POLICE v. TU'UTA KULANOA.

(Criminal Appeal : Hunter J. Nuku'alofa, 10th August, 1956.)

Plea of Autrefois Convict — Irregularity in first trial — First conviction quashed — Licensee charged and convicted again of same Offence — Principles of plea of autrefois convict discussed — The Constitution, Clause 12.

The accused appealed against his conviction by the Magistrate on a charge of stealing. At his trial he pleaded autrefois convict. He had previously been charged and convicted of the same offence, but after conviction applied for and was granted a writ of Habeas Corpus by which the first conviction was quashed on the ground that that conviction was bad since 24 hours had not elapse between the service of the summons and the trial. The Magistrate over ruled the plea, convicted the accused and again sentenced him to prison.

HELD. That the plea of autrefois convict failed as the accused had not been in peril at his first trial owing to the irregularity of the proceedings.

Appeal dismissed.

Folau appeared for the appellant (accused).

Hama appeared for the Respondent (Police).

HUNTER J. : In this case the accused, who is the appellant, was brought before the Court on the 23rd May, 1956, and charged with theft of a fork to which he pleaded guilty and was sentenced by the Magistrate to 6 months imprisonment. After that an application for a Writ of Habeas Corpus was made on the ground that the conviction was bad as it was less than 24 hours from the time of the Service of the summons to the time of the hearing of the case. That matter came before me and I granted the application and held the first conviction to be bad and ordered accused to be released. After that the Police brought a second prosecution against the accused again for the same offence. The accused came before the Court and submitted that he could not be tried again as he had already been convicted for the same offence. The accused also pleaded Not Guilty to the charge. The Magistrate however did not uphold his submission and convicted the accused and sentenced him to imprisonment. But at the time he sentenced him to prison he took into consideration the time in which accused had already been in gaol pending the hearing of the Habeas Corpus application and sentenced the accused to only 4 months imprisonment. After the last (2nd) conviction accused then appealed to the Supreme Court on the ground that he had already been convicted for the same offence.

Clause 12 of the Constitution provides that : No one shall be tried again for any offence for which he has already been tried whether he was acquitted or convicted. This is derived from the English Common Law : the defence is called a Plea of Autrefois Convict. If he was acquitted Plea is one of Autrefois Acquit. In England it is a provision of the Common Law not of Statute. It appears to me that when interpreting Clause 12 we must be guided by the principles of the English Law regarding a plea of Austrefois Convict. The Clause reads as follows : No one shall

be tried again for any offence for which he has already been tried. And as I said previously during the course of the argument in this appeal the question is whether the accused has previously been tried before the conviction from which accused has appealed took place. Was he in fact tried in the true sense of the word ? On the first occasion the Police issued a summons against him and he was brought before the Magistrate and was asked whether he was guilty or not guilty, and he pleaded 'Guilty'. After that the Magistrate convicted him but as I pointed out a short while ago I held that the Magistrate was wrong in convicting him as he had no power to try the accused within the time in which he was brought before him. The question is, should the Court on reading Clause 12 insert the word 'Properly' before the word 'Tried' in the 2nd line. It appears to me that the Clause should be so read. It must mean that no one shall be tried again for an offence for which he has already been PROPERLY TRIED. For an example a Magistrate has a Clerk, and the Clerk carries out the Magistrate's work : that is not a proper trial, and if anything like that took place there can be no doubt that the accused could be tried again. In England when considering a plea of this kind the test is whether the accused was imperilled at the time of the hearing of his trial. In this case in the first trial the accused was not in peril of being convicted. What actually took place shows that for after he was sentenced he applied for a Writ of Hebeas Corpus which came before me I ordered his release. Archbold points out (33rd Edition P. 153) that if because there was anything defective in the trial either in the indictment the place of trial the way in which the trial was conducted etc. the accused was not liable to be convicted, then a plea of Autrefois Convict is no defence. A very old case is referred to in the English & Empire Digest Vol. 14, pars. 3631 1484 : the note says that the plea of autrefois acquit (and the same applies to the plea of autrefois convict) is a good plea only when the acquittal is upon an indictment sufficient in law. See also the more recent case referred to in the same volume at para. 3652 and decided in 1912 : (R. v. Marsham.) In that case the appellant was convicted by a metropolitan Magistrate of assulting a police constable in the execution of his duty, but by some inadvertence the constable who was assulted gave his evidence at the hearing of the charge without being sworn. Upon the attention of the Magistrate being called to the irregularity, he later in the same day, reheard the case, all the evidence being then given upon oath. The Magistrate again convicted appellant. The accused appealed and submitted before the Court of Appeal that his conviction must be quashed on the ground that he had been previously convicted but the Court of Appeal answered that that was not so because in the first trial the accused was not convicted lawfully as the police constable did not give his evidence on oath and therefore the accused was not put in peril. What Clause 12 of the Constitution prohibits is the prosecution of a person who has already been properly tried according to law whether he was acquitted or convicted. The Clause should at all time be read as follows : "No one shall be tried again for

an offence for which he has already been PROPERLY tried whether he was convicted or acquitted." The next test is whether accused at the time of his first trial was put in peril of being convicted of the same crime to that for which he is in peril of being convicted in the second proceedings. It has taken me some time to try and make clear the conclusion to which I have come but there is an important principle involved in this case. I hold that this plea made under Clause 12 of the Constitution fails. I can see no reason why I should interfere with the Magistrate's decision. I therefore dismiss the Appeal.