JAMAICA

IN THE COURT OF APPEAL

R.M. CRIMINAL APPEAL No. 96/1972

BEFORE: The Hon. Mr. Justice Luckhoo, J.A.(Presiding).
The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.

R. v. Mrs. JACK ASHENHEIM

W. Swaby for the appellant.

H. Downer for the Crown.

January 26, March 9, 1973

LUCKHOO, J.A.:

The appellant was charged on an information which alleged that on October 28, 1971, she "drove a motor vehicle to wit, a motor car registered KC 819 along Constant Spring Road in the parish of St. Andrew at a speed greater than 30 miles per hour to wit 43 miles within the limit specified in the Schedule to the Road Traffic (Amendment)(No.5) Regulations, 1957 made by the Governor in Executive Council on the 22nd day of July, 1957 under the provisions of section 51 of the Road Traffic Law, Cap. 346, and published in the Jamaica Gazette Supplement Proclamations, Rules and Regulations dated 29th July, 1957, contrary to section 93(3) of Chapter 346." The appellant was convicted on May 3, 1972, by the learned judge of the Traffic Court for the parish of Kingston on the information as laid and was fined $10, and in default thereof imprisonment for 10 days at hard labour.

Nothing in this appeal turns on the evidence which was to the effect that, on October 28, 1971, as a result of a police radar trap, the appellant was found to be driving along a portion of the Constant Spring Road at a speed of 43 miles per hour whereas the speed limit on that portion of the road was 30 miles per hour. The grounds of appeal advanced relate to whether the information as laid was defective in that it wrongly charged the breach of s.93(3) of the Road Traffic Law Cap.346, (hereinafter referred to as "the Law") and if so, whether the conviction thereunder is incurably bad. At the close of the evidence before the judge of the Traffic Court learned attorney for the defence Mr. Swaby submitted that the offence charged was one of exceeding the

speed limit and that such an offence was created by s.22 of the Law and was punishable under s.94 of the Law (neither of which sections was mentioned in the information) and not by any regulation made under that Law, whereby the penalty upon conviction thereof would be as provided by s.93(3) of that Law. The clerk of the court agreed with that submission but the judge rejected the submission and proceeded to convict the appellant on the information as laid. It is common ground that s.22(1) of the Law creates an offence which may succinctly be described as exceeding the speed limit. That subsection provides as follows -

> "(1) It shall not be lawful for any person to drive a motor vehicle of any class or description on a prescribed road or on a road within a prescribed area at a speed greater than the speed prescribed as the maximum speed in relation to a vehicle of that class or description and if any person acts in contravention of this section he shall be guilty of an offence."

By s.2 of the Law, the word "prescribed" means prescribed by regulations. Section 51 of the Law provides for the making of regulations for any purpose for which regulations may be made under Part II of the Law (which includes s.22) and generally as to the use of motor vehicles and trailers on roads .... and otherwise for the purpose of carrying Part II of the Law into effect "and without prejudice to the generality of the foregoing provisions" to make regulations in respect of a number of specified matters, one of such matters appearing at paragraph (o) of that section as follows -

> "(o) the speed at which motor vehicles may be driven on any specified road or part of a road, or on any road within any specified area of the Island;"

In its original form reg. 191 of the Road Traffic Regulations, 1938 made under the provisions of s.51 of the Law provided as follows -

> "191 - The Island Traffic Authority shall by Notice published in the Jamaica Gazette and in one newspaper of the Island declare that from and after the date fixed by such Notice no motor vehicle or trailer shall be driven or operated within the limits specified in such Notice at a speed greater than twenty miles per hour and outside such limits at a speed greater than forty miles per hour.
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> Provided that no motor tractor or truck with or without trailers shall be driven or operated at a speed greater than twenty-five miles per hour."

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In 1957, reg. 191 as originally made was revoked by the Road Traffic (Amendment) (No.5) Regulations, 1957 and the following substituted therefor -

> "191. (1) No motor vehicle of any class or description shall be driven or operated in any speed limit area at a speed greater than the rate of speed specified hereunder as the maximum speed in relation to a vehicle of that class or description -"

Thereafter the regulation specifies the maximum speeds at which the several classes of vehicles may be driven in a speed limit area and outside a speed limit area in the Island, a "speed limit area" being defined therein thus - "means and refers to a road or part of a road or an area specified from time to time in the Fifth Schedule to these Regulations." The Fifth Schedule to the Road Traffic Regulations (appearing at reg.4 of the Road Traffic (Amendment)(No.5) Regulations, 1957, as the Schedule to those Regulations) specifies the Speed Limit Areas in the Island.

