BALRAM *v.* THE POLICE

[Appellate Jurisdiction (Hyne, C.J.) December 10th, 1955]

Accused attacking character of prosecution witness—S. 71 C.P.C.

The appellant was convicted by the Acting Senior Magistrate, Suva, of the offence of housebreaking and larceny contrary to section 322 (*a*) of the Penal Code on the 21st September, 1955.

The facts proved were that one evening Mr. and Mrs. Sajananand left their home in Gordon Street, Suva, locking or bolting all the doors and windows. When Mr. and Mrs. Sajananand returned they found a window open and property including some sovereigns or half sovereigns were missing. Some of the missing property was found later in the possession of the appellant.

At the trial the accused's defence was that Mrs. Sajananand had given him some of the property and it was suggested that she and the accused were friends.

On appeal against conviction.

HELD.—(1) An accused person's character cannot be attacked merely because the proper conduct of his defence necessitates the making of injurious reflections upon the prosecutor or his witnesses.

(2) Evidence which tends to show that the accused was of a general fraudulent or dishonest disposition is not admissible as part of the case for the prosecution.

(3) A Magistrate who hears a previous charge against the accused is not automatically barred from trying the accused for another offence.

[**EDITOR'S NOTE.**—When and only when the accused gives evidence with the permission of the judge may he be cross-examined as to character and then if previous convictions are denied they can be proved later in rebuttal.]

Cases referred to:—

R. v. Butterwasser [1948] 1 K.B. 4.
R. v. Fisher [1910] K.B. 149.
R. v. Tidmarsh 23 Cr. App. R. 79.
Stirland v. D.P.P. (1944) A.C. 315.

K. C. Ramrakha for the appellant.

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

HYNE, C. J.—Objection to trial before the Magistrate who tried the case was taken in the Court below and overruled by the learned Magistrate.

The present case was heard on various dates from the 26th August, 1955, and the appellant was convicted and sentenced on the 21st September, 1955.

In Criminal Case No. 846/55, Magistrate's Court, Suva, the accused was tried on a loitering charge in respect of an offence said to have been committed on the 15th March, 1955. He was convicted by the same Magistrate who tried the present case. The loitering charge was in respect of the same premises.

It is submitted that the Prosecution was in effect, in the loitering case, when accused was cross-examined as to photographs, consciously or unconsciously paving the way for a conviction in the present case, and Mr. Ramrakha submitted further that it is clear from the Magistrate's comments at p. 58 in the present case that he was influenced by the loitering case. At p. 58, the learned Magistrate said:—

> " I consider the accused to be an unscrupulous blackguard who was quite prepared to make attacks upon the character of a decent married woman if he could save himself, and even if it might result in the breaking up what would otherwise appear to be a normal happy union between two respectable people."

Mr. Ramrakha submits, therefore, that the Magistrate should not have heard the case.

I cannot agree that because the Magistrate had heard a previous charge against the accused of an offence committed on the same premises, he is automatically barred from hearing a subsequent charge against the same accused. I agree with the learned Solicitor-General that there is in this case no question of personal interest or judicial bias, and as the learned Magistrate himself said if a Magistrate is to be barred from hearing a case because he has dealt with and convicted the accused in respect of another charge on a different date in respect of the same house one would need a score of Magistrates to deal with cases coming before the Court.

I am bound to agree that there is little substance in this ground.

One ground is to the effect that when the charge was amended appellant's consent to trial by the Magistrate was not obtained.

Appellant's Counsel referred the Court to section 4 (1) of the Criminal Procedure Code which reads:—

> " Subject to the provisions of this Code, any offence under the Penal Code may be tried by the Supreme Court, or by any Magistrate's Court by which such offence is shown in the fifth column of the First Schedule to be so triable. Provided that where so stated in the fifth column of the First Schedule the offence shall not be tried by a Magistrate's Court unless the consent of the accused to such trial has first been obtained."

The offence for which the accused was charged was Burglary, an offence only triable by a Magistrate if the accused consents.

