

order the defendant to give up possession within seven days and pay to the plaintiff mesne profits at the rate of £4 per month as from May 1st, 1962 until possession is given up. I order him also to pay the costs of these proceedings.

Order accordingly.

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KAMARA and FIVE OTHERS v. COMMISSIONER OF POLICE

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SUPREME COURT (Cole, J.): July 10th, 1964
(Mag. App. No. 54/63)

- [1] Courts — magistrates' courts — procedure — charges—charge may be amended before plea: A magistrate may amend a charge without first calling upon the accused to plead to it (page 78, lines 17–23). 15
- [2] Courts — magistrates' courts—procedure—pleas—unnecessary before amendment of charges: See [1] above.
- [3] Criminal Procedure—appeals—appeals against conviction—charge unlawfully substituted—trial a nullity: A trial upon an unlawfully substituted charge is a nullity (page 80, lines 6–8). 20
- [4] Criminal Procedure—charges—amendment—charge may be amended before plea in magistrate's court: See [1] above.
- [5] Criminal Procedure — charges — amendment — substitution of new charge not permissible—trial a nullity: The power to amend a charge given by s.90 of the Criminal Procedure Act (*cap.* 39) extends only to the amendment of the original charge and does not authorise the substitution of an entirely new and different charge (page 79, lines 33–36; page 80, line 3). 25
- [6] Criminal Procedure—charges—preferring charge—new and different charge—to be preferred by *nolle prosequi* and trial *de novo* not amendment: An entirely new and different charge cannot be preferred by amending the original charge and the prosecution should enter a *nolle prosequi* on the original charge and commence proceedings *de novo* on the new charge (page 79, lines 33–39; page 80, line 3). 30
- [7] Criminal Procedure — pleas — amended charge — unnecessary to take plea before amending charge: See [1] above. 35

The appellants were charged in the Police Magistrate's Court, Port Loko, with assault.

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They were not called on to plead to the charge. It was amended to a charge of wounding and on that they were tried and convicted

after consenting to be tried summarily and pleading not guilty.

On appeal, they contended that the omission to call on them to plead to the charge of assault was an illegality and that the magistrate had no power to amend the charge of assault to one of wounding.

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Case referred to:

(1) *R. v. Duru* (1943), 9 W.A.C.A. 33, followed.

Statutes construed:

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Criminal Procedure Act (Laws of Sierra Leone, 1960, *cap.* 39), s.90:

The relevant terms of this section are set out at page 78, lines 28-40.

Criminal Procedure Ordinance (Laws of Nigeria, 1923, *cap.* 20), s.84:

The relevant terms of this section are set out at page 79, lines 17-29.

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Cole and *S. H. Harding* for the appellant;

C. S. Davies, Ag. Senior Crown Counsel, for the respondent.

COLE, J.:

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This is an appeal from the decision of the Police Magistrate, Port Loko, on September 21st, 1963. He convicted all six appellants of the offence of unlawful wounding and sentenced the first, second, third, fourth and fifth appellants to six months' imprisonment and the sixth appellant to a fine of £100 or six months' imprisonment in default. All the appellants have appealed against their convictions only.

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The amended grounds of appeal which were argued were as follows:

"1. That the learned trial magistrate committed an illegality in the course of the trial as specified hereunder:

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That the learned magistrate failed to call upon the accused to plead to the charge of common assault which was before the court.

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2. That the learned trial magistrate had no power to allow an amendment of a charge of common assault under s.19 of the Summary Conviction Offences Act (*cap.* 37) to one of unlawful wounding under s.20 of the Offences against the Person Act, 1861.

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3. That the learned trial magistrate erred in law in not complying with the provisions of s.110(2) of the Criminal Procedure Act, (*cap.* 39) in that he failed to inform the accused of their rights to recall any or all of the witnesses of the prosecution for cross-examination."

Before I deal with the arguments it seems to me necessary to state the facts as I understand them. By criminal summons No. 18128 dated April 19th, 1963, all six appellants were summoned to appear before the Magistrate's Court, Port Loko, on Wednesday, May 15th, 1963, at 9 a.m. to answer to the following complaint:

"For that you (all first five defendants) on Monday March 4th, 1963, did assault unlawfully the two plaintiffs, Alpha Amadu Kamara and Hassana Kamara, at the instigation, incitement and direction of the sixth defendant, Hajah Tigida, at Petifu Junction, Loko Masama Chiefdom, Port Loko District contrary to s.19 of the Summary Conviction Offences Act (*cap.* 37)."

The records do not show what happened on May 15th, 1963—whether the court sat or whether the appellants appeared or not.

It would appear that all the appellants with the exception of Abdul Bai Kamara appeared before the magistrate at Port Loko on June 18th, 1963. They were not called upon to plead. Mr. Aaron Cole appeared for all five appellants. The case was then adjourned to July 18th, 1963.

On July 18th, 1963, the records do not show that the appellants were called upon to plead to the charge under s.19 of the Summary Conviction Offences Act (*cap.* 37), the charge for which they were originally brought before the court. Mr. Buck, who was counsel for the complainants on that date, applied for the charge to be amended to one of wounding contrary to s.20 of the Offences against the Person Act, 1861. Mr. Hudson Harding, counsel for the first appellant Bai Kamara, also known as Abdul Bai Kamara, objected to the application. According to the record, Mr. Harding's objection is stated as follows: "This embarrasses us and unless the court rules otherwise I apply for an adjournment." Mr. Aaron Cole, counsel at the time for the other appellants, is recorded to have stated "I don't object to the amendment."

