STANLEY ERNEST GULLIDGE *v.* RAM SHARAN

[Appellate Jurisdiction (Hyne, C.J.) 18th February, 1955]

Autrefois acquit—S. 208 (1) *of the Criminal Procedure Code.*

The respondent was charged with driving a motor vehicle whilst his efficiency was impaired by drink and driving the same vehicle without due care and attention. After the close of the case for the prosecution it was proved that the vehicle driven by the accused was numbered 1109 and not 3923 which was the registration number specified in the charge.

The 1st Class Magistrate, Suva, held that on account of the provisions of section 208 (1) of the Criminal Procedure Code the charge could not be amended after the case for the prosectuion had closed and dismissed the case.

The prosecution then charged the respondent again with the same offences inserting the correct registered number of the car.

At the trial before the 1st Class Magistrate, Nausori, the respondent pleaded " autrefois acquit ". This plea was accepted by the Magistrate who discharged the accused.

The prosecution then appealed.

HELD.—that the accused was never in peril of conviction at the original trial and therefore the plea of " autrefois acquit " should not have been accepted.

Cases referred to:—

Regina v. Susannah Green 169 E.R. 940.

Justin Lewis, Crown Counsel, for the appellant.

R. A. Crompton for the respondent.

HYNE, C. J.—The question for consideration by this Court is whether or not the respondent was in peril of conviction in the previous proceedings, and whether the plea of autrefois acquit can be sustained. The general principle at common law is that a man must not be put in peril twice for the same offence.

To determine in any particular case whether such a plea is available it is necessary to ask, as *Kenny* says on p. 499 in his *Outline of Criminal Law,* 1952, " Was the prisoner in jeopardy on the first indictment ? Was there a final verdict ? Was the previous charge substantially the same as the present one ? "

In the original charge before the learned Magistrate at Suva the particulars of offence set out that the respondent was driving motor vehicle No. 1109. In the charge heard on the 9th November the particulars of offence set out that the motor vehicle concerned was numbered 3923.

In the hearing before the Senior Magistrate at Suva the fact that the wrong number had been given to the car in the charge before him was not brought to the notice of the Magistrate until after the close of the case for the prosecution.

Much has been said in the judgment of the learned Magistrate who heard the second complaint about sections 83 (2), 101, 122 and 125, and variance between the charge and the evidence. With respect to the learned Magistrate, I do not think it is necessary to consider the implications of these sections for the purpose of this judgment. The section which is of importance is section 208 (1) which reads as follows:—

> " 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."

The learned Magistrate who dealt with the first charge was, as has been said, not aware of the defect in the charge, namely, that a wrong car number had been inserted, until after the close of the case for the prosecution.

Under section 208 (1) the power of amendment given to the Magistrate or the power to substitute or add a new charge must be exercised by him before the close of the case for the prosecution. The Magistrate was therefore precluded from amending the charge, since he did not know of the defect until the prosecution had closed its case, and he accordingly acquitted the respondent of the charge preferred against him.

I agree that in charges relating to motor offences it is not necessary to specify the number of the car. In this connexion, my attention has been drawn to p. 1027 of *Archbold, 33rd Edition,* where several forms of indictment relating to such offences are set out, in none of which is the number of the car referred to. I agree that the inclusion of the number of the car in the charge is mere surplusage, but at the same time, if it does appear in the charge, then it seems to me that it is incumbent upon the prosecution to establish that the car driven was in fact the car the number of which appears in the charge. He cannot it seems to me, be found guilty of driving another car. As learned Counsel for the respondent says, a man cannot drive more than one car at a time. He, however, advances this argument for other reasons.

Learned Crown Counsel has referred to the case of the *Queen v. Susannah Green,* 169, E.R., at p. 940. In this case the prisoner was indicted for stealing a pair of boots the property of A and was acquitted. She was then indicted again for stealing the same boots laid as the property of B, and pleaded autrefois acquit. A was a boy of fourteen years of age living with and assisting B, his father. The boots were the property of B, but at the time they were stolen A had temporarily in his father's absence the charge of the store from which they were stolen.

On behalf of the prisoner it was contended that she was in peril whether the goods were rightly or wrongly described in the first indictment as the property of Rowland Britton. Under section 14 (1) of the Criminal Procedure Code Act, 1851, the Court might have amended the indictment by substituting the name of John Britton for that of Rowland Britton. They did not, however, do so, and in his judgment *Earle J.* said: " With reference to the plea of autrefois acquit we must

consider what the indictment was and not what it might have been made. The Judge was not bound to amend. He did not amend, and the prisoner was acquitted upon an indictment under which she was never in peril of a conviction."

Counsel for the respondent has submitted that the case of *Susannah Green* is not on all fours with the present case, for the reason that the subject of the offence in the *Susannah Green* case was larceny, and in order to establish a charge of stealing the ownership of the article stolen must be proved as laid in the indictment.

It is, of course, true that on a trial for larceny the prosecution must prove the ownership of the goods as laid in the indictment. This, as I read it, was not the ground on which the plea of autrefois acquit in *Susannah Green's* case was decided. The question appears to me to be whether the defect could have been cured by amendment, and in the present case it could not be cured by amendment, and in the present case it could not be cured by amendment because of the time at which the error in the number of the car came to the notice of the learned Magistrate. There was no defect in the form of the charge, it is true, but there was a defect in substance, inasmuch as the number was wrongly stated. The learned Magistrate could have amended before the close of the case for the prosecution had he had knowledge. He had no such knowledge. He did not amend, and the prisoner, by reason of the substance of the charge, was never in peril of conviction; that is to say, he was never in jeopardy.

There is, in my view, another reason why the plea cannot succeed. Inasmuch as the number of the car in the second charge differs from the the number of the car in the first charge, the respondent was never, on the first charge, in peril of conviction of driving car No. 3923 whilst his efficiency as a driver was impaired by drink, for the reason that he was not charged with driving this car.

While there was a final verdict as to car No. 1109 there was no final verdict in relation to car No. 3923 and even though in both cases the offence was driving a car whilst the repondent's efficiency was impaired, it cannot be said that the previous charge was substantially the same as the latter charge.

In autrefois acquit it is necessary to prove that there could have been a conviction on the first indictment of the offence charged in the second. In my view, this was impossible in the circumstances, and for these reasons too the plea of autrefois acquit cannot be substantiated.

The test is whether the appellant has been acquitted of an offence which is the same offence as that which was charged against him on the second occasion. Obviously, by reason of the difference in numbers of the car, this was not so. The substantial identity of one offence with another is an essential condition of the validity of a plea of autrefois acquit.

In the present case the respondent was therefore not in jeopardy, for two reasons: first, for the reason given in the case of *R. v. Susannah Green*, and secondly, because the charges were not substantially the same. The plea of autrefois acquit cannot be supported.

The case is remitted to the Magistrate for re-hearing and determination with the direction that the plea of autrefois acquit cannot be sustained.