**PATEL v THE PEOPLE (1969) ZR 132 (HC)**

HIGH COURT

GARDNER J

12th SEPTEMBER 1969 35

**Flynote and Headnote**

[1]   **Criminal procedure - Form of charge - Omission of exception or qualifications from charge.**

   Section 127C (b) (ii) of the Criminal Procedure Code makes it unnecessary to include in a charge under the Exchange Control Act and Regulations issued thereunder any words of exception. 40

[2]   **Criminal procedure - Form of charge - Omission of exception or qualifications from charge.**

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   Omission of the phrase "without the permission of the minister" from a charge under the Exchange Control Act and the Regulations issued thereunder was not a miscarriage of justice as the regulation under which the appellant was charged was correctly set out, the appellant was represented by counsel, and no objection was raised to 5 such omission by such counsel at an early stage of the proceeding.

[3]   **Money - Exchange Control Regulations, 1965 - Regulation 9 construed - Meaning of the word "Payment".**

   The use of the word "payment" in Regulation 9 of the Exchange Control Regulations means a transfer of money not necessarily in 10 discharge of a debt or other obligation.

[4]   **Money - Exchange Control Regulations, 1965 - Regulation 9 construed - Meaning of the word "Outside".**

   A payment is completed when money is received by the addressee of an envelope consisting of money, and the placing of money in 15 an envelope in Zambia addressed to a place outside Zambia and the posting of such letter constitutes a preparation for a payment outside Zambia.

[5]   **Evidence - Burden of proof - Presumptions - Statutory reversal of the - burden of proof***.* 20

   Section 4 (2) of the Exchange Control Act creates a presumption that any person charged with an offence under the Act involving the commission of an act without a permit committed such act without such permit; and there is, therefore, no *onus* on the prosecution to give any evidence that such act was done without such permit. 25

[6]   **Criminal procedure - Form of charge - Duplicity of charge - Prejudice.**

   Even though a count is bad for duplicity, it is not grounds for reversal where the appellant knew what the count related to and was in no way prejudiced by the wording of the charge and where there was no miscarriage of justice. 30

[7]   **Jurisprudence - American law - Effect of American decisions in Zambia.**

   Decisions by the courts of the United States of America are not binding on Zambian courts but may be considered by Zambian judges - especially when similar constitutional rights are in question. 35

[8]   **Jurisprudence - Reception of English law - English cases on admissibility of evidence.**

   The question of admissibility of evidence is one of law and practice and, in the absence of governing Zambian law, English authorities may be followed. 40

[9]   **Evidence - Admissibility - Reference to English cases.**

   See [8] above.

[10]   **Evidence - Illegally obtained evidence - Admissibility depends on fairness.**

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   Even if appellant's constitutional rights were infringed in obtaining evidence, such evidence should be admitted if it is not unfair to the accused or not obtained by unfair conduct.

Cases cited:  5

   (1)   *R (Sheahan) v Justices of County Cork* (1907) 2 Ir. R 5.

   (2)   *Roger v R* 1962 R & N 385.

   (3)   *Reuben v R* 1962 R & N 518.

   (4)   *R v Thompson,* 9 CAR 252.

   (5)   *Mapp v Ohio,* 367 US 643 (1961). 10

   (6)   *Weeks v Y S ,* 232 US 283 (1914).

   (7)   *Karuma v R* [1955] 1 All ER 236.

   (8)   *Noor Mohamed v R* [1949] 1 All ER 370.

   (9)   *King v R* [1968] 2 All ER 610.

Statutes and regulations construed: 15

   (1)   Exchange Control Act, 1964 (No. 2 of 1965), ss. 4 (2). 6.

   (2)   Criminal Procedure Code (1965, Cap. 7), ss. 127C (b) (ii), 323.

   (3)   Exchange Control Regulations, 1965, r. 9.