Mr. Downer for the Crown in supporting the conviction on the information as laid submitted that reg.191 itself creates an offence - that of exceeding the speed limit - and this notwithstanding that s.22 of the Law itself creates the like offence; that breach of reg. 191 being a contravention of a regulation made under the provisions of s.51 of the Road Traffic Law is punishable in accordance with the provisions of s.93(3) of the Law conformably with the provisions of the Law which became operative upon conviction for such an offence e.g. disqualification, but otherwise than with the penalties provided under s.94 of the Law which he concedes is applicable where there is a conviction for an offence charged under s.22 of the Law. Mr. Downer contended that it was for the prosecuting authorities to determine whether a charge of exceeding the speed limit should be laid under s.22 of the Law or reg. 191 depending upon the circumstances of the case and other relevant factors e.g. whether the defendant had a previous history of convictions for exceeding the speed limit.

Subsection (3) of s.93 of the Law provides as follows -

> "(3) If any person acts in contravention of or fails to comply with any regulations or orders made under any Part of this Law he shall, for each offence, be liable on summary conviction to a penalty not exceeding twenty pounds and in default of payment thereof to imprisonment, with or without hard labour, for any period not exceeding three months."

Section 94 of the Law which is applicable to an offence under s.22 provides as follows -

> "Any person who acts in contravention of, or who fails to comply with, any of the provisions of this Law, and any person guilty of an offence under this Law, for which no special penalty is provided, shall be liable in respect of each contravention, failure or offence to a penalty not exceeding twenty pounds and in default thereof to imprisonment, with or without hard labour, for any period not exceeding two months or in the case of a second or subsequent conviction to a penalty not exceeding fifty pounds and in default of payment thereof, to imprisonment with or without hard labour, for a period not exceeding three months or in the discretion of the Court to imprisonment, with or without hard labour, for a period not exceeding three months."

We think that the legislature never intended that reg.191 should create the offence of exceeding the speed limit as an alternative to s.22 of the Law. Regulation 191 made under the authority of s.51 of the Law was clearly intended to prescribe "the speed at which motor vehicles may be driven on any specified road or part of a road or on any road within any specified area of the Island" in order to give full effect and meaning to the provisions of s.22 of the Law, for without the matters specified by reg. 191, s.22 would be unenforceable. It is clear therefore that upon conviction for the offence of exceeding the speed limit the appropriate penalty is that provided by s.94 and not that by s.93(3) of the Law. The latter is the appropriate provision in respect of a number of the regulations and orders made under the authority of the Law and it provides the penalty for a contravention of, or a failure to comply with, such regulations or orders. As Wooding, C.J. pointed out in Gould v. Williams (1962) 5 W.I.R. 122 at p.123 there is clear authority that the contravention of a regulation is of itself an offence notwithstanding that no provision is made therein for penalising it.

It would follow that the reference to s.93(3) of the Law in the information laid against the appellant is incorrect. Further the information omits reference to s.22 of the Law. Is the information thereby rendered so defective that the conviction should be held to be incurably bad? It is apparent that the appellant was neither misled nor prejudiced by the error in the information. The information could have been amended before conviction. This without doubt was not done because the learned judge regarded the information to be without error. The appellant knew exactly

what charge she had to answer and endeavoured to answer it. However, it was submitted on her behalf that the conviction, having proceeded upon an information containing a defect of this kind, cannot be upheld and must be quashed. In support of that submission learned attorney for the appellant cited the case of R. v. George McFarlane (1939) 3 J.L.R. 154 a decision of the Jamaica Court of Appeal. In that case as the headnote states "the appellant was charged on a sworn information with failing to comply with a notice to provide a garbage receptacle for certain premises belonging to him, 'contrary to s.24(2) of the Public Health Law (18/1925).' The offence did not come under s.24(2) but under regulations made under the same law. Further the offence was not accurately described. At the conclusion of the case for the prosecution the defendant's solicitor pointed out that the wrong section was mentioned in the information but no amendment was made and the defendant was convicted upon the information as laid.

