A

BRIJ BASI SINGH AND ANOTHER

v.

REGINAM

[SUPREME COURT, 1968 (Moti Tikaram Ag. P.J.), 29th October, 26th November] B

Appellate Jurisdiction

Criminal law—plea—autrefois acquit—larceny of cattle—acquittal at first trial on ground property in cattle laid in wrong person—second trial—charge laying property in correct person—whether conviction possible at first trial—incumbent upon prosecution to establish ownership if owner named in charge—Penal Code (Cap. 8—1955) s.301—Penal Code (Cap. 11—1967) ss.291(2) (c), 307—Criminal Procedure Code (Cap. 14—1967) ss.123(c) (i), 124, 204, 300(1)—Criminal Procedure Act 1851 (14 & 15 Vict., c.100) (Imperial) s.1—Criminal Appeal Act 1912 (New South Wales) s.6 (1)—Constitution of Fiji (Fiji (Constitution) Order 1966, Sch.2) s.8(5). C

Criminal law—charge—larceny—naming of owner of property stolen not essential—if owner named his ownership must be proved—Criminal Procedure Code (Cap. 14—1967) s.123(c) (i). D

The appellants were acquitted in the Magistrate's Court of the offence of larceny of cattle, the ground of acquittal being that in the particulars of offence the property in the cattle was laid in one Mohammed Ayub Khan, whereas the trial magistrate found that they were the property of Mohammed Taki Khan, the father of Mohammed Ayub Khan. At the stage when the defect was discovered it was too late for the magistrate to amend the charge under section 204 of the Criminal Procedure Code, and the magistrate further found that there was no evidence that Mohammed Ayub Khan had any special property in the cattle or was in possession or control of them. The appellants were later charged with larceny of the same cattle (based on the same act of larceny) but described as the property of Mohammed Taki Khan. A plea of *autrefois acquit* was rejected by the magistrate. E F

Held: 1. At the first trial the appellants could not have been convicted of the charge as laid, because

(a) No amendment of the charge was made and, at the stage at which the question of erroneous averment of ownership was raised, it could not have been amended, and G

(b) Though by virtue of section 123 (c) (i) of the Criminal Procedure Code it is not incumbent upon the prosecution on a charge of larceny to aver in whom the property is laid, nevertheless once the prosecution has chosen specifically to name the owner it must prove that the goods stolen were the property of that person, either as absolute owner or within the extended meaning assigned by section 291 (2) (c) of the Penal Code. H

2. The plea of *autrefois acquit at* the second trial was therefore rightly rejected.

Cases referred to : *Gullidge v. Ram Sharan* (1955) 4 F.L.R. 160: *R. v. Burns* (1920) 37 W.N. (N.S.W.) 77: *R. v. Green* (1856) 7 Cox C.C. 186; 169 E.R. 940: *R. v. Barron* [1914] 2 K.B. 570; 10 Cr. App. R. 81.

A

Appeal against a conviction by the Magistrate's Court after the rejection of a plea of *autrefois acquit.*

S. M. Koya for the appellants.

J. R. Reddy for the respondent.

B

The facts sufficiently appear from the judgment.

MOTI TIKARAM J.: [26th November, 1968]—

This is an appeal against the rejection of a plea of autrefois acquit. A further ground of appeal to the effect that the learned trial magistrate erred in holding that the appellants were in possession of the animals in question at the material time and erred in invoking the doctrine of recent possession was not argued before this Court at all. I have treated that ground of appeal as having been abandoned.

C

On the 22nd December, 1967, the appellants were charged together with one Malakai Driu, before the first class magistrate's court at Nadi with the offence of Cattle Stealing contrary to Section 301 of the Penal Code, Cap. 8. in Criminal Case No. 784 of 1967. The particulars of offence were as follows : -

D

> "BRIJ BASI SINGH s/o Manohar Singh, SINGIRAM SINGH s/o Manohar Singh and MALAKAI DRIU between the 16th day of December 1967 and the 18th day of December 1967 at Sabeto, Nadi in the Western Division stole one cow and a bull calf of the total value of £20 the property of Mohammed Ayub Khan s/o Mohammed Taki Khan."

E

On 7th May, 1968 the learned trial magistrate ruled that the third accused, Malakai Driu, had no case to answer. He therefore acquitted and discharged him.

