MINISTRY OF LABOUR, INDUSTRIAL RELATIONS & PRODUCTIVITY v MERCHANT BANK OF FIJI LTD

HIGH COURT — APPELLATE JURISDICTION

SHAMEEM J

12, 19, 26 April 2002

[2002] FJHC 2

Evidence — "autrefois acquit or convict" — conflict between s 319(1)(b) CPC and Constitution — whether a "decision in terms of" s 198 CPC leads to a discharge or acquittal — Constitution s 28(1)(a) — Criminal Procedure Code ss 198, 201, 201(3), 203, 210 — Magistrate Court Act 1980 — Trade Union Act (Cap 96) s 59(1).

Appellant sought an appeal from the dismissal by the Suva Magistrates' Court of the charge of preventing its employees from joining or becoming members of a trade union by making it a condition of employment.

Held — The magistrate had no power to dismiss the charge under s 198 of the Criminal Procedure Code and that she failed to exercise her discretion judicially because that section only applies when the accused was first brought to court.

Appeal allowed.

Cases referred to

Davern v Messel (1984) 155 CLR 21; *DPP v Vikash Sharma and 3 Ors* HAA0011/94; *Robert Tweedie Macahill v R* Crim App No FCA43/80, 80/265; *State v Atish Jeet Ram* Crim App AAU004 of 1995S; *State v Saiyad Iqbal (Crim App No HAA0037/1998)*, cited.

DPP v Neumi Kalou and Anor Crim App No HAA0016/1996); *Jelson (Estates) Ltd v Harvey* [1984] 1 All ER 12; *R v Hendon Justices and Ors, Ex parte Director of Public Prosecutions* [1993] 1 All ER 411; *R v Pressick* [1978] Crim LR 377; *Rajesh Chandra v State* FCA AAU0056/99; *State v Kanito Matagasau* Crim App No HAM010 of 2001; *State v Semisi Wainiqolo and Moce* CA HAA00117/1997; *Williams v DPP* (1991) QBD 651, considered.

S. Shah for the Appellant

T. Tuitoga for the Respondent

Judgment

Shameem J. This is an appeal by the Ministry of Labour, Industrial Relations and Productivity from the dismissal by the Suva Magistrates' Court, of the following charge on the 24th of January 2002.

Statement of Offence

DENYING AND/OR PREVENTING EMPLOYEES FROM JOING A TRADE UNION: contrary to Section 59(1) of the Trade Union Act Cap 96.

Particulars of Offence

MERCHANT BANK OF FIJI LIMITED being an employer at Suva in the Central Division denied and/or prevented its employees from joining or becoming members of a trade union by making it a condition of employment.

The case was first called before the learned magistrate on the 14th of December 2001. It was adjourned to the 16th of January 2002 for mention. Both parties were present and the case was adjourned to 24th of January 2002 for disclosure.

On the 24th of January 2002 the case was called but counsel for the Appellant did not appear. The record reads as follows:

For Prosecution — No appearance.
Accused — No appearance. Mr Tuitoga.
Counsel — Application to dismiss the charge
Court — No appearance of complainant.
Section 198 of Criminal Procedure Code. Charge dismissed.

The grounds of appeal are as follows:

(i) *the learned Magistrate erred in law in wrongly construing and applying the provisions of section 1908 of the Criminal Procedure Code in this case.*

(ii) *The learned Magistrate erred in her ruling concerning the effect of section 198 of the Criminal Procedure Code.*

(iii) *The learned Magistrate erred in law in failing to exercise proper and due judicial discretion to adjourn the matter, in light of the serious nature of the charge and all the circumstances of the case.*

(iv) *The learned Magistrate erred in law in obstructing the Ministry of Labour, Industrial Relation and Productivity from carrying out his constitutional and lawful function.*

At the first hearing date of the appeal I asked counsel whether they were arguing that the effect of the dismissal of the charge was an acquittal. They both said that it was and agreed that the sanction of the DPP was required for appeals against acquittal. The hearing of the appeal was adjourned for a week to allow such sanction to be obtained.