Held, that, in the circumstances, to amend the information would be to transform it and that even if the Court of Appeal had power to make such an amendment under s.304 of the Resident Magistrates Law, (39/1927) it would not exercise it." In that case reference to s.24(2) of Law 18 of 1925 showed that it had no connection whatsoever with the complaint laid in the information. It dealt with the failure by an owner or occupier to comply with a notice to provide a sufficient closet. For the respondents it was admitted that reference to the section of the Law was a mistake and that reference should instead have been to the regulations made under that Law. Further it was conceded that reference in the information to notice was unnecessary as what was really charged was failure "to provide a suitable garbage receptacle". It was submitted by counsel for the respondents that the reference in the information to s.24(2) of the Law and to "Notice" should be struck out, that the appellant knew and understood the real charge, answered it, and was therefore rightly convicted. The Court of Appeal considered that if effect were given to the amendments suggested little would remain of the original information and further that even if the Court had the power under s.304 of the Resident Magistrates Law, 1927 to amend an information it would not exercise it for the amendments sought would transform the information rather than amend it.

In the instant case the position is somewhat different. Here the information would have been quite unobjectionable had there been a reference at the end to s.22 of the Law instead of to s.93(3). But attorney for the appellant urges that it nevertheless offends against the provisions of s.64(2) of the Justices of the Peace Jurisdiction Law, Cap.188 as to the form of documents in criminal proceedings before a court of summary jurisdiction and that this is fatal if there is no amendment before conviction. Section 64 of Cap. 188 provides as follows -

> "(1) Every information, complaint, summons, warrant or other document laid, issued or made for the purpose of or in connection with any proceedings before examining Justices or a Court of summary jurisdiction for an offence, shall be sufficient if it contains a statement of the specific offence with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.
> (2) The statement of the offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and, if the offence charged is one created by statute, shall contain a reference to the section of the statute creating the offence.
> (3) After the statement of the offence, necessary particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be required.
> (4) Any information, complaint, summons, warrant or other document to which this section applies which is in such form as would have been sufficient in law if this section had not been passed shall, notwithstanding anything in this section, continue to be sufficient in law."

These provisions were enacted by s.7 of the Criminal Justice Law, 1929 (No.16). While s.64(2) requires that if the offence charged is one created by statute it shall contain a reference to the section of the statute creating the offence it is to be observed that s.64(4) saves the validity of any information which would have been sufficient in law had the 1929 statutory provisions not come into force. It is important therefore to enquire what form of information was sufficient in law immediately prior to the enactment of s.7 of the Criminal Justice Law, 1929. Reference to s.8 of the Justice of the Peace Jurisdiction Law, Cap.416 (1927 Revised Edition of the Laws of Jamaica) and to s.31 of the Appeal Regulation Law Cap.417 (1927 Revised Edition of the

Laws of Jamaica) which were in force immediately before s.7 of the Criminal Justice Law, 1929 came into operation provides the answer to that question. Section 8 of Cap. 416 abovementioned provided as follows -

"Every such complaint upon which a Justice or Justices of the Peace is or are or shall be authorized by law to make an order; and every information for any offence or act punishable upon summary conviction, unless some particular Law of this Island shall otherwise require, may respectively be made or laid without any oath or affirmation being made of the truth thereof, except in cases of information where the Justice or Justices receiving the same shall thereupon issue his or their warrant in the first instance to apprehend the defendant as aforesaid; and in every such case where the Justice or Justices shall issue his or their warrant in the first instance, the matter of such informations shall be substantiated by the oath or affirmation of the informant, or by some witness or witnesses on his behalf, before any such warrant shall be issued; and every such complaint shall be for one matter of complaint only, and not for two or more matters of complaint, and every such information shall be for one offence only, and not for two or more offences; and every such complaint or information may be laid or made by the complainant or informant in person, or by his counsel or attorney, or other person authorized in that behalf."