F

On the 20th May, 1968, the appellants were also acquitted. The learned trial magistrate found that there was no evidence that Mohammed Ayub Khan was the owner of the cattle in question. He found that the cattle referred to in the charge were the property of Mohammed Taki Khan. The reason for the acquittal is found in the concluding portion of the learned trial magistrate's judgment in Criminal Case No. 784 of 1967 which reads as follows : -

G

> "It would appear then from Section 123(c) (i) of the Criminal Procedure Code and the decided cases that the averment of the ownership of the property the subject of the larceny is no longer to be considered material, but merely descriptive. If alleged however in the charge it must be proved as laid.
>
> The powers of the Court to amend the charge then remains to be considered.

H

> Section 204 of the Criminal Procedure Code reads so far as it is applicable to the present case : -

'Where, at any stage of the 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.'

It is apparent that the averment of an incorrect name of the alleged owner of the cattle is a defect in substance (Gullidge v. Ram Sharan). The point on this defect being raised after the close of the prosecution case, this court has no power of amendment. Accordingly the accused must be acquitted of the present charge."

On the 20th May, 1968, after being acquitted, the appellants were again charged before the same magistrate at Nadi for the following offence in Criminal Case No. 370 of 1968 as follows :-

Statement of Offence

CATTLE STEALING Contrary to Section 307 of the Penal Code, Cap. 11.

Particulars of Offence

BRIJ BASI SINGH son of Manohar Singh and *SINGIRAM SINGH* son of Manohar Singh between the 16th and 18th day of December, 1967 at Wailoko, Sabeto, Nadi in the Western Division stole one cow and a bull calf of the total value of £20.0.0. the property of Mohammed Taki Khan son of Rahmat Ali Khan."

A plea of *autrefois acquit* was submitted on behalf of both Appellants but the Learned Trial Magistrate rejected the plea in a carefully reasoned ruling. The trial of the two accused then proceeded on the charge as laid and the Learned Trial Magistrate found both Accused guilty and convicted them. He fined each of them £50 and in default of payment they were each ordered to serve a period of imprisonment for 3 months. The Petition of Appeal insofar as it relates to the issue of autrefois acquit reads as follows :-

"4. . . . . .

(a) *That* the Learned Trial Magistrate erred in law in rejecting your Petitioners' plea of *Autrefois Acquit* and their submissions based on the provisions of Section 124 of the Criminal Procedure Code Cap. 14 having regard to the following matters :

(i) that on the 20th day of May, 1968 your Petitioners were acquitted of the offence of Cattle Stealing contrary to Section 301 of the Penal Code (now Section 307 of the same Code) in Criminal Case No. 784 of 1967 (hereinafter called the "*first* trial") by a Court of competent jurisdiction, namely by the 1st class Magistrate's Court at Nadi.

(ii) that in the *first trial* your Petitioners were tried on the same facts and for the same offence with which they were charged in this case.

(iii) that at the time of the *second trial* the said acquittal was neither reversed or set aside.

(iv) that in the *first trial* your Petitioners could have been convicted of the offence of Cattle Stealing aforesaid as a matter of law and your Petitioners have been put in peril for the same offence in this case both in fact and law as that with which they were charged in the *first trial.*"

It is common ground in this case that the cattle in question were the same in both trials and that there was only one alleged act of larceny in respect of these cattle. No question of jurisdiction of the Trial Court is involved in this appeal. Furthermore it is agreed that the order of acquittal in the first trial has neither been reversed nor set aside. The Learned Trial Magistrate when dealing with the plea of *autrefois acquit* made at the commencement of the second trial observed and ruled as follows : -

. . . . . "The true test on the validity of a plea of either autrefois convict or autrefois acquit is the same in either case, viz: 'Was the accused in jeopardy of a conviction on the former trial of the same offence as charged against him on the second trial.' In my opinion this is not the case here, and I am persuaded in my view by the decision of the Supreme Court of N.S.W. in the case of *R. v. Burns* 37 W.N. at 77. In that case the accused was charged and convicted on an indictment which alleged that he did falsely pretend to 'N' that he was a soldier in the A.I.F. by means of which false pretence he did obtain from 'W' a certain document to wit a Government travelling privilege authorising the issue to him of seven railway tickets, with intent to defraud.