On the second hearing date (on the 19th of April 2002) the Appellant was represented by counsel for the Director of Public Prosecutions, who submitted that the effect of a s 198 dismissal of charge, was a discharge which was not a bar to subsequent prosecution. She further submitted that such a dismissal might operate to prejudice the rights of the complainant and the prosecution. In particular, a charge should not be dismissed on a mention date because the accused could in no way have been prejudiced by the absence of the complainant or the prosecutor. She argued that the discretion had been wrongly exercised in this case and asked for the order to be quashed.

Counsel for the Respondent submitted that the dismissal was an acquittal because s 198 did not specifically provide for a power to recharge unlike s 201(3) of the Code, which did. He further argued that there can be no order for a retrial after such acquittal because s 28(1)(k) of the Constitution prohibits support his argument that a trial for the purpose of an "autrefois acquit" plea was deemed to have been held once the accused had pleaded to the charge.

Section 198 of the Criminal Procedure Code

This section provides as follows:

(1) *If, in any case which a magistrates' court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him at the time and place appointed in the summons for the hearing of the case, or is brought before the court under arrest, the, if the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear by himself or by his barrister and solicitor, the court shall dismiss the charge, unless for some reason it shall think it proper to adjourn the hearing of the case until some other date, upon such terms as it shall think fit, in which event it may, pending such adjourned hearing, either*

admit the accused to bail or remand him to prison, or take such security for his appearance as the court shall think fit.

(2) *The expression "barrister and solicitor" in this section and in section 200 and 202 shall in relation to a complaint include a public prosecutor.*

5 The issue of whether a s 198 dismissal leads to a discharge or an acquittal has been well-ventilated in the courts in Fiji. State Counsel referred to three authorities: *State v Semisi Wainiqolo and Moce* CA HAA00117 of 1997, *DPP v Neumi Kalou* Crim App No HAA0016 of 1996, and *State v Kanito Matagasau* Crim App No HAM010 of 2001.

10 In *Semisi Wainiqolo* (above) Pain J considered an appeal against the acquittal in the Magistrates' Court, ordered after the charges were dismissed under s 198, "on the ground that no prosecutor was present in Court". Pain J held that s 198 only applies on first call, when the accused appears "in obedience to the 15 summons served upon him at time and place appointed in the summons for the hearing of the case or is brought before the court under arrest". Thereafter, s 198 has no application, and it is s 203 that applies. That section provides that when the matter is further adjourned for hearing, and the accused does not appear, the court may proceed to hearing (if the accused is not charged with a felony), and 20 if the complainant does not appear the court may dismiss the charge. At 5 of his judgment, his Lordship said:

I can find no provision in the Criminal Procedure Code which enables a Magistrate to acquit an accused because the prosecutor fails to appear. The only provisions for acquittal that I am aware of are section 3210 (which provides for an acquittal if there 25 is no case to answer) and section 215 (which provides for acquittal after a defended hearing).

The orders of acquittal were quashed and a hearing of the case ordered.

The case of *Neumi Kalou* (above) is not quite on point, because that was appeal against an acquittal under s 210 of the Code, ordered because the prosecution was 30 not ready to proceed to hearing. However Scott J treated a dismissal under s 198(1) as entirely different from an acquittal.

In *Kanito Matagasau* (above) Surman J considered a dismissal of a charge under s 198. It is not clear from the judgment whether the appeal was against a dismissal or an acquittal, but the appeal was allowed on the ground that the Chief 35 Magistrate had failed to exercise his judicial discretion properly. There is no discussion in the judgment about the effect of s 198.

Of these cases, the first, *Semisi Wainiqolo* is the only one on point. In England a dismissal of a charge leads to an acquittal. However the relevant statutory provision is s 15 of the Magistrate Court Act 1980. A reading of the various 40 sections of that Act shows that the words "dismiss the information" are used synonymously with acquittal. For instance s 9(2) provides: "The court, after hearing the evidence and the parties, shall convict the accused or dismiss the information". The statutory provisions in Fiji are quite different, and the english authorities are therefore of limited assistance in respect of the effect of a 45 dismissal under s 198.

On a perusal of ss 198, 201, 203 and 210 of the Criminal Procedure Code, it appears that the work "acquittal" is used only in ss 201 and 210. Section 201 provides a power to acquit after the charge is withdrawn by the prosecution in the course of a hearing, either before or after the prosecution case is closed and the 50 accused is called upon to make his defence. Section 210 applies at the end of the prosecution case. In principle although it is possible to acquit if no evidence has

been led at all, the purpose of ss 201 and 210, is to provide for a power to acquit in the course of the trial, when evidence is being led.

