

RATU JOSAI VUCAGO v. THE POLICE

[Appellate Jurisdiction (Vaughan, C.J.) July 11th, 1950]

Subsection 2 of s. 205 of the Criminal Procedure Code—whether accused has a right to unconditional issue of subpoena.

The appellant was convicted by the 2nd Class Magistrate at Nausori of the offence of malicious damage to property contrary to s. 349 (1) of the Penal Code.

The Magistrate refused the request of the appellant made at the end of the trial after the accused himself and one witness for the defence had given evidence that he should be given an opportunity of calling further witnesses.

On appeal, Counsel for the respondent drew the Court's attention to the decision in the case of *Thomas Shorunke v. Rex* (1946) A.C. 316, and argued whether or not in view of this decision the appellant was entitled to exercise a common law right to the unconditional issue of process.

On appeal from the Magistrate's Court.

HELD.—That on account of the differences between the relevant provisions of the law in Nigeria and Fiji subsection (2) of section 205 of the Criminal Procedure Code does not admit of the principle laid down in the case of *Shorunke v. Rex*.

Cases referred to:—

Thomas Shorunke v. Rex (1946) A.C. 316.

[**EDITOR'S NOTE.**—Subsection (2) of section 205 of the Criminal Procedure Code reads as follows:—

“(2) If the accused person states that he has witnesses to call but that they are not present in Court, and the Court is satisfied that the absence of such witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the Court may adjourn the trial and issue process, or take other steps, to compel the attendance of such witnesses.”]

A. I. N. Deoki for the appellant.

W. G. Bryce, Acting Solicitor-General, for the respondent.

VAUGHAN, C.J.—There is an important point of law with which I may usefully deal at this stage. The learned Acting Solicitor-General, in the course of argument, very properly drew my attention to the Privy Council case of *Thomas Shorunke v. Rex* (1946) A.C. 316. The question before their Lordships in that appeal was whether the judge of the Court of trial, on being requested by the accused at the beginning of the trial to subpoena certain witnesses, was justified in refusing to do so on the ground that the accused (appellant) refused to state the

purposes for which he wished the witnesses subpoenaed. Their Lordships, having considered the relevant Ordinances and rules in force in Nigeria, held that they did not provide the only means whereby subpoenas could be obtained in the Colony and that there existed in appropriate cases the English common law right of subpoena, and therefore that the appellant was entitled to have process issued without disclosing the reasons for which he wished to call the witnesses. The point raised by the learned Acting Solicitor-General is whether, having regard to this decision, the accused in the case before me possessed and was entitled to exercise a common law right to the unconditional issue of process in spite of the discretion given to the Magistrate by the provisions of subsection (2) of section 205 of the Criminal Procedure Code.

I have not had the advantage of considered argument by Counsel on this matter and I propose to deal with it very briefly. After careful consideration of the case referred to I conclude that the accused in the case before me had no such right. Firstly, the provisions of the law in Nigeria relating to the application of the common law of England, and contained in section 14 of the Supreme Court Ordinance of Nigeria (Cap. 3 of *Laws of Nigeria*, 1923) differ in important respects from the provisions of sections 35 and 37 of the Supreme Court Ordinance of Fiji relating to the same matter, the limitations on the application of the English common law to Fiji being far more strongly emphasized than are the limitations on the application of the English common law to Nigeria in the corresponding Nigerian provision. Secondly, section 3 of the Fiji Criminal Procedure Code, which expressly states that "all offences under the Penal Code shall be inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained," leaves far less scope for the application of common law principles to matters arising in criminal trials than does the corresponding provision in section 14 of the *Nigerian Criminal Procedure Code (Amendment No. 2) Ordinance No. 48 of 1933*, which states that "trials before Commissioners of the Supreme Court . . . shall be conducted summarily in the manner and subject to the conditions laid down in this part of the Ordinance." Thirdly, subsection (2) of section 205 of the Fiji Criminal Procedure Code, which gives the Magistrate a discretion in the matter of issuing process on behalf of the accused, is limited in its application to a particular stage of the trial, and a separate and different provision (section 293) describes the procedure in the case of Supreme Court trials. As a result of these differences between the relevant provisions of the law in Nigeria and Fiji, I conclude that subsection (2) of section 205 does not admit of the application of the principle laid down by their Lordships in the case of *Shorunke v. Rex*.

The Court ordered the case to be returned to the Magistrate for evidence to be recorded on another issue.