KAPOWEZYA v THE PEOPLE (1967) ZR 35 (CA)

COURT OF APPEAL

BLAGDEN CJ, DOYLE JA AND RAMSAY J

17th JANUARY 1967 15

Flynote and Headnote

[1] **Criminal law - Minor offences - Conviction of, when charged with major offence - Section 168 (1) of Penal Code Construed.**

Pursuant to section 168 (I) of the Penal Code, an accused charged with robbery can be convicted of common assault because all the 20 elements of the latter are included in the former and the particulars of the former give, in the case at trial, notice of all the ingredients of the latter.

[2] **Criminal law - Minor offences - Conviction of, when charged with** 25 **major offence - Section 168 (2) of Penal Code construed in dictum**.

Pursuant to section 168 (2) of the Penal Code, an accused charged with one offence can be convicted of minor or related (cognate) offences where he has a fair opportunity of making his defence to the latter.

Cases cited: 30

(1) *R v Chand Nur* Bom. HCR 240.

(2) *R v Muhcja s/o Manyenye* (1942), 9 EACA 70.

(3) *R v Home,* (1944), 11 EACA 107.

(4) *R v Gwempazi s/o Mukonzho,* (1943), 10 EACA 101.

(5) *Ndecho and Luora v R* (1951), 18 EACA 171. 35

(6) *Paulo s/o Busondo v R* (1953), 20 EACA 317.

(7) *Kashizha s/o Madagede v R* (1954), 21 EACA 389.

(8) *Wachira* s/o *Njerja v R* (1954), 21 EACA 398.

(9) *Mohamed Hassani Mpanda v Republic* (1963) EA 294.

(10) *R v Mancinelli* 6 NRLR 19. 40

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(11) *R v Fulunete* 1957 R & N 332.

(12) *Hermes v R* 1961 R & N 34.

(13) *R v Justin* 1962 5 NRLR 459.

(14) *R v Chilao* 5 NRLR 459.

Statute 5 construed:

Penal Code (1965, Cap. 6), s. 168 (1), (2).

Appellant in person.

Desai, State Advocate, for the respondent:

Judgment

Doyle JA: Appellant was charged with robbery of a bicycle, a 10 jacket and £3 10*s*. in cash. The case for the prosecution was that appellant, who was drunk, was quarrelling with his wife near Matero. A man, Michael Roberts, who was riding a bicycle met them. Roberts was also drunk. He said in evidence that he did not know appellant or his wife but that without more ado appellant began to beat him with his fists and 15 knocked him unconscious. When he recovered consciousness, he found his bicycle, a raincoat, a jacket, a shoe and a pair of children's shorts missing. Meanwhile, shortly after the assault appellant met a man, Linos, who said in evidence that appellant was quarrelling with his wife and that appellant informed him that he had assaulted a man and taken his bicycle. Linos 20 also gave some confused evidence about, a third man. Linos, who was a police reservist, found Roberts in the road and reported to the police. He went with a policeman to the appellant's house where they found the bicycle with the raincoat attached to it. There was no trace of the other articles. Later appellant was charged and denied the robbery though he 25 admitted taking the bicycle because, as he alleged, Roberts had told his wife to marry another man.

Appellant in his defence said that he was quarrelling with his wife over her alleged unfaithfulness when he was in prison, that Roberts came along and his wife said he was the man who had encouraged her to 30 remarry, that appellant accused Roberts who made no reply and a second man then intervened. Appellant then struck Roberts, took his bicycle and went home. He denied any knowledge of the jacket, shoes, or money.

The learned magistrate believed the prosecution witnesses and convicted appellant of the robbery of the bicycle and the jacket. He attributed 35 appellant's readiness to inform Linos that he had assaulted Roberts and taken his bicycle to a fear that Roberts in his drunken state might die as a result of the blows given.