In contrast ss 198 and 203 clearly apply before witnesses have been called. Unlike ss 201 and 210, the word "acquit" is not used in either section. This makes sense. An acquittal before any evidence has been led, and on the first call or hearing date, would carry dire consequences for the prosecution. This is because an acquittal, if it is not declared to be a nullity on appeal, is a bar to subsequent prosecution on the same facts.

For these reasons, I am in complete agreement with Pain J's finding in *Semisi Wainiqolo* that a dismissal of a charge under s 198 of the Code cannot lead to an acquittal. It is therefore open to the prosecution to lay a fresh charge.

As to counsel's submission that a dismissal of the charge is a bar to subsequent prosecution under s 28 of the Constitution, I see no conflict between the Criminal Procedure Code and the Constitution. Section 319(1)(b) of the Code provides that "the High Court shall not order a new trial in any appeal against an order of acquittal".

However, where the order of acquittal was in itself a nullity, any such order never existed, and the accused may stand trial on the same charge.

This is certainly the case in the common law of England. In *R v Hendon Justices and Ors, Ex parte Director of Public Prosecutions* [1993] 1 All ER 411, the court considered a judicial review application by the DPP of a decision to acquit because the prosecutor had failed to appear for trial. It held that dismissing the information, and acquitting the accused was an unreasonable decision which no reasonable bench could have come to, that the acquittal was a nullity and that mandamus would issue requiring the justices to hear the informations according to law.

Tracing the history of cases where the question of quashing acquittals had arisen, the court held (at 49, per Mann LF):

> *We have already stated that in our judgment the respondent justices' decision to dismiss the information was outwith their statutory power. It was thus a nullity and could not have sustained a plea of autrefois because there had not been a lawful acquittal …*

It was on this basis that acquittals have been quashed in Fiji on many occasions (see for instance *Semisi Wainiqolo* (above), *DPP v Neumi Kalou* (above), *State v Saiyad Iqbal* (Cr App No HAA0037 of 1998, *DPP v Vikash Sharma* HAA0011/94 and *Robert Tweedie Macahill v R* FCA43/80, 80/265), *Rajesh Chandra v State* FCA AAU0056/99). In *Rajesh Chandra* (above), the Court of Appeal upheld the quashing of an order for acquittal, made by the Magistrates' Court after the erroneous refusal of an adjournment.

Section 28(1)(k) of the Constitution provides that every person charged with an offence has the right "not to be tried again for an offence of which he or she has previously been convicted or acquitted". This provision does little more than restate the position in common law, of the principle of "autrefois acquit or convict".

Counsel for the Respondent submitted that the words "save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal" which were omitted from the 1997 Constitutions, showed a clear legislative intention to prohibit retrials after acquittal. If his reasoning is correct, s 28(1)(k) also prohibits retrial after conviction. This is clearly not the

case. The Fiji Court of Appeal disposed of this argument very quickly in *State v Atish Jeet Ram* Crim App AAU004 of 1995S.

Indeed the report of the Constitution Review Commission at paragraph 165, confined its concern in relation to autrefois acquit, to appeals against acquittal to the Court of Appeal after trial by assessors. It made no mention of acquittals or dismissal of charges, or discharges in the Magistrates Courts. Although counsel asks me to draw an analogy in relation to summary trials, a perusal of Australian and English authorities display a judicial readiness to hear appeals against acquittals from courts of summary jurisdiction (per Mason and Brennan JJ in *Davern v Messel* (1984) 155 CLR 21; 53 ALR 1; [1984] HCA 34) and in respect of cases where the legislative intention to create a right of appeal against acquittal is clear.

In Fiji, there is indisputably such a legislative right in respect of appeals to the High Court. And as counsel concedes, s 201 of the Criminal Procedure Code specifically allows the prosecution to recharge after a discharge; even it is entered after a trial on the merits, before the prosecution has closed its case. Counsel's submission is that recharging in those circumstances is justifiable and not unconstitutional because it gives the prosecution an opportunity to reorganise itself, and return with a fresh charge. With respect, if that is so under s 201, why is it not so under s 198? Isn't there a stronger case for a plea of autrefois acquit under s 201 where evidence has been led and half the trial over? If a discharge which is not a bar to subsequent prosecution, does not offend s 28(1)(k) of the Constitution, then a dismissal under s 198 of the Code, entered on first call and before a plea has been taken can hardly be seen as so offending. The question is sure whether the accused, in respect of either discharge or acquittal has been in peril of being convicted, and whether therefore there is a breach of s 28(1)(k).

