ILISONI TAMAIBEKA *v.* THE POLICE

[Appellate Jurisdiction (Hyne, C.J.) November 29th, 1955]

S. 192 (d) of the Penal Code—whether necessary to formally convict as an idle and disorderly person.

The accused was convicted by the 1st Class Magistrate's Court, Suva, on a charge of disorderly behaviour contrary to section 192 (*d*) of the Penal Code and the Court sentenced the accused to 6 months' imprisonment with hard labour.

This sentence could only be imposed after a second conviction for being an idle and disorderly person but although the first conviction was proved the Court never expressly said that the appellant was convicted of being an idle and disorderly person.

On appeal against conviction and sentence:—

HELD.—It was not necessary for the Court to state formally that the accused was convicted of being an idle and disorderly person.

[**EDITOR'S NOTE.**—Section 193 of the Penal Code reads as follows:—

" 193. The following persons—

(*a*) any person convicted of an offence under the last preceding section after having been previously convicted as an idle and disorderly person; . . . are deemed rogues and vagabonds."]

Cases referred to:—

R. v. Teesdale 138 L.T. 160.

M. Marquardt-Gray for the appellant

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

HYNE, C. J.—The original grounds of appeal were—

(1) That the learned Magistrate erred in law in holding that the petitioner was an incorrigible rogue when there was no evidence before the Court that the petitioner had ever been previously convicted as an idle and disorderly person although the petitioner had on the 19th day of November, 1954 been convicted of being a rogue and vagabond.

(2) That in any case the sentence is unnecessarily harsh and excessive.

At the hearing Mr. Marquardt-Gray for the appellant asked leave to add a further ground of appeal as follows:—

(3) That the learned Magistrate erred in law in finding that the accused was an incorrigible rogue as there is no provision in the Penal Code for such a finding.

The learned Attorney-General, for the respondent, offered no objection to this additional ground and the application was accordingly granted.

Mr. Marquardt-Gray dealt first with ground (1) and he referred to sections 192 and 193 of the Penal Code. He submitted that section 192 provides for seven categories of persons who may be deemed to be idle and disorderly persons and he referred particularly to the word " deemed ". He then addressed himself to the meaning of section 193 (*a*) which reads as follows:—

> " Any person convicted of an offence under the last preceding section after having been previously convicted as an idle and disorderly person."

Mr. Marquardt-Gray's submission is that although the appellant has been convicted as a rogue and vagabond, he has not been convicted as an idle and disorderly person although he has been convicted of various offences under section 192. Mr. Marquardt-Gray's submission is that the Magistrate erred in law in convicting the appellant as a rogue and vagabond, because the appellant had never been convicted as an idle and disorderly person. He contends that as the appellant was found guilty of disorderly behaviour he should only have been sentenced in accordance with S. 192.

As to ground (3) the contention of Mr. Marquardt-Gray is that the learned Magistrate found that the accused was an incorrigible rogue. I do not think that there was an express finding by the Magistrate that the accused was an incorrigible rogue. All he said was " I look upon the accused as nothing more or less than an incorrigible rogue who has failed to take advantage of the opportunity given to him by the Court to redeem his good character." Mr. Marquardt-Gray contends that the Magistrate in fact convicted the accused of being an incorrigible rogue and he submits that there is no such person as an incorrigible rogue provided for in the Ordinance. He suggests further that the learned Magistrate apparently has the Vagrancy Acts in England in mind.

As I said earlier, I do not think there was any such finding by the Magistrate. He might just as well have said that he regarded the appellant as undesirable character or a worthless person, and the use of the words " incorrigible rogue " have in my view no legal significance.

The learned Attorney-General submits that the various categories in section 192 are merely definitions of what are in fact idle and disorderly persons. It is no offence *per se*, to be drunk and disorderly.

It is contended by the appellant's Counsel, in effect, that in order to be convicted as a rogue and vagabond it is necessary for the Court to say quite clearly that the accused was convicted of being an idle and disorderly person.

This, however, is not the case as appears from *Rex v. Teesdale*, 138 L.T. p. 160, the head note to which reads:—

> " It is not necessary that a person convicted of an offence under section 4 of the Vagrancy Act, 1824, should be adjudged a rogue and vagabond in express words in order to render him liable on a second conviction for a similar offence to be dealt with as an incorrigible rogue under section 5. By the very words of section 4 a person convicted of any offence therein named *shall be deemed* a rogue and vagabond."

In the course of his judgment the learned Lord Chief Justice, *Lord Hewart*, said—" No argument is open to the appellant that the first conviction was not a conviction as a rogue and vagabond merely because the words rogue and vagabond did not in terms appear in the conviction setting forth particulars of an offence mentioned in section 4." In the opinion of the Court that argument fails . . . because the Justices clearly treated the appellant . . . as having committed an act of such a character that under the Act he was deemed to be a rogue and vagabond.

Section 192 of the Penal Code sets out that certain persons shall be deemed idle and disorderly persons, while section 193, subsection 1, says that any person previously convicted as an idle and disorderly person shall be deemed a rogue and vagabond.

On the authority of the *Rex. v. Teesdale* it is quite clear that although previous convictions under section 192 may not have stated in express terms that the appellant was adjudged an idle and disorderly person, he was nevertheless in effect convicted as such. There is, as the Lord Chief Justice said, no necessity to use " express terms ".

The appellant was convicted under section 192 (*d*). He had been previously convicted under this section and this, as I have said, amounted to conviction as an idle and disorderly person.

The learned Magistrate could, therefore, properly convict appellant as a rogue and vagabond and sentence him accordingly. Again on the authority of *Rex v. Teesdale*, there was no necessity for the learned Magistrate to adjudge him in terms so to be.

As to ground (2) namely that the sentence is harsh and excessive, it is submitted by the appellant's Counsel that the disorderly behaviour occurred at a football field during the course of a football game and that it was very little more than an over-active display of partisanship for one team. The Magistrate, however, gave ample reasons why he imposed the sentence of six months' imprisonment and in view of the appellant's previous convictions I see no reason for interfering with the sentence.

The appeals against conviction and sentence are dismissed.