The evidence in the case was in part confused no doubt resulting from the fact that the two main parties were drunk. The property alleged 40 in the charge to be stolen differed materially from that alleged in evidence to be stolen. It does not seem to me that the learned magistrate gave sufficient thought to the drunken state of the main parties. He convicted appellant largely because he believed Roberts had nothing to do with appellant's wife and that therefore appellant's story was untrue. It is

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quite possible that appellant's drunkenness led to the illusion that Roberts was the man who had induced his wife to remarry. The fact that at all times appellant admitted taking the bicycle points to innocence of theft, and the reason assumed by the magistrate for this does not appear to me very probable. On the whole, I do not think that the evidence justified a 5 conviction for robbery.

[1] There is no doubt that appellant assaulted Roberts. Can he be convicted of common assault on a charge of robbery? This depends on the interpretation to be given to section 168 of the Criminal Procedure Code which reads as follows: 10

"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved he may be convicted of the minor offence although he was not charged with it. 15

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

This section is a facsimile of subsections (1) and (2) of section 238 of the Indian Penal Code and is to be found in identical form in the Codes of 20 each of the East African territories.

Prima facie, where a section has two subsections, these must have different meanings. The learned author of Sohoni's *The Code of Criminal Procedure*, 15th ed., at page 1373, dealing with the Indian section, has this to say: 25

"Sub-section (1) contemplates cases where the offence charged consists of several particulars, a combination of some only of which constitutes a complete minor offence. Under this sub-section, all the particulars which complete a minor offence must be present in the major offence. They may be in an aggravated form. It is further 30clear from the reading of this section that there might be other particulars which might he present in the major offence and which are not present in the minor offence. It is not necessary to prove the offence charged in the indictment to the whole extent, provided the facts proved constitute a complete offence. Similarly, it is not 35necessary to prove the offence charged in the same aggravated form, provided what is proved constitutes a complete offence. (Footnote omitted.)

Sub-section (2) contemplates cases where a person is charged with an offence and facts are proved which reduce it to a minor 40 offence. There are all the particulars present in the case which make it a major offence. But certain additional facts are brought before the Court either by the prosecution or by the defence to reduce the offence to a minor offence." (Footnote omitted.)

This is at least a possible logical distinction. Subsection (1) covers a 45 case where only some of the particulars are proved while subsection (2)

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covers a case where all the particulars are proved, but there is some additional factor which reduces the charge. An example of the latter which immediately springs to mind in English, Indian, and Zambian law is the reduction of murder to manslaughter by reason of provocation. In such 5 a case all the particulars which constitute murder may be proved but the fact of provocation reduces the offence.

R v Chand Nur [1], a case which has often been quoted with approval, does not appear to make any distinctions between the two subsections. It contains the following passage: 10

"In cases contemplated by this section the graver charge gives to the accused notice of all the circumstances going to constitute the minor one of which he may be convicted. The latter is arrived at by mere subtraction from the former. But when this is not the case, when the circumstances embodied in the major charge do not 15necessarily and according to the definition of the offence imputed by that charge constitute the minor offence also, the principle no longer applies, because notice of the former does not necessarily involve notice of all that constitutes the latter. The section is not intended to apply to a collateral offence."

It 20 may be, however, that a reference to the actual report, which is not available, might show that the passage, though it refers to the section, was only dealing with the first subsection. Other Indian cases cited by Sohoni refer to the necessity for major and minor offences being cognate in the sense of having the main ingredients in common. Sohoni also 25 cites *In re Valli Ammal* 1957 Mad. 114 as an authority that an offence of receiving stolen goods is a minor offence to the offence of theft in a dwelling - house. While it may be that these offences can equate in that they both relate, though in a different way, to stolen goods, receiving cannot be arrived at by a simple matter of subtraction of some of the 30 ingredients of theft, nor would they appear to be of the same genus. That the actual reports are not available may detract from the assistance to be obtained from the Indian cases.