Thus in *Williams v DPP* (1991) QBD 651 a defendant who had been issued with defective summons, and whose charge had been dismissed by the magistrate before he had pleaded to it, was held never to have been in peril of being convicted on the summons and the prosecution was not prevented from laying a fresh charge.

In *R v Pressick* (1978) Crim LR 377, a case referred to me by counsel for the Respondent, the defendant was acquitted when the prosecution was unable to offer any evidence on the hearing date. On fresh proceedings the judge held that the defendant was entitled to plead autrefois acquit because he had pleaded at the first hearing and the proceedings had not been declared a complete nullity. However, the plea is not the only consideration in deciding whether the accused is in jeopardy, and, as was held in *Jelson (Estates) Ltd v Harvey* (1984) 1 ALL ER 12, one of the factors to be considered is whether the acquittal was on the merits. If the first proceedings are not declared a nullity, then the question for a court facing an autrefois acquit or convict plea is first whether the proceedings had reached a stage so that the accused was in peril of a conviction, and second whether the acquittal was as a result of a decision which could never have led to the danger of a conviction.

Of course the result of my holding that the order to dismiss the charge was a nullity, and that its effect in any event was to discharge rather than to convict, is that the question of autrefois acquit is irrelevant to the appeal. However, if the magistrate had proceeded to acquit the Respondent, and applying the test from the plea of *autrefois acquit* the Respondent, and applying the test for the plea of autrefois acquit, the Respondent was never in jeopardy of a conviction. Although counsel had entered a plea of not guilty, disclosure was still to be completed and

no hearing date had been set. The matter of the non-appearance of the prosecutor, could never have led to a determination of the charge. There was never any argument on the merits and there was no danger of jeopardy. Autrefois acquit could not have been available.

However as I have already said there was no acquittal in this case. Under the Code, there could not have been, and the issue of double jeopardy is irrelevant to this appeal.

The decision to dismiss

The decision to dismiss under s 198 has less dire consequences than an acquittal under s 210. However, a dismissal could be prejudicial to the prosecution because many offences have time limitations, and the prosecution may be prevented by a limitation period, from laying a fresh charge. As I have already held, the magistrate had no power to dismiss the charge under s 198 because that section only applies when the accused is first brought to court. However, even if she had dismissed the charge under s 203 of the Code, in my view she would have been in error because of the circumstances of this case.

The discretion to dismiss a charge under either s 198 or s 203 of the Code, must be exercised judicially, after balancing the interests of both prosecution and defence. In this case I can find no evidence of such balancing. There was no attempt to enquire as to the whereabouts of the prosecutor, no attempt to check on the readiness of the parties for trial, no question asked about the receipt of disclosure and no consideration of the nature of the charge. Furthermore, the charge was dismissed on a mention date. No attempt was made to simply set a hearing date at the convenience of defence counsel. The prosecutor might then have forfeited her right to be consulted on a hearing date, but the charge would have remained. There is no doubt at all that the decision to dismiss the charge without a proper consideration of the interests of both parties, was not made judicially. The decision, followed by, I was told from the bar table, a refusal to accept a fresh charge, resulted in real prejudice to the prosecution and the complainant. On this ground also the appeal against the order to dismiss the charge is allowed. The Magistrate's Court must now proceed to set a hearing date and try the charge. As I have already said, because the order was a nullity, there is no question of double jeopardy.

Conclusion

This appeal against dismissal of charge is allowed on the ground that the learned magistrate had no power to dismiss under s 198 of the Criminal Procedure Code and that she failed to exercise her discretion judicially. Her order is invalid and the matter must now proceed to trial. Finally even if I had not held that her order was invalid, a dismissal of a charge under s 198 of the Criminal Procedure Code is not a bar to prosecution and a fresh charge could have been filed, and should have been accepted.

Appeal allowed.