IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Criminal Appeal No.15 of 1984

Between:

ABDUL ASIF s/o Abdul Lateef — Appellant

and

REGINAM — Respondent

S.R. Shankar for the Appellant
Sohan Singh for the Respondent

Date of Hearing: 11th July, 1984
Delivery of Judgment: 25 July, 1984

JUDGMENT OF THE COURT

O'Regan, J.A.

On 31st August, 1982, the appellant was convicted in the Magistrate's Court at Tavua on two counts of larceny, involving the theft of goats, and three counts of cattle-stealing. He was sentenced to six months' imprisonment on each of the larceny counts and fifteen months' imprisonment on each count of cattle-stealing but one of the former sentences and two of the latter were ordered to be cumulative with the end result that the appellant was effectively sentenced to serve three years' imprisonment.

His appeal against both conviction and sentence were heard in the Supreme Court at Lautoka on 10th November,

1982 and judgment was delivered on 19th November, 1982.

The main thrust of the appeal was against the admission in evidence of confessions both oral and written said to have been made by the appellant. The learned Judge, after considering the relevant evidence, said :

> " The magistrate has clearly relied to a large extent on these statements and since he has not properly dealt with these or all the implications of the evidence there is no option but to set aside the convictions and sentences without prejudice to the right of the Director of Public Prosecutions to prosecute again on the same facts. "

The appellant was thereupon released from prison but was re-arrested on or about 2nd May, 1983 and charged in the Tavua Court on that date with two counts of cattle-stealing. The charges were in respect of the same matters detailed in the two of the counts of cattle-stealing upon which he had been found guilty on 31st August, 1982 and in each instance, save for a minor detail, were ipsissima verba with such counts.

The appellant elected trial by the Supreme Court. At the preliminary hearing on 2nd December, 1983, counsel for the appellant raised the plea of autrefois acquit but the presiding magistrate being of the opinion that such was a matter for the trial Judge, declined to rule thereon.

Learned counsel formally raised the matter again at the commencement of the trial on 5th March, 1984. After hearing argument the learned Judge said :

> " To decide on these matters, in my view, entails a review or interpretation of the judgment made by my learned brother Judge. I consider I have no power to review or comment on his judgment in any way. As I see it, such power lies only in the Court of Appeal. In effect it seems to me, in the circumstances of this case, that I am debarred from adjudicating on the special plea in bar. "

He then adjourned the trial to enable the appellant to apply for leave to appeal to this Court out of time. His application was heard by Mishra J.A. on 8th May, 1984 and the application duly granted.

The grounds of appeal were :

(a) That upon setting aside the said convictions and sentences the learned Judge on appeal stated inter alia 'without prejudice to the right of the Director of Public Prosecutions to prosecute again on the same facts';

(b) That under section 319 of the Criminal Procedure Code the learned Judge did not make any order for re-trial nor did he exercise the discretion vested in him under the said section to make such an order hence the setting aside of the conviction and sentence is an acquittal and/or quashing of the conviction and as such special plea of autrefois acquit is available to the appellant on any subsequent prosecution on the same facts.

The first of these grounds and a large part of the second are merely recitals of the factual situation and the latter part of the second, whilst adverting to questions of law, did not fall within the prescription of section 22 of the Criminal Procedure Code inasmuch as such questions did not involve "appeals against the decision of the Supreme Court" on the second appeal from the Magistrate's Court.

Very early in the argument, because of that factor, we apprehended real difficulty in meeting the exigencies of the situation which now exists. In the guise of an appeal we were in reality being asked, on

the one hand, for an order akin to declaration as to the meaning of the learned Judge's order and on the other, to deal with a plea of autrefois acquit. As to the latter, whilst we sympathise with the views of the Judge presiding at the second trial, we think that the plea was properly raised before him and that it was for him to hear the argument and make the decision therein.

We canvassed these difficulties with counsel. We made it clear that we were anxious to resolve the difficulties that now and for too long have beset the appellant and vexed all others having to do with his trial. Following some discussion, Mr. Shankar devised amended grounds of appeal which seemed to encompass the issues at the heart of the problem and bring them before this Court in a regular form pursuant to section 22. An order was accordingly made by consent allowing the amendments.

The amended grounds are :

(a) That the learned Judge having set aside the convictions of the appellant erred in not ordering acquittals on all counts.

(b) That the learned Judge in reserving "the right to the Director of Public Prosecutions to prosecute again on the same facts" exceeded the powers vested in him by section 319 of the Criminal Procedure Code or alternatively that if the words "without prejudice to the right of the Director of Public Prosecutions to prosecute again on the same facts" are construed either to mean a trial de novo then the learned Judge erred in the exercise of such powers.

(c) That the learned Judge at the second trial erred in law in failing to decide the plea of autrefois acquit raised by the appellant.

It is convenient to deal first with Ground (c). We have already expressed our view in a general way on the point encompassed by this ground of appeal. We remind ourselves that the appeal before us is a second appeal pursuant to section 22 and note that this ground involves a first appeal from the Supreme Court and thus is not regularly before us. All in all we are not disposed to say more about it.