There was no evidence he obtained the document by any false pretence made to 'N' but that the false pretence was made to either 'A' or 'W', clerks in the same Department. The Chief Justice, held that, although the points raised in the appeal might have been decided in the appellants favour, no substantial miscarriage of justice occurred and the appeal should be dismissed under Section 6(i) of the Criminal Appeal Act (a similar provision to Section 300(i) of the Criminal Procedure Code), a view not held by other Justices. The Chief Justice also considered that the facts disclosed to the Court were a variance between the evidence and the charge but this Court has found, following *Gullidge v. Ram Sharan* (1955) 4 F.L.R. 160 that this is a defect in substance, this Court considering itself bound by that authority. All the Justices however agreed, as I read the case, that a plea of autrefois acquit could not be raised to any subsequent charge. Gordon J., stated in his judgment: "It is clear that if the accused had been acquitted on this indictment such acquittal would not support a plea of 'autrefois acquit' if he were subsequently charged with obtaining the same document by means of a false pretence made either to 'A' or 'W'. In my opinion his conviction on the present indictment would be equally unavailing to support a plea of 'autrefois convict' to a fresh indictment charging the accused with obtaining the same documents by means of a false pretence made to 'A' or 'W'.

In any event the matter is fully covered by the decision in *Gullidge v. Ram Sharan.* Hyne C.J. at page 162 stated in his judgment : -

'The question appears to me to be whether the defect could have been cured by amendment, and in the present case' (as, of course,

in the first charge against these accused) '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, in as much 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 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. In as much as the number of the car in the second charge differs from 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 . . . . . 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 respondent's efficiency was impaired, it cannot be said that the previous charge was substantially the same as the latter charge.' And in that case the plea of 'autrefois acquit' was not supported. For the same reasons and for the other reasons set out in this ruling the plea of *autrefois acquit* cannot be supported and a plea of 'not guilty' is entered on behalf of each accused."

The general principle at common law is that a person must not be put in peril twice for the same offence. Statutory recognition is given to this principle by Section 124 of the Criminal Procedure Code which reads as follows :-

"124. A person who has been once tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal has not been reversed or set aside, not be liable to be tried again on the same facts for the same offence."

Similar protection for the citizen is embodied in the Constitution of Fiji Section 8 (5) of which provides as follows :

"No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal."

The plea of *autrefois convict or autrefois acquit* avers that the defendant had been previously convicted or acquitted on a charge for the same offence as that in respect of which he is arrainged. The question for determination by this Court is whether the plea of *autrefois acquit* was rightly rejected or not. The answer to the question however depends on whether or not the appellant was in peril of conviction in the first trial.

On behalf of the Appellants Mr. Koya has argued that the averment of ownership was a mere surplusage and, therefore, proof of ownership was not essential to support a conviction of larceny. He referred to Section 123 (c) (i) of the Crimnal Procedure Code which reads as follows :-

"(c) (i) the description of property in a charge or information shall be in ordinary language, and such as to indicate with reasonable clearness the property referred to, and, if the property is so described, it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property;"

He, therefore, contended that the Appellants were in jeopardy of being convicted at the first trial in spite of the fact that there was no amendment of the charge as laid. He argued that even if it were incumbent on the Prosecution to prove the ownership as alleged in the charge the Appellants were in peril of being found guilty by virtue of Section 291 (2) (c) of the Penal Code which reads :-

"291 (2) (c). The expression 'owner' includes any part owner, or person having possession or control of, or a special property in, anything capable of being stolen."

The opposite stands taken by the Crown and the Defence in the first trial with regard to the applicability of the above Section appear to be the reverse of that taken by the parties at the hearing of this appeal. Mr. Koya had argued that the Appellants could not be convicted of larceny of the cattle in question. Relying on *Archbold* he contended that the prosecution must establish that the property was in the person named in the charge. He also argued that the word 'possession' does not mean manual control and inferentially submitted that Mohammed Taki Khan did not come within the definition of 'owner' as laid in Section 291 (2) (c). On the other hand the Police Prosecutor who appeared in the first trial advanced the following argument :-

"I rely on the definition of 'owner.' There is evidence that he looks after his Father's cattle and he has the control and custody of the cattle. His son is an owner as defined in the Penal Code."