*Sarah and Carruthers,* for the appellant

*Heron, State Advocate*, for the People  20

**Judgment**

**Gardner J:** This is an appeal against a conviction by the Senior Resident Magistrate at Ndola on the 18th December, 1968 for doing an act preparatory to the making of a payment outside Zambia contrary to Regulation 9 of the Exchange Control Regulations, 1965, and section 6 of the Exchange Control Act. The particulars of the offence as set out in the 25 charge sheet were that the appellant on divers dates between 3rd and 10th May, 1968, at Ndola in the Western Province of the Republic of Zambia did an act preparatory to the making of payments outside Zambia in that he for the purpose of making a payment outside Zambia placed or caused to be placed in the post sixty - five airmail envelopes for transmission 30 outside Zambia to fifty - five Oakfield Road, London, N.4 containing 8 x K10 notes cash making a total of K5,200 legal tender in Zambia.

The grounds of appeal are as follows:

   (2)   that the count on which the appellant was convicted was bad for duplicity, 35

   (4)   the count on which the appellant was charged did not disclose an offence in law;

   (5)   the magistrate was wrong in law to have admitted evidence obtained by Gordon David Hilditch as a result of his examination of out - going mail in the Ndola Post Office. 40

   (6)   There was no or no sufficient evidence that the appellant had no permission from the minister to send Zambian currency through the post.

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   (7)   The magistrate was wrong in law to find that a statutory explanation was required from the appellant.

   (8)   The magistrate was wrong in law to have admitted the statement marked 'D' of the appellant.

During the course of the appeal Mr. Carruthers, for the appellant, 5 withdrew the 8th ground of appeal relating to the statement made by the appellant.

I will deal with these grounds of appeal in the order which they were dealt with by Mr Sarah and Mr Carruthers on behalf of the appellant.

[1] [2] Under ground four of the appeal Mr Sarah argued that the 10 wording of the charge did not disclose an offence because the words "without the permission of the minister" were not included in the charge. He referred to Glanville Williams on Criminal Law, Second Edition at pages 899 and 900 and in particular an Irish judgment in the case of *R (Sheahan) v Cork JJ.* [1] in which Mr Justice Gibson discussed the effect 15 of the Magistrates Courts Act, 1952, s. 81 and the Magistrates' Courts Rules, 1952, r. 4 (3) and said:

   "The test, or dividing line, appears to be this: Does the statute make the act described an offence subject to particular exceptions, qualifications, etc., which, where applicable, make the *prima facie* 20 offence an innocent act? Or does the statute make an act, *prima facie* innocent an offence when done under certain conditions? In the former case the exception need not be negatived; in the latter, words of exception may constitute the gist of the offence."

Glanville Williams points out that this applies only to summary 25 trials and the case of an indictment there is a statutory permission to omit reference to exceptions and qualifications under the Indictments Act, 1915, Schedule I Rule 5 (2). The rule referred to the Indictments Acts 1915 uses the same wording as section 127C (b) (ii) of the Zambian Criminal Procedure Code and provides that it shall not be necessary in any count 30 charging an offence constituted by an enactment to negative any exception or exemption therefrom.

To illustrate his point Mr Sarah compared the Exchange Control Regulations with the Roads and Road Traffic Act, the Dangerous Drugs Act and the law relating to Rape. He argued that in order to charge a 35 person with careless driving or driving without a licence it is necessary for the charge to contain words indicating that the driving was without due care and attention or without a licence whereas in the case of the Dangerous Drugs Act it would be sufficient to charge a person with being in possession of dangerous drugs because the possession of dangerous drugs is 40 absolutely prohibited by that Act except in very rare circumstances where a licence from the minister could be obtained. It was argued that the Exchange Control Act is one of control and did not expressly prohibit transactions concerning money but merely made regulations governing such exchange. I agree with Mr Sarah that under the Roads and Road 45 Traffic Act it is necessary to specify that a person was driving without due