The section has been considered in a number of East African cases. The first to which I will refer is *R v Muhcja s/o Manyenye* [2], where the 35 Court of Appeal held in relation to section 173 of the Tanganyika Criminal Procedure Code (Zambia, section 168) that a conviction for doing grievous bodily harm with intent to disable could be substituted for a conviction of attempted murder. In *R v Home* [3] the same court held in relation to section 179 (2) of the Kenya Criminal Procedure Code (Zambia, section 40 168 (2)) that on a charge of attempted murder a conviction for assault occasioning bodily harm would lie. No detailed reasons were given.

In *R v Gwempazi s/o Mukonzho* [4] the appellant had set fire to a house in which were his wife and children. He was charged with and convicted of attempted murder under section 208 of Uganda Penal Code. The 45 Court of Appeal for Eastern Africa quashed this conviction because there was no definite finding by the judge as to intent. In considering whether another offence might be substituted they said (at page 102):

"It remains to be considered whether on the evidence the appellant can be convicted of any other offence in view of the provisions of section 179 (2) of the Criminal Procedure Code (as amended by Ordinance No. 1 of 1940) [Zambia, section 168 (2)]. As under section 317 of the Penal Code the punishment for arson 5 is the same as that for the offence under section 208 of the same Code, arson cannot be held to be 'a minor offence' in relation to the offence under section 208."

It would seem from this that the court would have convicted of arson if arson had been a minor offence in relation to attempted murder. Arson 10 cannot, however, generally be arrived at from attempted murder by a process of subtraction, though in the particular case this was possible as arson was the means by which the attempt to murder was made; nor is arson of the same *genus* as attempted murder: the court in fact substituted an offence of assault occasioning actual bodily harm. 15

In *Ndecho and Luora v R* [5] the same court held, in relation to section 179 (2) of the Kenya Penal Code, that on a charge of murder there could not be a conviction of wilfully obstructing the police in the due execution of their duty. In dealing with the cases of *Home* [3] and *Muhcjo* [2] the Court said (at page 173): 20

"The point which we stress and which may be in danger of being overlooked is, that in both these decisions, this Court implied that the minor offence must be of a cognate character. Admittedly neither judgment stated this in explicit terms, yet we are convinced that that is the effect of both judgments." 25

And again (at page 173):

"It will be observed that in both these cases the minor offence substituted was cognate to the offences charged in that they were both offences which involved hurt to the human body. This Court has never said, and in our opinion could not without error say, that 30 section 179 (2) permits a Court, on an information for murder, to find the person so charged, to quote one example, guilty of riding a bicycle without a light. In our view to read the sub-section as giving the Court such a power would not only be repugnant to natural justice but would introduce into the wording of the 35 subsection something that is not there. The governing word in this sub-section is the word 'reduce', and the sub-section cannot be read as if the words ran 'and facts are proved which reveal another offence'. The facts proved must reduce the major offence to a minor offence. The words used being 'facts are proved which reduce it to 40 a minor offence'. In our opinion we have no doubt that the Legislature both intended and have so expressed the intention that the minor offence must be cognate to the major offence charged."

Finally, in summarising their judgment, they said (at page 174):

"In order to make the position abundantly clear we restate again 45 that the judgments of this Court given in *Rex v Muhcja* and *Rex v Home* mean nothing more than this: where an accused person is

charged with an offence he may be convicted of a minor offence although not charged with it, if that offence is of a cognate character, that is to say of the same *genus* or species. Furthermore we point out that the wording of section 179 (2) is permissive only 5 and that in our opinion, when the major offence charged is murder, a Court should exercise its discretion most warily before convicting a person charged, with any alternative offence, although cognate, other than manslaughter. The test the Court should apply when exercising its discretion is whether the accused person can reasonably 10 be said to have had a fair opportunity of making his defence to the alternative."

No reference was made to *Gwempazi s/o Mukonzho* [4]. It must follow from the reasoning in the case that a conviction for arson could never be substituted on a charge of attempted murder.

