SABIT HUSSAIN AND WATISONI MUDU *v.* RAM MANOHAR

[Appellate Jurisdiction (Carew, P.J.) March 18th, 1954]

Offence against discipline under s. 27 of the Police Ordinance—accused tried therefor—whether autrefois convict can be pleaded at subsequent trial—meaning of words "legality of sentence" in s. 340 (1) of the Criminal Procedure Code—whether original proceedings a Court of competent authority.

The two appellants were police constables. They were convicted of assault by the Magistrate's Court of the 1st Class at Nausori. It was proved that while they were on duty at Nausori Police Station the respondent was struck by the appellants on 12th October, 1953.

On 29th October, 1953 the first appellant was charged with an offence against discipline under section 27 of the Police Ordinance. He pleaded guilty and was fined 10/-. The award of this fine was confirmed by the Acting Superintendent, Southern, on 30th October, 1953.

On appeal against conviction by the Magistrate's Court.

HELD.—(1) The plea of autrefois convict can be considered by an Appellate Court although argued for the first time in that Court.

(2) Disciplinary proceedings brought by virtue of the Police Ordinance are not a trial by a Court of competent jurisdiction and therefore the plea of autrefois convict will not succeed if made at a subsequent trial.

Cases referred to:—

R. v. Kendrick and Smith 144 L.T. 748.
R. v. Thomas [1950] 1 K.B. 26.
R. v. Tonks [1916] 1 K.B. 443.
Wemyss v. Hopkins [1875] 10 Q.B. 378.

[**EDITOR'S NOTE.**—This case is reported only in so far as the first appellant is concerned. The second appellant did not address the Court.]

F. M. K. Sherani for the first appellant.

D. M. N. McFarlane for the respondent.

CAREW, P.J.—The main grounds of appeal relied upon by the first appellant are (1) that at his trial before the Magistrate he should have pleaded autrefois convict, and (2) that as he had been convicted and fined by the officer in charge of the police station, any subsequent punishment for the same offence is barred by the proviso to section 54 of the Police Ordinance, (Cap. 47). He further complains that the sentence is harsh and excessive.

Mr. McFarlane for the respondent took the point that a plea of autrefois convict is a plea in bar, and that as it was not taken at the trial, before the plea of guilty, it cannot now for the first time be taken on appeal. I agree that technically this is a correct statement of the law. In the case of *R. v. Tonks* (1916) 1 K.B. p. 443 where there had been a plea of not guilty which had not been preceded by a formal plea of autrefois convict, the Court of Appeal held that if a plea of autrefois convict could be supported no technicality would prevent the Court of Appeal from doing what was right. The Criminal Appeal Act, 1907, it said, was clear on that point.

Although the Fiji Court of Appeal Ordinance contains the same material words as the Criminal Appeal Act, 1907, the wording of the provisions of the Criminal Procedure Code which give the right of appeal from Magistrates' Courts are dissimilar. Under the English Act and the local Court of Appeal Ordinance, with the leave of the Court of Appeal or upon a certificate of a Judge, a person may appeal against his conviction on any ground involving a question of fact or question of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of appeal ; or, with leave, against sentence, unless the sentence is one fixed by law.

Section 339 of the Criminal Procedure Code gives the general right of appeal, but section 340 (1) provides that no appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on such plea by a Magistrate's Court, except as to the extent or legality of the sentence.

The first appellant was not represented at his trial before the Magistrate. If a plea of autrefois convict could have been sustained at that time, and this Court is now unable on account of a technicality to interfere, injustice might be done.

For this reason I am prepared to give the words "legality of sentence" in section 340 (1) of the Criminal Procedure Code a wide meaning, and accordingly I allow the plea of autrefois convict to be examined by this Court.

It is an established rule of the common law that a man may not be put in peril twice for the same offence. The rule applies not only to the offence actually charged in the first indictment, but to any offence of which he could have been properly convicted on the trial of the first indictment. Whether the facts are the same in both trials is not a true test: the test is whether the prisoner has been convicted of an offence which is the same or practically the same as that with which he is charged (*R. v. Kendrick and Smith* 144 L.T. 748.) Furthermore, it is necessary that the previous conviction was before a court of competent jurisdiction (*Wemyss v. Hopkins* [1874-5] 10 Q.B. p. 378), and that there was a final verdict.