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care and attention or driving without a licence for the very reason that the driving of a motor car can be an offence in a number of different ways, e.g., it can be without due care and attention, without a driver's licence, without a road licence or without lights, etc., and it is necessary to 5 indicate to an accused person without doubt the exact nature of the offence with which he is charged. The same applies to the analogy of the law relating to rape in that the having of carnal knowledge can be an offence in a number of different circumstances and it is necessary for the accused to know what circumstances are alleged against him. In the case of 10 the Exchange Control Regulations, however, the payment or making preparation for a payment of money *outside Zambia* is made an offence only in the event of the payer having no permit from the minister. Regulation 9 is a prohibition on doing an act preparatory to making a payment outside Zambia and only the holding of a permit will avoid that 15 prohibition. Furthermore doing such an act without a permit is the only circumstance in which the doing of an act is made an offence. The appellant could not therefore be misled about the nature of the charge although the exception of having a permit from the minister was omitted from the wording of the charge. I was referred to the case of *Roger v R* [2] In which Mr Justice Maisels held that the omission of the word "maliciously" in a charge of causing malicious damage was fatal to the charge because it revealed no offence. Section 132 (2) (b) of the Criminal Procedure and Evidence Act, Cap. 28 of the Southern Rhodesia legislation has the same effect as section 127 (b) (ii) of the. Criminal Procedure Code but Mr Justice 25 Maisels was not deciding in that case that a statutory exception had been wrongly omitted from the charge. The word creating the offence, namely, "maliciously" was omitted and this was what rendered the charge defective in that it disclosed no offence. In the present case if the words "outside Zambia" had been omitted the argument for the appellant would 30 have had more weight although having regard to section 323 of the Criminal Procedure Code, which I will refer to immediately, the decision in Roger's case might very well not be followed by this court. I have also been referred to the case of *Reuben v R* [3] in which Blagden, J, considered in great detail the effect of section 323 of the Criminal Procedure Code. This section reads as follows: 35

   "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on any ground whatsoever unless any matter raised in such ground has in the opinion 40 of the appellate court in fact occasioned a substantial miscarriage of justice: Provided that in determining whether any such matter has occasioned a substantial miscarriage of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceeding".  45

Blagden, J, found that an error in quoting a section instead of a regulation number was a "slip" and did not occasion a substantial miscarried of justice. In this case there was no error in quoting the regulation number and I have to consider whether the ommission of the statutory exception occasioned a miscarriage of justice.

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The *onus* is upon the State to satisfy this Court that there has been no miscarriage of justice and in this case Mr Heron, on behalf of the State, whilst admitting that it would have been better had the charge contained the words "without the permission of the minister", maintained that the appellant was in no way misled, embarrassed or hampered in his defence. I 5 find that section 127C (b) (ii) renders it unnecessary to include in the charge any words of exception although I agree with Mr Heron that it would be very much better if this type of charge included such words. I also find that the appellant, who was represented by counsel at his trial, was not in any way misled or embarrassed by the charge and particulars as 10 framed, especially in view of the fact that the regulation number under which the appellant was charged was correctly set out in the statement of offence. I have taken into account the fact that the appellant was represented by counsel and objection could have been raised at an early stage of the proceedings and the failure of counsel to raise such an 15objection indicates to me that they were not embarrassed by the charge as framed.