The charge, after some argument relating to the proposed amendment being bad for duplicity, was eventually amended to read as follows:

"Statement of Offence

All six defendants are charged with wounding in contravention of s.20 of the Offences against the Person Act, 1861.

Particulars of Offence

That all six defendants at Petifu Junction, on Monday, March 4th, 1963, maliciously wounded Alpha Amadu Kamara and Hassana Kamara."

This amended charge, an entirely new and different one, was then read to the appellants and no plea was taken.

Without ruling on Mr. Harding's application for an adjournment, the magistrate proceeded to take the depositions, thereby treating the case as a preliminary investigation. After one of the complainants, Alpha Amadu Kamara, had given evidence and had been cross-examined by both Mr. Harding and Mr. Cole, the magistrate's records read as follows:

"Court: This is a case which in my opinion can be suitably dealt with under s.110 of the Criminal Procedure Act (*cap.* 39). Defendants asked if they so consent—difference between summary trial and committal explained to them."

All six appellants then consented to be tried summarily and each pleaded not guilty. The trial then proceeded resulting in the conviction of the appellants and the sentences already mentioned were imposed.

I now turn to the grounds of appeal. As regards ground 1, I find no substance in it. It would appear that no sooner had the appellants appeared before the magistrate than the application for an amendment of the charge was made. In my opinion the magistrate was right in entertaining the application without first calling upon the appellants to plead. I can find no statutory or other legal provision which lays down the contrary. This ground therefore fails.

Ground 2 seems to fall into a different category. The statutory provision which enables a magistrate to grant amendments to a charge in a criminal case is s.90 of the Criminal Procedure Act (*cap.* 39). It provides:

"A variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged crime or offence was committed is not material, if it is proved that the charge was in fact made within the time, if any, limited by law for the making thereof.

But if any variance between the charge and the evidence appears to the Court to be such that the accused has been thereby deceived or embarrassed, the Court shall adjourn the hearing and allow any witness to be recalled, and such questions to be put to him as by reason of the terms of the charge may have been omitted.

The Court may make any amendment of the charge on such terms as may seem to it to be just."

Does this section enable a magistrate to amend a charge by

substituting an entirely new and different charge from that before him? This question was considered by the West African Court of Appeal in the case of *R. v. Duru* (1). In that case the appellant was tried summarily for an offence contrary to s.473(1) of the Nigerian Criminal Code (1923, *cap.* 21). After four witnesses for the prosecution had been heard it became apparent to the court that the charge was misconceived. The trial judge, purporting to act under the provisions of s.84 of the Nigerian Criminal Procedure Ordinance (1923, *cap.* 20), then substituted for the original charge an entirely new and different charge. After taking another plea and recalling the witnesses for cross-examination he continued the trial and convicted the appellant of the substituted offence. It was held that the powers conferred by s.84 of the Criminal Procedure Ordinance permitted only the variation of the particulars of a charge but not the substitution of a new and different one. Section 84 of the Nigerian Criminal Procedure Ordinance (*cap.* 20) reads:

“A variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material, if it is proved that the charge was in fact made within the time (if any) limited by law for the making thereof.

But if any variance between the charge and the evidence appears to the court to be such that the accused has been thereby deceived or misled, the court may adjourn the hearing and allow any witness to be recalled, and such questions to be put to him as by reason of the terms of the charge may have been omitted.

The court may make an amendment of the charge on such terms as may be just.”

This section is substantially the same as s.90 of our Criminal Procedure Act (*cap.* 39) already quoted above. In the course of their judgment the learned judges said, *inter alia*, (9 W.A.C.A. at 34):

“We are of opinion that the powers given by this section are limited to amendments of the original charge and do not authorise or cover the substitution of an entirely new and different charge for the original, as was done in this case. The proper course was for a *nolle prosequi* to be entered upon the first charge and then proceedings started *de novo* upon the second charge. . . .”

Later on they added:

“We feel bound to hold that there has been such a violation of the proper form of legal process as to vitiate the conviction.”

In my view, the same principles apply to this case. I therefore hold that the magistrate acted on wrong principles in amending the original charge before him by substituting an entirely new and different charge. Since the substituted charge was without legal foundation the magistrate could not properly adjudicate on that charge. In the circumstances I hold that the trial of all the appellants was a nullity. The appeal having succeeded on this ground consideration of ground 3 does not arise. I therefore quash the convictions of all the appellants and order that the sentences imposed on them be set aside. I further order that they be discharged forthwith. I also order that the fine of £100 imposed on the sixth appellant Hajah Tigida, if already paid, be refunded to her.

Order accordingly.

ROBERTS v. LEIGH

SUPREME COURT (Cole, J.): July 20th, 1964
(Misc. App. No. 31/1964)

- [1] **Criminal Procedure — appeals—affiliation proceedings—appeal from affiliation proceedings is criminal appeal:** An appeal from affiliation proceedings is an appeal from criminal proceedings and is governed by the rules applicable to criminal appeal proceedings (page 82, lines 14–17).
- [2] **Criminal Procedure—appeals—appeals against conviction—leave to appeal to be obtained within time limit:** Where a defendant has pleaded guilty and no appeal against conviction lies except by leave of a judge, such leave should be obtained within the time limited for appeal (page 82, lines 34–38).
- [3] **Family Law — illegitimacy—affiliation proceedings—appeals—appeals are criminal appeals:** See [1] above.
- [4] **Family Law — illegitimacy—affiliation proceedings—single woman—marriage since birth of child and residence with husband a bar to proceedings:** A woman cannot obtain an affiliation order where she has married since the birth of her illegitimate child and is at the time of the application living with her husband (page 83, lines 2–6).