In 15 *Paulo* s/o *Busondo v R* [6] the same court held that on a charge of doing acts intended to prevent arrest the trial judge could convict of wilfully obstructing a police officer in the execution of his duty. The court said, "We think that he clearly could because the cognate element here between the two offences is the intention to resist a lawful arrest."

In 20 *Kashizha s/o Madagede v R* [7] the same court held, in relation to section 182 (2) of the Uganda Criminal Procedure Code (Zambia, section 168 (2)), that, on a charge of murder, a conviction could not be entered of accessory after the fact to murder. The court, having referred to *Ndecho's* case [5] and others, held that the rule was that the minor offence 25 must be cognate to the major offence. They said (at page 391):

"It is clear that the offence of being accessory after the fact is not cognate with murder, though in some cases evidence admissible to prove murder may establish that the accused, while not a murderer, was accessory after the fact of murder. The accessory 30 takes no part in the actual commission of murder, need not be present at it, and in fact may know nothing about it until after its committal."

This case clearly shows that a minor offence does not become cognate merely because the evidence led to prove the major offence in fact fails 35 to do so, but proves the minor offence. It does not support the dictum in *Gwempazi*'s case [4] in relation to attempted murder and arson.

It is of interest to note that the foregoing cases all dealt with the equivalent of the second subsection of section 168.

In *Wachira s/o Njenga v R* [8] a full bench of the Court of Appeal for 40 Eastern Africa dealt with the construction of section 179 of the Kenya Criminal Procedure Code [Zambia, section 168]. The case is not made easier to understand by an error in the head note which states that Briggs, JA, dissented from the first general rule for ascertaining a cognate offence laid done by the majority judgment. The point at issue was 45 whether on a charge under regulation 8C (1) of the Kenya Emergency Regulations, 1952, a conviction could take place for an offence under

Regulation 8E (1) of those Regulations. A majority of the court, Briggs, J A., dissenting, held that such a conviction would lie.

The majority of the court having cited the passage from the Bombay case of *R v Chand Nur* [1], earlier referred to in this judgment and basing themselves upon it, held that it was necessary to see: 5

(1) whether the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by that charge constitute the minor offence; and

(2) whether the charge under regulation 8C (1) in the instant case gave to the accused notice of all the circumstances going to 10 constitute the offence under regulation 8E (1), of which he was convicted.

Briggs, JA, who also based himself on the Bombay case, agreed with the first of these rules but dissented from the second. He did not consider that it was sufficient if, in the instant case, the charge on the major offence 15 gave to the accused notice of all the circumstances going to constitute the minor offence of which he was convicted. In his view, if it were possible that in any single instance the charge on the major offence would not give notice of all the facts which must be alleged to convict on the minor offence, the offence was not cognate. 20

The majority analysed the two offences in issue and came to the conclusion that the offence under Regulation 8C (1) did contain all the ingredients of an offence under regulation 8E (1) and that the particulars did in fact give the necessary notice.

Briggs analysed the offences and came to the conclusion that an 25 offence under regulation 8C (1) did not contain all the ingredients of an offence under regulation 8E (1) and furthermore that the particulars of an offence under regulation 8C (l) would not necessarily in every case give notice of the ingredients of an offence under regulation 8E (1).

It is not necessary for me to decide whether the majority or Briggs, 30 JA, were correct in their analysis of the two offences in issue. It is necessary to note that the decision departs considerably from previous decisions and lays down:

(1) in the case of the whole court, the narrow rule that to satisfy section 179 the major offence must in fact contain the minor 35 offence;

(2) in the case of the majority that the particulars of the major offence must in the case at trial give notice of all the ingredients of the minor offence; and

(3) in the case of Briggs the even narrower rule that the 40 particulars of the major offence must be such that they necessarily in every case give notice of the ingredients of the minor offence.