Rejecting the Police Prosecutor's statement that the position was cured by the provisions of Section 291 (2) (c) of the Penal Code the learned Magistrate in his judgment which is a model of industry held that he found no merit in that view and went on to record his finding as to ownership as follows :-

" . . . . . There is no evidence that Mohammed Ayub Khan was the 'part owner' of the cattle or had any 'special property' in them (as the members of a golf club may have in lost golf balls resting upon the golf links owned by the Club). As to the cattle being in the 'possession' or 'control' of Mohammed Ayub Khan, the evidence disclosed that, although he may well have been grazing them, he brought them back and they were placed in his father's paddock. At the time of stealing, the cattle were neither in his possession or under his control, but were in the possession and under the control of their rightful owner Mohammed Taki Khan."

The learned Crown Counsel has submitted that the plea of *autrefois acquit* was rightly rejected because the appellants were never in peril of conviction as they could not have been legally found guilty of the charge

as laid. He has cited the case of *Queen v. Susannah Green,* 169 E.R. 940, in support of his contention. 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 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 A. Under Section 1 of the Criminal Procedure Act, 1851 the Court might have amended the indictment by substituting the name of B for that of A. They did not, however, do so and in his judgment Erle J, said :

> "The goods remained all the time in the father's possession and could not have been laid as the property of the son. 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."

Upholding the Recorder's rejection of the plea of *autrefois acquit* the Court of Criminal Appeal held the accused was not a bailee and the ownership of goods could not properly be laid in him.

In the first trial as far as the present case is concerned, the appellants could not have ben convicted of the charge as laid. No amendment was made and by virtue of Section 204 of the Criminal Procedure Code the trial Court could not have amended the charge by substituting the name of Mohammed Taki Khan for that of Mohammed Ayub Khan at the stage at which the question of erroneous averment of ownership was raised. Whilst I agree that by reason of Section 123(c) (i) of the Criminal Procedure Code it is not incumbent on the prosecution on a charge of larceny to aver in whom the property is laid, neverthless, once the prosecution has chosen to specifically name the owner it must then prove upon the trial that the goods stolen are the property of the person named in the indictment. (See paragraph 1514 of *Archbold* 36th Edition), either as absolute owner or by virtue of the extended meaning assigned to the term "owner," by section 291(2) (c) of the Penal Code. The evidence in the first trial clearly disclosed that the cattle in question were the property of Mohammed Taki Khan and that, as rightly found by the learned trial magistrate, Mohammed Ayub Khan did not come within the definition of an owner. In my view, it is not open to the trial court to convict an accused person of larceny of property alleged to belong to A when the evidence discloses that the property belongs to B. Consequently I have come to the conclusion that the appellants were never in jeopardy of being convicted of larceny of cattle as laid in the first trial. In the particular circumstances of this case, the appellants could only succeed on a plea of *autrefois acquit* if the charge is one in respect of which he could have been legally convicted on the prior occasion. The test is whether the former offence and the offence now charged have the same ingredients in the sense that the facts constituting the one were sufficient to ensure conviction on the other, not that the facts relied on by the Crown are the same in the two trials. (See cases cited at page 406 in footnote (9) in Vol. 10 of *Halsbury's Laws of England* 3rd *Edition.*) A

plea of *autrefois acquit* is not proved unless it is shown that the verdict of acquittal of the previous charge necessarily involves an acquittal of the latter — *Rex v. Barron* [1914] 2 K.B. 570. In my view the case of *Susannah Green* is on all fours with the present case and I uphold the learned trial magistrate's rejection of the plea of *autre fois acquit.*

A

It is interesting to note that whilst Section 123(c) (i) of the Criminal Procedure Code says that:-

> " . . . . . it shall not be necessary (except when required for the purpose of an offence depending on any special ownership of property or special value of the property) to name the person to whom the property belongs . . . . "

B

the specimen form (of stating offences) given in the second Schedule under Section 123 of the Criminal Procedure Code, for larceny contrary to Section 294 of the Penal Code makes provision for the owner to be named. In my view in charges of larceny it is a good practice to name the owner of the stolen property wherever possible.

C

This appeal is dismissed.

Appeal dismissed.