

DECIDED
2 August 1977

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• I, : i: ~ ~ • ... , !: • ... : n OD_Qi\iT . ' A-T i . J. lii .. <.: . . ~ • . . . AP?'.E:LL\..TE JURISDICTION
• . HIGH COURT CRIJVIINAL APPEAL No. 105 OF 1977 . CF. CRIJ.VIINAL APPEAL No. 106 .OF
1977 ORIGINAL CRIMINL CA Si No. 1 36 OF 1976 OF THE DISTRICT COURT OE'
'KONGWA -DIS'J:RICT AT KONGWA ".: BEFO .. R'>' . l:J ~- .A .M. Sli.NGA •
DIS'rRICT :n:~G I STRATE : -PATRIC.K .s/o IV'it:~OLE • . .

• - • APP ELL1;,.NTS • . MBI'ITYANI. \$/0 BOLLITJ.: • • • versus .. THE REPIJBL IC • • •

- . . 0 • RESPONDENT . cw~RGE: Uttering coun;erfei t not~ c/s 360(1)-of the ~enal Code. • ..
• JU D G M E N T . CH I PET fl • J • . The two appellants_, Patridk M2J.9le and. ~lbatyani
~oleti, were each charged with and convicted of an offence cited . in the charge she~t as
"Uttering counterfeit note c/s "39Q(1) of the Pe~l Code, 11 and were each sentenced to two
year:s; im.prisonment~ they now _appeal, and their appeals are her'3by consolidated. • • •
Before I proceed to deal wi-th the merits of the app-ealJI I would. like .to dispose of two
procedural- q_uestions, In the first pl.ace, the manner -in which the cm. rges were :framed
left mu.ch to be desired. The charge sheet reads as follows: STATEMENT OF OFFENCE:
Utterine counterfeit' hote c/s 360 (1) of the Penal Code • . PARTICULLRS OF OFFENCE 1st
accus<:)d: That lYiba.tyani Boleti is charged on the 1st day 'bf Decemb~:::~:, 1 976, e;t;
about 22 hours at Kongwa Per:: :c, shop Kone;wa Sub-District, J.vlpwa'pwa District,
Dodoma Region, was :found in possession of one counterfeit . ..' (note) of shs. 100/-
numbe.red L 303223 knowing the same- to be counterfeit- PARTICULJ,..RS OF OF:F'ENCE
ind accused: That Patrick Malole 13 . charged on the 1st day of December, • 1 976, at about
21 hours at Kongwa Pcr;~::s shop Kongwa Sub~:, District, Mpwa:pwa .District; Dodoma
Region~ was found in possession of one counterfeit note of shs .. 100/- numbered L 303215
knowi:ne "the same to be_ counterfeit • 11 . 'To start with, scctiqn 360 of the Pena:l Code
does not create the offence of "utte:r-i.ng a counterfeit note." That section creates iho
off_ence of uttering counterfeit coin~ Besides, section 360 of the P:::nal Code does not have
a sub- section. • • From the partiouls of the charges, the charges ought. to hG've been laid
und~r section 348 of the Penal Code which creates the offence, inter alia, of being in
unlawful possession of forged bank note or currency note. T~ is apparc~t • from the
particulars of the charges, that the learned trial rragis trate and the public prosecutor had

section 348 of the Penal Code in mind.

- ... 2. 2 Inasmuch as the charge cited the wrong section of the law, the charge was defective. What is then the effect of such defect? Section 346 of the Criminal Procedure Code provides that no finding, sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on an appeal or revision on account of any error or irregularity in the complaint, summons, warrant, charge, etc. unless the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice. The question, therefore, is whether this defect in this case in fact occasioned a failure of justice. In my view, where a charge has cited a wrong section of the law, but the particulars of the charge clearly refer to the actual offence committed, and if the accused cannot be said to have been under any apprehension as to the offence with which he stood charged then such defect is curable under the provisions of section 346 of the Criminal Procedure Code. In the instant case there were two defects: the first was that a wrong section of the law was cited; the second was that it alleged "uttering counterfeit money"; it noted the particulars of the charges however, leave no doubt that the charges alleged against the appellants were those of being in possession of a forged bank-note or currency note, which is an offence under section 348 of the Penal Code. In my view, therefore, the fact that a wrong section of the law was cited is a curable defect under the provisions of section 346 of the Criminal Procedure Code. The use of the words "uttering counterfeit money" were similarly unfortunate. The phrase that ought to have been used was "being in possession of forged money". But, as it may, in my opinion, in the language used, the appellants as to have occasioned any failure of justice. The particulars of the charges, as I have said, could have no doubt in the mind of any of the appellants. Indeed, I would go so far as to say that a forged bank-note is in fact a counterfeit bank-note in that to counterfeit a bank-note is to make the same thing as to forge it. On these grounds, therefore, I hold that those two defects are not fatal to the convictions, in as much as they are curable under the provisions of section 346 of the Criminal Procedure Code. The second procedural irregularity in the charge sheet is that the charge sheet cites as one count what were really two separate counts - one against each appellant. This was wrong. It has been pointed out on other occasions that where more than one count is charged in one charge or information the counts must be set out separately and each count must contain the statement of offence and the particulars thereof. Of course each count constitutes a distinct offence, (J'f: ~itic v., (1961) E.L. 470), however, this is not an irregularity because the second count is identical to the first. The failure of Justice 1 and so, cannot vitiate the convictions. Having decided the procedural aspects of the matter, I will now turn to the merits of the appeal. The prosecution evidence was that the appellant, the Bate, might the two appellants went to Longwa pombe shop together, and on arrival there, the second appellant, Mr. Mbatyani Boleti, asked the complainant (Pw. 1) to give them shs. 97- worth of pombe, which Pw. 1 did. The second appellant then gave the

complainant said that she had. no change, the first appellant told her to keep the money and give her change tomorrow. These two notes were later found to be forged. Each of the appellants denied having given the notes to the complainant. The learned trial district magistrate accepted the evidence of the complainant which was supported by that of Pw. 2, and Pw. 3. Having perused the entire record, and bearing in mind that the learned magistrate had the advantage of seeing and hearing the witnesses, I am far from persuaded that his findings of fact ought to be impugned. In my view, the findings are fully supported by the evidence. There is further ample expert evidence to the effect that the two notes, fairly clever forgeries, were not genuine bank-notes, and the appellants gave no explanation as to how they came to possess the so-called evidence to discharge the burden that lay on them by statute that they were in lawful possession of the forged notes. In the circumstances, the convictions under section 348 of the Penal Code were inevitable. However, in order to keep the record straight, section 360(1) of the Penal Code shown in the schedule is substituted with section 348 of the Penal Code. On the question of sentences, I note that an offence under section 348 of the Penal Code attracts, as correctly pointed out by the learned magistrate, a maximum sentence of seven years imprisonment. The art of forgery that went into the making of the forged notes, had been developed to near perfection. Although the appellants were first offenders, the circumstances clearly called for deterrent sentences. Besides, there is the duty on everyone to protect our national currency. For these reasons I do not propose to interfere with the sentences. They are to stand. As the sentences require confirmation by this court, they are hereby confirmed. In the result, save as indicated herein, the appeals are hereby dismissed. (Court) 111/1977, (B.D. CHIP-STL JUDGE Delivered in Court on 2nd day of August, 1977. I hereby confirm the findings of fact and law. B.D. CHIPSTL JUDGE

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