[3] [4] Mr Sarah raised another reason for maintaining that the charge as drawn did not disclose an offence. His argument in this respect was that the use of the word "payment" in the charge and in the context 20 does not disclose an offence because in order to effect a payment there must be two persons, in that a person cannot make a payment to himself; and in Regulation 9 the words "outside Zambia" is a preposition of position and not one of motion. He pointed out that as originally charged the appellant had to answer an alternative charge of attempting to export 25 currency contrary to Regulation 17 (1) of the Exchange Control Regulations but this charge was withdrawn by the State at an early stage in the trial. It was argued that Regulation 9 could not be combined with Regulation 17 and for this reason the words "for the purpose of making a payment outside Zambia" were wrongly included because there is no 30 need for the State to approve *mens rea* under Regulation 9. The legal authorities relating to the meaning of the word "payment" are not very helpful in the circumstances of this case in that those referred to on page 2127 of Strouds Judicial Dictionary, 3rd Edition, do not relate specifically to the use of the word "payment" in criminal cases. I do not accept the 35 proposition that a payment necessarily implies two persons in the context of the Exchange Control Regulations. A person may pay money to himself in two different capacities, e.g., as a trustee. I am more inclined to accept the proposition set out in the authorities cited in Paragraph 1 (c) on page 2127 of Strouds Judicial Dictionary, namely that payment is not a 40 technical word and it has been imported into law proceedings from the exchange and not from law treaties. It does not necessarily mean payment in satisfaction or discharge but may be used in a popular sense. I find that the use of the word "payment" in regulation 9 means a transfer of money not necessarily in discharge of a debt or other obligation. With 45 regard to the use of the word "outside" I hold that a payment would be completed when the money was received by the addressee of an envelope containing money and that the placing of money in an envelope in Zambia addressed to a place outside Zambia and the posting of such letter consti -

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tutes a preparation for a payment outside Zambia. The charge, as drawn, discloses clearly an offence against regulation 9 of the Exchange Control Regulations. I find that there is no merit in the ground of appeal and it must therefore fail. 5

[5] Mr Sarah then went on to the sixth ground of appeal namely that there was no evidence that the appellant had no permission from the minister. It is argued that the Exchange Control Act, section 4 (2) imposes on an accused the persuasive burden of proof and there is still some *onus* on the prosecution to prove that an offence has been committed. In 10 support of his argument Mr Sarah again quoted Glanville Williams at pages 901 - 903 and the cases referred to therein; but those cases related to what the author calls "*implied* statutory reversal" of the burden of proof. In the case before me there is an *express* statutory reversal of the burden of proof in that section 4 (2) of the Exchange Control Act provides as follows: 15

   "Any person charged with any act or omission which is an offence under this Act if the act is done or omitted to be done without permit, exemption, permission or other authorisation, shall be presumed unless and until the contrary is proved by the accused 20 person to have done or to have omitted to do such act without such permit, exemption, permission or other authorisation as the case may be, when he performed or omitted to perform the act in question".

And Glanville Williams discussed the weight of evidence required where 25 such a presumption applies against an accused and quotes cases in which it has been held that the *onus* on an accused is less than that required from the prosecution in proving the case beyond all reasonable doubt. Evidence was adduced of the appellant's doing an act preparatory to making a payment outside Zambia in this case. No evidence was called from the 30 appellant or from witnesses on his behalf and the statutory presumption therefore remains unrebutted. There is obviously an *onus* on the prosecution to prove that the appellant is guilty of an act preparatory to making a payment outside Zambia but there is no *onus* at all on the prosecution to give any evidence that such act was done without the 35 permission of the minister. The learned Senior Resident Magistrate found that he was satisfied that the act was done in the absence of a rebuttal by the appellant, the statutory presumption that he did not have a permit from the minister must take effect.

The sixth ground of appeal therefore fails. 40

[6] The next ground of appeal dealt with by Mr Sarah is the seventh ground of appeal that the count was bad for duplicity. In his judgment the learned Senior Resident Magistrate said that he followed the judgment in *R v Thompson,* [4] and found that the appellant knew what the count related to and could not say that he had in any way been embarrassed or 45 prejudiced. The count was therefore bad for duplicity but the accused had not been embarrassed or prejudiced and the count should stand. Mr Sarah argued that in the case of *R v Thompson* the Court of Appeal had exercised its powers under the *proviso* to section 4 of the Criminal Appeal Act of

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1907, when they found that a count was bad for duplicity; and it was not for the magistrate to apply such a *proviso* because the power was vested in the Court of Appeal and cannot be exercised by a magistrate. This proposition by counsel is contrary to the effect of the finding of the Court of Criminal Appeal in the Thompson case. The headnote in that case reads as 5 follows:

   "An objection to a count as bad for duplicity, or to the number of counts as embarrassing, must be based on the ground that the defence is likely in fact to be prejudiced by such counts, and this is a matter for the discretion of a judge subject to the revision of this 10 count . . ."