No reference is made in the case to *Ndecho's* or the preceding cases which refer to cases being of the same *genus* and no distinction is made

between the two subsections of section 179. The section is treated as a whole. It appears that the attention of the court was mainly directed to determining which of two previous decisions of that court also relating to 5 regulations 8C (1) and 8E (1) was correct. Although a decision of a full bench, the failure of the court to consider any of the preceding Kenya cases must detract from the authority of the decision. Both majority and minority judgments refer to cognate offences; but the use of this expression seems unnecessary when all it is supposed to mean is that the greater offence includes the less.

The 10 fact that the court treated section 179 as a whole has been commented on by Spry, J, in *Ali Mohamed Hassani Mpanda v Republic* [9]. He states (at page 296):

"What is immediately significant is that both the majority decision and the dissenting judgment of Briggs, JA, refer throughout 15 to s. 179 as such and not to either of its sub-sections. It is, I think, clear that the court considered that the section had to be applied as a whole. On this interpretation, as I understand it, the only distinction between the two sub-sections is that the first relates to cases where the prosecution fails to prove, while the 20 second relates to cases where the defence disproves, one or more of the essential ingredients of the major offence. The tests whether the offences are cognate remain the same, and sub-s. (2) is not, as it seems at first sight, wider in its scope than sub-s. (1)."

The learned judge has produced an explanation of the distinction 25 between the two subsections of section 179. It does not, however, appear to me to be the true distinction as, where the prosecution produces evidence on a point and the defence produces evidence against it, it is not necessarily possible to say whether the prosecution has failed to prove the point or the defence has disproved it.

I 30 have already drawn attention to the normal rule that where there are two different subsections, they ordinarily have different meaning. *Wachira*'s case [8] disregards this. It would also appear to have far reaching effects. It has been customary in the Zambian, Kenya, and other East African courts in appropriate cases to convict of manslaughter on a 35 charge of murder. Sections 168 to 176 of the Zambian Criminal Procedure Code deal with convictions for offences other than those charged. Similar provisions exist in each of the East African Codes. Section 168 is a general provision, and the other sections make particular provisions. In these sections no special provision is made for a conviction for manslaughter on 40 a charge of murder. Such a conviction must therefore rest on the provisions of section 168. If one applies the rules laid down in *Wachira's* case [8] and the passage cited from the Bombay case to the offences of murder and manslaughter, it would appear that murder and manslaughter do not in every case come within them. The first rule requires that the circumstances 45 embodied in the major charge must necessarily and according to the definition of the offence imputed by that charge constitute the minor offence. In other words the circumstances of the major charge must both

in fact and by definition include the minor charge. The definition in the Penal Code of murder is "of malice aforethought causing death by an unlawful act or omission." The definition of manslaughter is "causing death by an unlawful act or omission." By definition, therefore, murder includes manslaughter and so satisfies the rule laid down. The 5 circumstances of a charge of murder based on an intentional act necessarily include voluntary manslaughter; but the circumstances of a charge of manslaughter based on an intentional act do not necessarily include manslaughter resulting from omission or a negligent act not aimed at the victim. Intention is not an aggravated form of negligence. 10

Sohoni's suggested distinction between the two subsections would also not enable every charge of murder to be reduced to involuntary manslaughter.

Ndecho's case [5] and the other East African decisions which refer to the necessity of an offence being cognate in the sense of being of the same 15 *genus* would enable such a conviction in the case where the circumstances of murder did not necessarily include those of manslaughter. Murder and manslaughter, which both deal with the killing of a person, are of the same genus.

If one examines section 168, one finds quite plainly that subsection 20 (1) falls within the first rule laid down in *Wachira*'s case [8] and the Bombay case. It deals with an offence which contains a number of particulars, some of which constitute another offence. The minor offence results from simple subtraction.

