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Present: Drieberg J.

HORAN *v.* JAMES SILVA.

786—M. C. Colombo, 12,189.

Motor Car Ordinance—Using offensive and quarrelsome language—Omission to state the words used in the charge not a fatal irregularity—Motor Car Ordinance, 1927, rule 26 (1) schedule 4.

Where a person is charged with using offensive and quarrelsome language directed to the passengers of an omnibus, the omission to state in the charge the precise words used is not a fatal irregularity provided the proceedings show that the nature and the particulars of the charge were understood by the accused.

APPEAL from a conviction by the Municipal Magistrate of Colombo.

R. C. de Fonseka, for accused, appellant.

April 15, 1930. DRIEBERG J.—

The appellant was found guilty of using offensive and quarrelsome language directed to the passengers in omnibus No. B 1685 while he himself was travelling in the said omnibus, an offence punishable under rule 26 (1) of schedule 4 and section 84 of the Motor Car Ordinance, 1927. He was sentenced to pay a fine of Rs. 50, in default one month's rigorous imprisonment.

I see no reason to question the correctness of the finding on the facts. The appellant himself gave evidence and called witnesses, whose evidence, if believed, would have entitled him to an acquittal. In a carefully considered judgment the learned Magistrate has given what I think are very good reasons for the opinion he formed.

Mr. Fonseka contends that the conviction was bad as the charge did not set out the offensive and quarrelsome language used by the appellant. He relied on the judgment in *Mohamed v. Bastian*

Appu,[1] in which it was held that it was a fatal irregularity in a conviction under section 287 of the Penal Code if the obscene words which caused annoyance were not set out in the charge.

In view of what has been held in other cases it is necessary to state how this charge came to be framed.

Summons was issued on a written complaint by the police charging the appellant with an offence under rule 26 (2) of schedule 4, viz., wilfully interfering with the comfort of passengers. The appellant appeared on October 7 and pleaded not guilty, and the trial was fixed for the 16th. On the 16th the appellant was present and was represented by a proctor. One of the passengers against whom the offensive language was directed, W. Deutrom, a Customs officer, was examined, and his evidence, so far as it concerns this point, was that he and three friends entered the appellant's bus No. A 1075 at the Lotus Pond stand, but that as the appellant delayed in starting they left his bus and took seats in No. B 791, in which they went as far as Parsons road; there the appellant, who had followed in his bus, went up to the driver of their bus and said " Put these three Burgher pariahs out of the bus," and he pulled Deutrom out.

Deutrom and two of his companions took another bus, B 1685, and near Galle Face the appellant came up, boarded their bus, and addressed the driver of it, referring offensively to them. Deutrom says that he used the same expression as before, referring to them as Burgher pariahs, and said that they were not fit persons to wear coats and trousers.

The Magistrate then noted that on the evidence of Deutrom he framed an additional charge. This is the charge under rule 26 (1) for using offensive or quarrelsome language. It was read and explained to the appellant, who said that he had cause to show. His proctor said that he was not ready to meet the new charge and the trial was adjourned. The appellant gave evidence at the trial and denied that he entered bus No. B 1685 and that he used offensive language.

I take it that in the case of this offence the offensive language should be set out in the charge in the same way as in a charge under section 287 of the Penal Code.

In the case of offences under section 287 of the Penal Code it cannot be said that the mere failure to set out the words in the charge is a fatal irregularity. In *Mohamed v. Bastian Appu* (*supra*) Loos A.J. said that the accused was not aware of the charge to which he had to plead and that he had not given evidence.

[1] (*1920*) *2 C. L. Rec. 24.*

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The earlier cases of *Nell v. Muttu* [1] and *Ratnayake v. Dionis* [2] do not appear to have been cited.

In *Nell v. Muttu* (*supra*) Bonser C.J. held that where the accused had not been prejudiced by the words not being set out in the charge the omission was merely a technical one, and he dismissed the appeal and directed the Magistrate to amend the conviction by setting out in it the obscene words which he found were used.

In *Ratnayake v. Dionis* (*supra*) de Sampayo J. approved of the decision in *Nell v. Muttu* (*supra*), and said that the irregularity might be overlooked if the words were in fact proved by the evidence.

In this case it cannot be suggested that the appellant was in any way prejudiced. It was a new charge framed by the Magistrate; time was taken to meet it, and the proceedings show that the nature and particulars of the charge were quite understood by the appellant and his proctor.

The other objection is that the Magistrate after reserving judgment examined the information book of the Kollupitiya Police Station, where Deutrom made his complaint. The Magistrate directed that a copy of the information be filed of record. The information was given by Deutrom at the Kollupitiya Station very shortly after the incident. The Magistrate seems to have been influenced by it to this extent: he considers it a point in favour of Deutrom that he and his companions, Woutersz and Bilsborough, went together to the station, that it was not likely that between Christ's Church, Galle Face, and the police station they could have made up the long account of the incidents at Lotus Pond stand, Parsons road, and Christ's Church; that going together they ran the risk of being separately questioned. These are fair inferences.

It cannot be said that it was used as evidence of any date, fact, or statement contained in it. (*Hamid v. Karthan.*[3])

The complaint was not one made in the course of an investigation under chapter XII. of the Criminal Procedure Code and was not within the provisions of section 122, and its use by the Magistrate was not limited by section 122 (3).

But even if this was not a proper use of the information book, it would not necessarily vitiate the conviction if there was other and reliable evidence to support the conviction (*King v. Soysa* [4]), and there is such evidence in this case.

I follow the course adopted by Bonser C.J. in *Nell v. Muttu* (*supra*), and send the case back to the Magistrate in order that he might set out in the conviction the offensive and quarrelsome words which were used.

The appeal is dismissed.

Appeal dismissed.

[1] *(1897) 2 N. L. R. 321.*
[2] *(1916) 2 C. W. R. 21.*
[3] *(1917) 4 C. W. R. 363.*
[4] *(1924) 26 N. L. R. 324.*