DEVE VUDINIABOLA AND OTHERS

v.

REGINAM

[SUPREME COURT, 1963 (Hammett Ag. C.J.),
27th September, 29th November]

Appellate Jurisdiction

Criminal law—evidence—Crown witness' previous conviction unknown at trial—duty of counsel—duty of court of appeal—Penal Code (Cap. 8) s. 288 (1).

Criminal law—appeal—no power in Supreme Court to order retrial—Criminal Procedure Code (Cap. 9) s. 325 (1).

The appellants were convicted of larceny solely upon the evidence of a taxi driver Peter Jaywant who, unknown to any counsel at the trial, had a previous conviction of four counts of burglary some ten years previously; Jaywant's evidence was implicitly believed and accepted by the Magistrate.

Held.—(1) That it was impossible to say that the Magistrate would have placed such reliance upon Jaywant's evidence had he known of the previous conviction and the convictions of the appellants must be quashed.

(2) That while it is the duty of a prosecutor to disclose to the defence any conviction of a Crown witness of which he is aware it is not his duty to make formal inquiries into the antecedents of every witness in every case.

(3) That it was the duty of the court of appeal in the circumstances which had arisen to examine the record and consider whether, had the point been raised at the trial, the court below must necessarily have come to the same conclusion as to the guilt of the appellants.

Semble.—Section 325 (1) of the Criminal Procedure Code does not empower the Supreme Court to order a retrial upon an appeal from a magisterial conviction.

Taylor v. Wilson (1911) 76 J.P. 69 followed.

Case referred to:

Rigby v. Woodward [1957] 1 All E.R. 391; [1957] 1 W.L.R. 250.

Appeal against conviction.

Appellants in person.

Palmer for the Crown.

HAMMETT Ag. C.J. [29th November, 1963]—

The four appellants were convicted by the Magistrate's Court sitting at Lautoka on 10th April, 1963, of Larceny, contrary to section 288 (1) of the Penal Code.

On 6th August, 1963, they applied for, and were granted by the Court below, extension of time within which to appeal, on the ground that only the previous week they had learned that the principal witness against them at their trial, namely Peter Prasad, had a criminal record, which was not disclosed to them by the prosecution at the time of their trial.

They all now appeal against the conviction on the following ground:—

> " That if the Court had known that the principle prosecution witness Peter Jaywant son of Ram Kissun had previous conviction for Receiving he would have been treated as an accomplice and his evidence would have required corroboration."

At the hearing of the appeal, counsel for the Crown has produced the criminal record of the Crown witness Peter Jaywant. Although it is not true that he had a previous conviction for receiving or that he should have been treated as an accomplice as is alleged in the ground of appeal, he was in fact convicted by the Magistrate's Court Lautoka on 14th February, 1953, on four counts of Burglary and was sentenced to 2 years' imprisonment on each count to run concurrently. He has not had any other convictions before or after that conviction which took place over 10 years ago.

It is of course the duty of a prosecutor, if he knows that a Crown witness has a previous conviction or criminal record, to disclose that fact to the defence. It would be most reprehensible for him not to do so. The defence can then, if it wishes, attack the character and the credibility of such a Crown witness in cross-examination.

On the other hand, it is not the duty of a prosecutor to make formal inquiries in every case, into the antecedents of every witness called by the Crown to ascertain whether or not he has any previous convictions, although where he knows that his whole case depends on the credibility of one particular witness, he would be well advised to do so.

In this case the prosecutor did not know that his principal witness had a previous conviction some 10 years previously. Even if he had known and had disclosed this fact to the defence, it is not at all sure that the appellants would have raised the point in cross-examination for fear that their own previous convictions, of which there were many, were also disclosed. Nevertheless, it is possible that one of the accused with the least number of previous convictions might well have cross-examined Peter Jaywant Prasad, the witness concerned on the point.

It is the duty of this Court to examine the record and consider whether even if the point had been raised at the trial, the Court below must necessarily have come to the same conclusion as to the guilt of the appellants.

The Court below held that on the day after 39,600 cigarettes were stolen from a locked van in Lautoka, Peter Prasad, a taxi driver, drove all the accused from Lautoka to Navua. In the boot of this taxi was a sack which he said was placed there by the accused and which he later saw contained cigarette cartons. This sack was left at a Chinese store in Navua and the money received therefore was handed round by the first accused.