The wording of subsection (2) is entirely different. It would of course 25 fit Sohoni's distinction, but this would only occur in an extremely limited class of cases. Indeed, it is difficult to think of any case where all the necessary facts are proved but the offence is not proved except that of murder reduced to manslaughter by reason of provocation, unnecessary force in self-defence, etc. The earlier decisions of the East African courts 30 on the equivalent of section 168 (2) lay down a rule that the minor offence must be cognate in the sense of being of the same genus. This not only makes a distinction between subsections (1) and (2), but makes a rule which is reasonable and just and which is wide enough to cover such cases of murder and manslaughter that do not come within the first subsection. 35 [2] I see no reason why subsection (2) should not be construed as including minor and related offences where, as was said in *Ndecho*'s case [5], the accused has had a fair opportunity of making his defence to the alternative. In my opinion the first rule laid down in *Wachira*'s case [8] is only applicable to subsection (1), which deals with the case where the greater 40 includes the less and does not apply to subsection (2), which covers the case where the evidence fails to prove the major offence charged but proves a minor offence of the same *genus*as the major offence.

Robbery is defined in the Penal Code as follows:

"Any person who steals anything, and, at or immediately before 45 or immediately after the time of stealing it, uses or threatens to

use actual violence to any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained shall be guilty of the offence of robbery . . ."

In the case where the violence or threatened violence is directed 5 against a person, robbery consists of theft plus common assault. In such a case a mere subtraction of the theft from the offence would leave a common assault, though not any graver form of assault. A conviction for assault could therefore lie within the rules laid down by the majority in *Wachira*'s case [8] but not strictly within the second rule laid down by 10 Briggs, J.A. An examination of the learned Justice of Appeal's reasoning shows, however, that he was not in fact dealing with the case where an offence could by definition be committed in different ways which would necessitate particulars which would vary according to the manner of committal. There is a case cited at page 1376 of Sohoni which deals with 15 this very point - *Bhagan Lal v State.* All. 504. It held:

"Where the offence under Section 366 Penal Code consists of abduction by means of compelling by force any person to go from any place, the offence of wrongful restraining is also involved in it. Where, however, the offence under Sec. 366 Penal Code is abduction 20 through using deceitful means, there would be no such obstruction to the person abducted as would prevent him from proceeding in any direction in which he had a right to proceed. Therefore it is only in a case falling under the former laws that a person charged under Sec. 366 can be convicted of the offence under S. 341 I.P.C."

[1] 25 I see no reason why, in such circumstances, the principle of subtraction should not be applied, and I am satisfied that, on a charge of robbery involving violence or threatened violence to the person, a conviction of assault can lie where the violence is found but not the theft.

I would therefore quash the conviction of robbery and substitute a 30 conviction of common assault contrary to section 219 of the Penal Code.

In the result as I have held that the offence fell within subsection (1) of section 168, consideration of subsection (2) was not strictly necessary. I felt, however, that the importance of the point and the conflict of decisions of other courts warranted a consideration of the whole section. 35

Judgment

Ramsay J: I agree entirely with the judgment that has just been read; but as the matter is a complicated one, I have sought and obtained a direction from the President of the Court that I should deliver a separate judgment. This I now do.

[1] So far as subsection (1) of section 168 is concerned, a court can 40 convict an accused person of a minor offence when the circumstances are such that the minor offence is contained in the major offence and the particulars of the major offence have given notice to the accused of all the ingredients of the minor offence.

[2] Subsection (2) of section 168 is wider in its scope. When the major 45 offence is not proved, a court may convict of a minor offence provided:

(a) it is cognate to in the sense of being of the same *genus* as the major offence; and (b) the accused has had a fair opportunity of answering the charge of the lesser offence.

What is a fair opportunity was considered in an opinion by Bell, CJ, in *R v Mancinelli* [10], when he dealt with the position where, at the 5 close of the prosecution case the charge as laid had not been made out, but there was *prima facie* evidence to support a lesser charge. He laid it down that the court should inform the accused that there was a *prima facie* case to answer on such and such a charge, namely, one of the invisible alternatives to the charge preferred by the prosecution; and he thought 10 it would be fair and wise for the court to frame the charge, read it to the accused, call upon him to plead to it, and give him (on the analogy of section 192 of the Code) the opportunity of having any prosecution witness recalled.