Before dealing with the other grounds we turn to consider the problems thrown up by the order made by the Judge. These effects were readily apparent when the order was made but subsequent events have thrown them into bold relief. The order setting aside the convictions left the counts on which they were founded, lying in the Tavua Court partly heard but never to be completed. And the reservation of the right to the Director of Public Prosecutions "to prosecute again on the same facts" left open the way for fresh informations to be laid and thereby duplicating the outstanding counts. Of course, that possibility subsequently became a reality in respect of two of the counts. The fact that the Director of Public Prosecutions has not proceeded anew in respect of the other three counts indicates that he is of the opinion that they are unlikely to succeed and yet counts alleging those very offences are still extant but unlikely to come to trial in the ordinary course of events. That state of affairs is unsatisfactory.

The powers of the Supreme Court on the determination of an appeal from the Magistrate's Court are contained in section 319(1) of the Criminal Procedure Code which, so far as it is relevant, provides :

> " At the hearing of an appeal ..... the Supreme Court may thereupon confirm reverse or vary the decision of the Magistrates Court, or may remit the matter with the opinion of the Supreme Court thereon to the Magistrate's Court, or may order a new trial, or may order trial by a court of competent jurisdiction or may make such other order on the matter as it may seem just ...."

We first remark that these powers are given in the alternative; secondly that they are discretionary and thirdly they do not include an express power to set aside a conviction without more.

In the absence of an express power to quash or to set aside a conviction we think it clear that the power to order a new trial of necessity includes the power to quash or to set aside the conviction. Accordingly, if such an order is made, all matters necessarily preceding the order for new trial are implied.

What are the express powers given by section 319 and were any of them exercised? Two of them, namely, (a) to remit the matter with the opinion of the Court and (b) to order trial by a court of competent jurisdiction quite clearly could not have been in contemplation in the present case. Nor has the Judge purported to confirm, reverse or vary the decision of the magistrate. Rather, having taken the view he did as to the admissibility of the confessional statements, he set about reversing the decision on the voir dire - not the decision of the Court on the case as a whole. And he did not order a new trial. It follows that he has proceeded on the power to "make such other order as ..... may seem just".

Holding, as we have, that the power to set aside a conviction is, by necessary implication, included within and is part and parcel of an order for new trial, we think that it was not open to the learned Judge to purport to exercise such a power under the umbrella of the general power. To do so would be indeed to make an order but not an order "<u>other</u>" than the kind expressly set out in the section and falling with the words "such other order.....".

Even if such a power existed, its use in the present case, would in our view, have involved a wrongful exercise of discretion. The order included an unauthorised delegation to the Director of Public Prosecutions of the

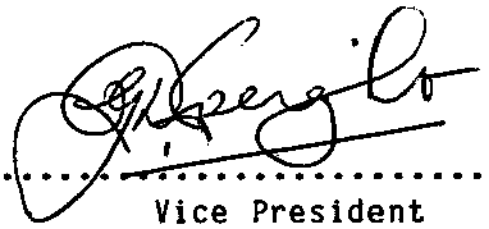
Court's duty to decide whether or not there should be a new trial. What the learned Judge had in mind obviously could have been achieved by an order for new trial. If the Prosecution considered that the new circumstance - the exclusion of the statements of admission - made it unlikely that a conviction would be obtained on one or more of the counts, it could have sought leave to withdraw such. At all events, if that course had been taken, the unsatisfactory features of the case to which we have already alluded would not have arisen. And further, the order made did not, as the section prescribes, promote or enhance the justice of the case.

We do not think, however, that an order for acquittal of the appellant would have been appropriate nor do we think that such was intended by the learned Judge. It is, of course, true that the appellant has had these matters hanging over his head like the sword of Damocles for an inordinately long time and that has been and is, unsatisfactory and unfair. We think, however, that the only way open to us is to meet and to mark that is by an order for costs. We apprehend that we have no power, either express or inherent, to order an acquittal or a discharge because of those factors and nothing in the reasons for judgment of the learned Judge or in the order he pronounced, warrant such a course.

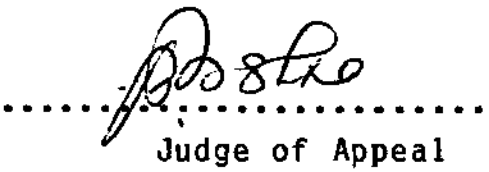
We allow the appeal and in substitution for the orders made by the learned Judge we order a new trial. In view of the unfortunate history of the matter and the delays thereby occasioned we direct that the new trial be heard as soon as practicable. The Director of Public Prosecutions should immediately withdraw the second set of information.

We think, also, that the unusual circumstances of the case warrant the unusual course of our making an

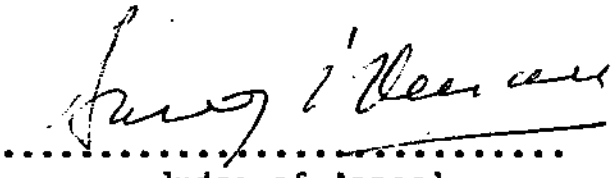
order for costs in the appellant's favour, which we fix at $250.



Vice President



Judge of Appeal



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