All the accused flatly denied this. None of the cigarettes were ever recovered and the Chinese in the shop concerned denied receiving anything from the appellants. There was no corroboration of the evidence of Peter Prasad.

The whole case for the prosecution depended on the uncorroborated evidence of Peter Prasad. If his evidence had not been implicitly believed and accepted completely by the learned trial Senior Magistrate, the appellants would not have been convicted.

In his judgment, he said this about Peter Prasad:

" The Court can see no reason for Peter Prasad inventing this. Nor is he an accomplice. He came back to Lautoka on Sunday, learnt of cigarette theft on Monday and at once reported to police. He is an independent witness whom Court believes. He gave evidence well."

It is impossible for me now to hold that the Court below would necessarily have placed such reliance upon or have accepted so implicitly the evidence of Peter Prasad if it had then known that he himself had, albeit 10 years ago, been convicted and sentenced to 2 years imprisonment in respect of four counts of Burglary.

In these circumstances the conviction of each of the appellants must be quashed. It appears to me that this is a suitable case in which it ought to be considered whether a new trial should be ordered before another Magistrate.

I am aware that this Court has on previous occasions, some years ago, ordered a new trial in suitable cases. The powers under which such orders were made are contained in section 325 (1) of the Criminal Procedure Code which reads:

" 325.—(1) At the hearing of an appeal the Supreme Court shall hear the appellant or his advocate, if he appears, and the respondent or his advocate, if he appears, and the Supreme Court may thereupon confirm, reverse or vary the decision of the magistrate's court, or may remit the matter with the opinion of the Supreme Court thereon to the magistrate's court, *or may make such other order in the matter as to it may seem just,* and may by such order exercise any power which the magistrate's court might have exercised:

Provided, etc."

The Proviso to section 325 (1) is not material to the point under consideration.

It appears that the power to order a new trial has been assumed to lie in the words—

" or may make such other order in the matter as to it may seem just."

My attention has been drawn to the decision of the King's Bench Division in *Taylor v. Wilson* 76 J.P. 69. This was a case stated under the provisions of the Summary Jurisdiction Act, 1857, section 6, the material part of which provides:

" The court to which a case is transmitted under this Act shall hear and determine the question or questions of law arising thereon, and shall thereupon reverse, affirm, or amend the determination in respect of which the case has been stated, or remit the matter to the justice or justices with the opinion of the court thereon, or *may make such other order in relation to the matter,* and may make such orders as to costs, *as to the court may seem fit*; and all such orders shall be final and conclusive on all parties:"

When that case was considered by the King's Bench Division it was not sent back for retrial because (in part at least) it was considered the Court had no power to order a retrial unless the Justices specifically asked for a ruling on a point of law and gave their decision, not as a final decision, but as an interim decision pending a ruling on the point of law. None of the Judges in that case considered that the power to order a retrial could be implied or assumed to lie within the general words—

" or may make such other order in relation to the matter as to the Court may seem fit."

which are, for all practical purposes, words to the same effect as those which appear in section 325 (1) of the Criminal Procedure Code.

In the headnote to the case of *Rigby v. Woodward* [1957] 1 All E.R. 391, appears the following passage:—

> "Semble: neither under s. 87 (1) of the Magistrates' Courts Act, 1952, nor under s. 6 of the Summary Jurisdiction Act, 1857, was there power to order a re-trial."

and the Editorial Note refers to *Taylor v. Wilson* 76 J.P. 69.

It appears to me to be open to considerable doubt whether the power to order a retrial (and by this I do not mean a *venire de novo* where the first trial is a nullity) can properly be assumed to lie within the meaning of these words. Unless an appeal Court is expressly given the power to order a retrial, I am of the opinion that it has no power to do so. This is a matter which it would appear should be considered by the Legislature.

I shall not order a new trial in this case as I might have considered ordering if I was of the opinion that I had the power to do so.

For these reasons the appeal of each appellant is allowed, the convictions are quashed and the sentences imposed by the Court below set aside.

Appeals allowed.

Solicitor-General for the Crown.