The appellant did consent on the 23rd June to trial by the Magistrate, but at the adjourned hearing on the 26th August, 1955, the Prosecutor asked for leave to amend the charge by the substitution of " 19th " or " 20th " in the particulars of offence. Defence Counsel objected on the ground that it prejudiced his case.

The learned Magistrate observed that a mere mistake as to time is not actually a defect in the charge unless it places the alleged offence outside the time limited for the bringing of proceedings and amended the charge. At the same time he said he would allow an adjournment if accused wished.

The charge was then amended and re-read and the accused pleaded " Not Guilty ".

He was not again asked if he consented to trial by the Magistrate.

Appellant's Counsel relies on section 208 of the Criminal Procedure Code which reads:—

> " Where at any stage of a trial before the close of the case for the prosecution, it appears to the Court that the charge is defective either in substance or in form, the Court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the Court thinks necessary to meet the circumstances of the case;
>
> Provided that where the charge is altered as aforesaid, the Court shall thereupon call upon the accused person to plead to the altered charge."

Mr. Ramrakha submits it then it becomes a new trial because the effect of a plea is, according to section 203, to invest the Court with jurisdiction to deal with the case. He submits further that if a new plea is necessary, a new consent is also necessary.

I have given careful consideration to this submission, and I think, though with some hesitation, that a new consent was not necessary.

The charge against the accused was burglary, and he had already consented to the Magistrate trying it. The charge still remained burglary after amendment and consent to trial on this charge had not been withdrawn. The amendment was a minor one and, as the learned Magistrate pointed out, there was no real necessity for this amendment at all.

I think that, as the Solicitor-General says, if an entirely new charge were substituted the position might be different.

Even in such a case, it is still doubtful if a new consent is necessary, since the section only requires that the accused shall plead to the altered charge. It does not say he must give his consent anew.

I do not think, therefore, that the conviction can be quashed on this ground.

It has been argued that the Crown must prove beyond reasonable doubt that the photographs and " sovereigns " were the property of Mr. Sajananand, and that the Magistrate erred in holding that the " sovereigns " were Mr. Sajananand's property. In other words, it is objected that the photographs and sovereigns were not the absolute property of Mr. Sajananand.

" Owner " is defined in section 280 (*iv*) (*c*) of the Penal Code as follows:—

> " The expression ' Owner ' includes any part owner, or person having possession or control of, or a special property in anything capable of being stolen."

There is evidence from which it might perhaps be assumed that the photographs were the property of Mrs. Sajananand, but surely photographs must be held to be the joint property of husband and wife.

Even if they were not his property, if it can be established that Mr. Sajananand owned the sovereigns, then that is sufficient, for it is not necessary that the Prosecutor should prove all the articles mentioned to have been stolen; if he proves the prisoner to have stolen any one of them it is sufficient.

There is evidence, both by Mr. Sajananand himself and his wife, that the " sovereigns " were the property of Mr. Sajananand.

Learned Counsel for the appellant has advanced a somewhat interesting argument.

His contention is that, because of the provisions of the Exchange Control Ordinance, 1950, Mr. Sajananand was holding the " sovereigns " illegally, and that therefore any person who took them away from him could not be convicted of larceny.

It is submitted that he had not disclosed his possession to the Financial Secretary nor had he received any permission to hold " gold ", the term " gold " including " gold coin ".

There is nothing on the record, however, to show whether he had or had not written to the Financial Secretary or had or had not received permission to hold it.

He did, however, have the coins in his possession, and they were certainly under his control. It has therefore been established that he was the owner for the purpose of the charge. The definition of " owner " in the Penal Code, is a very wide one. It is, in fact, identical with the definition of owner under section 1 (2) (*iii*) of the Larceny Act, 1916.

I come now to the important grounds of appeal.

While it was the Counsel for the Defence in the Court below who first introduced the question of conviction for another offence, I do not think that the prosecution was thereupon justified in leading evidence as to previous convictions.