In connection with this case I prefer the use of the words "irregular for duplicity" as were used by the Court of Criminal Appeal (rather than "bad for duplicity" as used by the learned Senior Resident Magistrate) and I agree that the count is irregular in that it refers to more than one offence 15 committed on different days but I also agree that the defence is in no way embarrassed by this wording of the charge and there has been no miscarriage of justice. This ground of appeal also fails.

Mr Sarah went on to argue ground 5 of the appeal, namely that the search by the customs officer Mr Hilditch was an infringement of the 20 appellant's rights under the constitution and Mr Carruthers, on behalf of the appellant, argued from there that the infringement made the admission of Mr Hilditch's evidence and the exhibits he produced inadmissible against the appellant. It is not necessary for me to consider the details of Mr Sarah's argument under this ground of appeal until I 25 have considered the argument by Mr. Carruthers that the evidence was not admissible. However, at this stage I note for the record that I have examined the 65 envelopes produced by Mr Hilditch before the trial court and each one of those envelopes is addressed to 55 Oakfield Road, London, N.4 but the name of the addressee on every envelope is different. 30 It follows from this that when Mr Hilditch found the first four envelopes the addressee's name on each one was different and this evidence would be material in applying an objective test to Mr Hilditch's reasonable suspicion. I also note that the appellant made a statement under warn and caution to the police in which he admitted having sent the envelopes 35 and money to a relative at the address in London and this statement was admitted in evidence by the learned Senior Resident Magistrate.

In the very early stages of the trial before the learned Senior Resident Magistrate counsel for the appellant objected to the evidence of Mr Hilditch on the grounds that his information was obtained as a result 40 of an infringement of the appellant's constitutional rights under sections 19, 22 and 18 of the Constitution. This question was submitted to the High Court under the provisions of section 28 (3) of the constitution and Magnus, J, on the 4th October, 1968, delivered his judgment on the reference to him, in which he found that subject to certain presumptions 45 the obtaining of evidence by Mr Hilditch was not an infringement against any of the appellant's constitutional rights. It was argued before me that the presumptions relied upon by Magnus, J, in his judgment were not in

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fact fulfilled when the whole of the prosecution evidence was adduced and therefore as Magnus, J, put it on page 37 of his judgment, line 8, "other considerations must arise." As I have said, it is not necessary for me to decide whether such other considerations must arise and if so 5 what would be the result of such considerations until I have first dealt with the arguments put forward by Mr Carruthers on the admissibility of the evidence.

Mr Carruthers argued that there had been an infringement of the rights of the appellant under sections 18 and 19 of the constitution 10 namely that under section 18 (1) "No property of any description will be compulsorily taken possession of" and under section 19 (1) "Except with his own consent no person shall be subjected to the search of his person or property."

[7] Mr Hilditch gave evidence to the effect that he had searched the 15 mails at Ndola Post Office where he found over a period of time the 65 envelopes containing money addressed to 55 Oakfield Road in London and as a result of a police surveillance of the post box he found that on one occasion the appellant had posted some of the letters. As a result of this the appellant made a statement to the Police admitting posting 20 all the letters as I have previously mentioned. If the finding of the letters resulted from an infringement of the appellant's constitutional rights Mr Carruthers argued that the learned Senior Resident Magistrate should not have admitted the letters or the evidence concerning them. It was argued that in default of a written constitution under English Law it is 25 appropriate to examine the American authorities because in the United States of America the law relating to a written constitution had been extensively considered in numerous judgments which should be taken into account by this court. Whilst such legal decisions by the courts of the United States of America are not binding on this court they may be 30 of course be the subject of consideration by this court where similar constitutional rights are in question. As a result of my consideration of the cases referred to by Mr Carruthers I note that in the United States of America after a long history of argument as to whether or not State laws about the admissibility of improperly obtained evidence are covered 35 by the Constitution in the same way as are federal laws the United States case of *Mapp v Ohio,* decided that the procedure laid down in *Weeks v U.S., [6]* (1914) should be applied throughout the United States of America. This procedure is set out on page 938 of the 64th Edition of the United States of America Constitution (Annotations and Cases). 40 The relevant paragraph reads as follows:

   "To remove the temptation to ignore constitutional restraints on search and seizure, evidence obtained in violation thereof is made inadmissible against an accused in federal courts."

Other decided cases cited in the same volume indicate that where federal 45 or state officers come into possession of evidence which was originally obtained by some other person in violation of the constitutional rights such evidence may be admissible. Under these authorities Mr Carruthers quite rightly points out that evidence referred to in the appeal now

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before me would not be admissible in the United States of America, if it were obtained by a federal or state officer in violation of constitutional rights. It was also argued before me that a written constitution carries more weight than the English Common Law and the result of an infringement of such constitutional rights would be different from that of a 5 breach of common law rights in considering the admissibility of evidence. With regard to the law relating to common law rights the Privy Council in the case of *Karuma v R* [7] decided that in considering whether evidence was admissible the test was whether it was relevant to the matters in issue and if it was relevant the court was not concerned by the 10 method with which it was obtained. At page 239 Lord Goddard, C. J, having found that the test to be applied was whether the evidence was relevant to the matters in issue said:

   "No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate 15 unfairly against an accused . . ."

In the case of *Noor Mohamed v R* [8] the courts discretion to exclude evidence is examined in detail and Lord Du Parcq said:

   "The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the 20 accused even though there may be some tenuous ground for holding it technically admissible . . ."

In the Karume case at page 239 Lord Chief Justice Goddard said,

   "If for instance the admission of some piece of evidence had been obtained by the defence by a trick no doubt the judge might , properly rule it out . . ."

Mr Heron, for the State, argued that the decisions of the courts of the United States of America should not be followed by this court as a matter of course and cited the case of *King v R*  [1] where the Privy Council held that the illegal search of a person, under a warrant for the 30 search of premises only, resulting in the finding of drugs was not a case in which evidence had been obtained by conduct of which the Crown ought not to take advantage. At page 617 Hodson L. after noting that the provisions of the Jamaican constitution gave protection to persons against search without consent, said: 35

   "This constitutional right may or may not be enshrined in a written constitution, but it seems to their Lordships that it matters not whether it depends on such enshrinement or simply on the common law as it would do in this country. In either event, the discretion of the court must be exercised and has not been taken 40 away by the declaration of the right in written form."

[8] [9] In considering whether the decisions in the American cases or the English cases should influence this court I take into account section 10 of the High Court Ordinance which provides:

   "The jurisdiction vested in the court shall, as regards practice and 45 procedure be exercised in the manner provided by this Ordinance

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   and this Criminal Procedure Code or by any other written law, or by such rules, order or directions of the Court as may be made under the Ordinance, or the same Code, or such written law, and in default thereof in substantial conformity with the law and practice for the 5 time being observed in England in the High Court of Justices."

[10] In my view the question of admissibility of evidence is one of law and practice and for that reason I prefer to follow the English authorities. Admissibility of this evidence would be fair to the accused and I have no hesitation in finding that whether or not there was an infringement of 10 constitutional rights the evidence was not obtained by any unfair conduct such as a trick. Whether or not there was an infringement of constitutional rights the learned Senior Resident Magistrate could not in the proper exercise of his discretion have excluded the evidence and the documents produced by Mr Hilditch on behalf of the prosecution. 15

Having regard to this finding the first part of the fifth ground of appeal namely that there was an infringement of constitutional rights does not require consideration and the appeal on this ground fails.

The whole of the appeal is therefore dismissed.

  20 *Appeal dismissed*

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