It was argued for the respondent that the two offences were not the same ; that the first offence was an offence against police discipline, whereas the second offence was an assault contrary to section 265 of the Penal Code, and that there was no final determination of the disciplinary inquiry because the award of the fine had not been confirmed by the Commissioner of Police ; and finally that there had been no adjudication by a Court of competent jurisdiction.

The disciplinary proceedings were taken under section 28 (1) of the Police Ordinance, (Cap. 47), for an offence against discipline contrary to section 27 of that Ordinance, and a fine of 10/- was awarded. This award was confirmed by the Acting Superintendent, Southern, but not by the Commissioner of Police. The provisions of the proviso to section 28 (1) (*v*) have not thus been complied with, so that there has been no final determination. It would seem that even now the Commissioner of Police could refuse to confirm the award.

There is no doubt that the officer in charge was competent to undertake the inquiry under section 28 of the Police Ordinance, (Cap. 47); but I doubt whether in doing so he was sitting as a Court of competent jurisdiction. Although witnesses may be called, such an inquiry is private. One of the essentials of a Court is that it is open to the public. Furthermore, the proceedings are not covered by the definition of a "Judicial Proceeding" appearing in section 4 of the Penal Code. Evidence is not taken on oath. In my view the officer in charge was not sitting as a Court of competent jurisdiction. He was conducting a private inquiry into the conduct of a member of the Police Force under the special provisions set up for that purpose.

Although the facts in support of the two charges were the same, the offences, in my opinion, were different. The first charge was for an offence by a police officer against discipline; the second was an offence by a member of the public, who is also a police officer, against the public peace, namely assault. It is clear that at the disciplinary inquiry the first appellant could not have been convicted of the offence of assault which was the subject of the later charge before the Magistrate.

On all grounds therefore the plea of autrefois convict fails; and the plea is carried no further by the proviso to section 54 of the Police Ordinance, (Cap. 47), because the reference there is to the "same offence". The proviso reads: "That no person shall be punished twice for the same offence." For the reasons which I have stated the offences were not the same.

Reference was made by Counsel to section 20 of the Penal Code. This section reads:—

> "A person cannot be punished twice either under the provisions of this Code or under the provisions of any other law for the same act or omission, except in the case where the act or omission is such that by means thereof he causes the death of another person, in which case he may be convicted of the offence of which he is guilty by reason of causing such death, notwithstanding that he has already been convicted of some other offence constituted by the act or omission."

The common law rule requires that no one shall be punished twice for the same offence, and this rule is given statutory authority in England by section 33 of the English Interpretation Act, 1889. That section provides:—

> "Where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law . . . the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at common law, but shall not be liable to be punished twice for the same offence."

In R. v. Thomas [1950] 1 K.B. p. 378 *Humphreys, J.*, in the course of delivering the judgment of the Court of Appeal, said in reference to this section of the Interpretation Act, 1889, at page 664:—

> "That Act may be said to state in language dear to the persons who prepare and are responsible for the language of statutes what the common law says in very much shorter and simpler language.

> Certainly it adds nothing and detracts nothing from the common law. It was argued that we ought to so read the section that the last word ' offence ' should be read as meaning ' act ' and it was submitted that ' act ', ' cause ', and ' offence ' all mean the same thing. In our view, that is not correct. It is not the law that a person shall not be liable to be punished twice for the same act. No Court has ever said so, and the Interpretation Act does not say so. Not only is it not the law but it never has been the law. . . ."

It will be noted that whereas the rule under the law in England requires that the offences must be the same, section 20 of the Penal Code provides that no person shall be punished twice for the same " act or omission ".

Although the law in Fiji is as laid down by section 20 of the Penal Code and prohibits punishment twice for the same act, except in the case of subsequent death, the case for the first appellant is no further advanced. In my opinion section 20 of the Penal Code does not alter the fundamental principle that the earlier trial for the " act or omission " must be conducted by a Court of competent jurisdiction. The first appellant had been subjected to no such trial at the proceedings conducted by the police officer at Nausori.

I quash the sentence of three months' imprisonment with hard labour and substitute therefore a fine of £1 and in default of payment one week's imprisonment with hard labour.