The learned Magistrate in his judgment said he allowed the Prosecution to give evidence of previous convictions because:—

(1) The character of a witness for the prosecution was attacked.

(2) As evidence of mens rea and to rebut lawful invitation set up by the accused.

As learned Counsel for appellant said, the only allegations against the wife were that the appellant and she had gone to matinées together and that they had met on several occasions. At the very most this could only be construed as an injurious reflection on a prosecution witness.

As *Lord Simon, L.C.* said in *Stirland v. D.P.P.* (1944) A.C. 315 at p. 327, " An accused person is not deprived of his protection under the section " (147) (*f*) of our Penal Code, " because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his witness."

Still less, it seems to me, can the prosecution in such a case, adduce evidence of previous convictions as part of its case.

Even if there were an attack on a prosecution witness the accused was not putting his own character in issue. All he sought to do, as I see it, was to show that on occasions when he had met Mrs. Sajananand he had done so by arrangement. There was, of course, no suggestion by appellant that he was at the house by invitation on the night of February 19th.

It was held in the case of *R. v. Butterwasser*, 32 Cr. App. R. p. 81, that the conviction in that case must be quashed on the grounds that the evidence of the prisoner's previous convictions had been wrongly admitted, the right of the prosecution, in a case where the prisoner had

not put his character in issue, being limited to that conferred by section 1 (*f*) (*ii*) of the Criminal Evidence Act (section 147 (*f*) of the Penal Code,) namely that of cross-examining the prisoner on his own bad character and previous convictions if he elected to go into the witness box. If he denies previous convictions then, of course, evidence of previous convictions could be given.

Evidence of previous convictions should not have been given. It was evidence upon a vital matter.

In *R. v. Butterwasser, Goddard, L.C.J.*, said, " When evidence is given with regard to the bad character of the prisoner which ought not to have been given, in my experience this Court has always quashed the conviction."

Applying this to the present case, the appeal succeeds on Grounds 14 and 15 and the conviction should be quashed.

It has been urged that as this was a trial before a Magistrate and not a jury, the danger of prejudice should be ruled out. While I agree that a trained Magistrate may perhaps not be influenced by such evidence, I am unable to hold that the principle enunciated in *R. v. Butterwasser* should not be followed.

Ground 17 is another important ground. I can say at once that I agree that the appellant did not raise the defence of invitation.

The most important part of this ground is that the evidence of previous convictions to show intent was that such previous convictions were not similar in nature to the offence charged.

The accused was charged with burglary. The previous conviction related to loitering and to Criminal trespass respectively.

The evidence of system has been the subject of many judicial decisions.

In *R. v. Fisher* [1910] K.B. p. 149, the prisoner was charged with obtaining a pony and cart by false pretences on June 4th, 1909. Evidence was given that on May 14th, 1909, and on July 3rd, 1909, the prisoner had obtained provender from other persons by false pretences different from those alleged in the indictment. He was convicted.

On appeal it was held " that the evidence was wrongly admitted, as it did not show a systematic course of fraud, but merely that the prisoner was of a general fraudulent disposition, and therefore it did not tend to prove falsity of the representations alleged in the indictment; that although there was sufficient evidence of the false pretences alleged to justify the conviction, the evidence as to other cases might have influenced the jury and the conviction must therefore be set aside.

In the case of *R. v. Tidmarsh*, 23 Cr. App. R. p. 79, the accused was charged with housebreaking on a given date and evidence was given of loitering on a later date. The Court held such evidence to be inadmissible as such evidence, that is of loitering, cannot be justified on the ground that it is evidence to show a system of breaking into houses.

Such evidence *may* have influenced the Magistrate, and even if there is sufficient evidence without this to convict, the conviction, following the case of *R. v. Fisher* cannot stand. This ground therefore succeeds.

While the appeal has not succeeded on the majority of the grounds put forward, the grounds relating to evidence of previous convictions and system have succeeded. These relate to vital matters, and this Court must therefore quash the conviction.

The appeal is allowed and the sentence and conviction are quashed.