This procedure was followed by Somerhough, J., in *R v Fulunete* [11], 15 when he called upon the prisoner for his defence to a charge of assault; he did so because in his view of the law "the effect of a simple, unqualified finding that there was no case to answer on the charge of murder amounts to a finding of Not Guilty - of the offence actually charged, and of each and every offence of which the defendant might have been found Guilty". 20 He said further, "Were the Crown to bring the prisoner to trial, therefore, upon a charge upon which he might have been found guilty by the Court . . . he would be being tried twice for the same offence, in breach of sec. 128 of the Criminal Procedure Code. . . . "

The position is now covered by section 20 (5) of the Constitution 25 which reads as follows:

"No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, 30 save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal."

In *Hermes v R* [12], pages 37 - 38 in the High Court of Nyasaland, Spenser - Wilkinson, CJ, referred to *Fulunete* [11] as a leading authority and said: 35

"On the one hand it is, as a general rule, for the public prosecutor to prosecute the offender upon such charges as he considers right, and if at the close of the case for the prosecution the offence charged is not made out but some lesser offence appears to have been proved, I thinly there is a duty on the prosecution to make the 40necessary application to the Court either to amend the charge or to call upon the accused for his defence upon some charge upon which under the provisions of section 178 [section 168 of the Zambia Code] the accused can be convicted without amendment. Moreover, it is not, it appears to me, the duty of a Magistrate to 45

enter into the arena too much on his own initiative for the purposes of convicting an accused person upon some charge with which he has not been formally charged. On the other hand, if it is clear on the evidence that the gist of the principal charge has been proved 5 but that some element is lacking which obviously makes the charge a lesser one, or that there is evidence of some lesser offence which is clearly cognate to the offence charged, it is clearly in the interests of justice that the accused person should not be acquitted but should be convicted upon the lesser charge which is thus clearly 10 proved."

It seems to me that this is the correct approach to the matter. It is the prosecution's duty to prove the charge which it has chosen to lay before the court. The court, however, may convict the accused person on the charge as laid or on any of the visible or invisible alternatives 15 provided it can do so without unfairness to him. This may involve adopting the procedure suggested by Bell, CJ, when putting the accused on his defence, it may be necessary to follow some similar procedure at the close of the defence case and before judgment if it is thought he might be taken by surprise. There will, however, be cases where the court can convict the 20 accused of a minor offence without following any of this procedure, if, in the particular circumstances of each case the court can decide what action if any, it should take so as not to be unfair to him.

In the instant case, subsection (1) of section 168 applies, and all the ingredients of a common assault are contained in the particulars of the 25 charge of robbery. The appellant had notice of the charge of assault, and dealt with it and admitted the assault in his statement at the dock. He was not taken by surprise and there is unfairness in convicting him of assault contrary to section 219 of the Penal Code.

There was evidence that the assault had occasioned actual bodily 30 harm, but even if such evidence is accepted, the appellant cannot be convicted of this offence either (a) under subsection (1) of section 168, as there is no averment of bodily harm in a charge of robbery, or (b) under subsection (2) of section 168, as the offence of assault is not cognate to the offence of robbery (*R v Justin* [13]).

This 35 judgment would be incomplete without a reference to *R v Chilao* [14] in which the High Court on revision set aside a conviction of receiving and substituted one of theft although the accused was not charged with theft. The reason given was that, within the meaning of section 168, theft was a minor offence to that of receiving stolen property. 40 No consideration was given as to whether or not it was also cognate. It is possible therefore that this case should no longer be regarded as authoritative.

Judgment

Blagden CJ: I agree with the judgments which have been delivered in this appeal and have nothing to add. The conviction will be set aside 45 and the sentence quashed and a conviction for common assault contrary

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to section 219 of the Penal Code substituted therefor and a sentence of seven months' imprisonment with hard labour imposed with effect from 3rd March, 1966. The appellant is to be released from custody forthwith.

Appeal allowed