Section 31 of Cap. 417 abovementioned provided as follows -

"Every information, summons, order, conviction, warrant of distress, or commitment, or other proceeding shall be deemed valid and sufficient in which the offence or claim shall be set forth in the words of the Law creating the offence or giving jurisdiction, or which shall follow the form given by any Law relating to the offence or claim, or the general form in the Schedule given for any such proceeding under Part I of the Justices of the Peace Jurisdiction Law or under the general provisions of that Law or any other Law passed, or to be passed for the like purpose; and no proceeding shall be set aside for form merely where it appears that the party accused or called on to answer in the matter was duly summoned, and had notice of the offence charged, or claim made against him."

With s.8 of Cap. 416 should be read s.7 of that Law which provided as follows -

"In all cases of informations for any offences or acts punishable upon summary conviction, any variance between such information and the evidence adduced in support thereof

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as to the time at which such offence or act shall be alleged to have been committed shall not be deemed material, if it be proved that such information was in fact laid within the time limited by law for laying the same; and any variance between such information and the evidence adduced in support thereof, as to the parish in which the offence or act shall be alleged to have been committed, shall not be deemed material, provided that the offence or act be proved to have been committed within the jurisdiction of the Justice or Justices by whom such information shall be heard and determined; and if any such variance, or any variance in any other respect between such information and the evidence adduced in support thereof, shall appear to the Justice or Justices present and acting at the hearing to be such that the party charged by such information has been thereby deceived or misled, it shall be lawful for such Justice or Justices, upon such terms as he or they shall think fit, to adjourn the hearing of the case to some future day, and, in the meantime, to commit (according to Form (4)) the said defendant to the common gaol, or other prison or place of security, or to such other custody as the said Justice or Justices shall think fit. ..."

Incidentally these provisions now appear as ss. 9 and 8 respectively of Cap. 188 (1953 Ed. of the Laws). There was thus no requirement before the provisions of s.7 of the Criminal Justice Law, 1927 (now s.64 of Cap. 188) came into operation for an information or complaint in connection with proceedings before a court of summary jurisdiction to contain a reference to a section of the statute creating the offence. However, s. 2 of Cap. 416 (which provided for the issue of summonses) contained the following proviso -

"Provided also that no objection shall be taken or allowed to any information, complaint, or summons for any alleged defect therein in substance or in form, or for any variance between such information, complaint, or summons, and the evidence adduced on the part of the informant or complainant at the hearing of such information or complaint as hereinafter mentioned; but if any such variance shall appear to the Justice or Justices present and acting at such hearing to be such that the party so summoned and appearing has been thereby deceived or misled, it shall be lawful for such Justice or Justices, upon such terms as he or they shall think fit, to adjourn the hearing of the case to some future day."

In such circumstances the defect in the information is cured by the operation of the second proviso to s.2 of Cap.188, and the conviction based on that information is good.

For these reasons the appeal is dismissed and the conviction and sentence are affirmed.

This provision now appears as the second proviso to s.2 of Cap.188. The position therefore immediately before what now appear as the provisions of s.64 of Cap.188 and as retained by virtue of s.64(4) of Cap.188 is as follows -

(1) There is no requirement for an information or complaint to contain any reference to the section of the statute creating the offence charged;

(2) no objection shall be taken or allowed to any information, complaint or summons in respect of -

   (a) any defect therein in substance or in form; or

   (b) any variance between any information, complaint or summons and the evidence adduced in support of the information or complaint at the hearing (2nd proviso to s.2 of Cap.188);

(3) no variance between any information and the evidence adduced in support thereof at the hearing in respect of the time or place at which the offence or act is alleged to have been committed shall be deemed material if it is proved that the information was in fact laid within the time limited by law in that behalf or that the offence or act was committed within the jurisdiction of the justice or justices by whom such information shall be heard and determined, as the case may be (s.8 of Cap.188);

(4) where any such defect or variance appears to the justice or justices present and acting at the hearing to be such that the defendant has been thereby deceived or misled such justice or justices may upon such terms as he or they may think fit adjourn the hearing of the case to some future day (2nd proviso to s.2 and s.8 of Cap.188).

It follows that the information as framed in this case is good by virtue of s.64(4) of Cap.188, save for the reference therein to s.93(3) of Cap.346. That subsection is a penalty section and creates no offence. This defect in the information is but a defect in the particulars supplied in the information which, as already has been stated, did not cause the defendant (appellant) in any way to be deceived or misled.