view with suspicion evidence tendered after a case has been fully disposed of—evidence which was in the possession of the accused at the time and which if true might have been a complete answer to the charge—I do not think it is possible for a Court under such circumstances to review its judgment.

The case is quite different from cases to which I have been referred, in which the Court consented to review a judgment pronounced by it.

In the case of *The Police Officer of Mawalla v. Galapatta*,[1] Wood Renton C.J. reviewed a judgment of his own where the question was whether a prosecution had been properly authorized, and where he had satisfied himself that a certain signature was proper authority.

It was afterwards shown to him that the signature in question was not that of the person whom he had supposed and he therefore set aside his previous order as having been made *per incuriam*, and as being due to a mistake of his own. Similarly in the case of *P. C. Batticaloa, No.* 8,306 [2], Shaw J. corrected a mistake which he had made owing to his attention not having been called to a certain alteration which had been made in the law.

In the present case I asked Mr. Pereira whether he could say that the fact that the offence was charged as having been committed on the 7th, while the evidence given by the boy was that it was committed on the 8th, revealed such a discrepancy between the evidence and the charge that the conviction was bad, and I did not understand him to say that he could go so far.

One knows how easily an ignorant boy may make a mistake in regard to a date, and it was natural to suppose that the assault might have occurred on the 7th as charged but that in evidence he made a mistake by saying it was on the 8th.

In view of the fact that the assault had undoubtedly taken place, in view of the evidence of three witnesses that this assault was committed by the accused, and in view of the fact that the accused gave no explanation whatsoever in regard to the circumstances under which the assault took place, it almost necessarily followed to my mind that the accused had no adequate defence and that he relied upon a quibble.

I have not been shown any authority which convinces me that the order made was not one which the Court was entitled to make and was not the proper order under the circumstances.

All that the Criminal Procedure Code requires is that the charge shall contain such particulars as to the time and place of the alleged offence, &c., as are reasonably sufficient to give the accused notice of the matter with which he is charged and to show that the offence is not prescribed.

Here the substantial charge was that the severe beating from which the boy was suffering on January 13 or 14 when he was brought home by the accused and later examined by doctors was caused by the accused. The accused was made fully aware of the matter with which he was charged.

This being so, I do not think I have any jurisdiction to entertain an application which is based upon representations which the accused withheld at the time he ought to have made them the defence to the charge.

The application is refused.

Application refused.

[1] 1 *C. W. R.* 197. [2] 23 *N. L. R.* 475.