A

BUDH RAM

v.

B **REGINAM**

[SUPREME COURT, 1975 (Grant C.J.), 18th April]

Appellate Jurisdiction

Criminal law—evidence and proof—accused charged with two offences of a similar character—accused acquitted during course of trial of one charge—
C *whether Magistrate entitled to take into account evidence already heard on that charge to determine guilt of accused on outstanding charge—Criminal Procedure Code (Cap. 14) s.121.*

If, during the course of a trial, the accused is acquitted of one or more of the charges, it is not permissable for the Magistrate to take into account the evidence already heard relating to those charges when determining the guilt of the accused on any outstanding charge.

D The case of *R. v. Ollis* [1900] 2. Q.B. 758 was applied by the Magistrate in circumstances in which it was of no relevance as it related to a case where there had been separate and distinct trials.

Appeal against conviction in the Magistrate's Court for obtaining money by false pretences.

GRANT C.J. : [18th April 1975]—

E On the 27th February 1975 at Suva Magistrate's Court the appellant was convicted after trial on one count of obtaining money by false pretences contrary to section 342 (a) of the Penal Code.

The appellant has appealed on a number of grounds, the only one with which I consider it necessary to deal being that the learned trial Magistrate erred in law in looking at evidence on which the appellant had been acquitted and using the same to convict him.

F As originally drawn the formal charge, which was presented under the proviso to section 79(3) of the Criminal Procedure Code, contained two offences of a similar character, set out in separate counts in accordance with section 121 of the Criminal Procedure Code. After the complainant in the second count named Kaliamma had given evidence which did not substantiate the charge, her son was called as a witness whose evidence was more relevant to
G the charge, resulting in the prosecution applying to withdraw the second count and preferring a third count in substitution naming Kaliamma's son as the complainant. The appellant thereupon pleaded not guilty to the third count and, under the provisions of section 192 of the Criminal Procedure Code, the second count was withdrawn and the appellant was acquitted in respect thereof.

The trial proceeded and cross-examination of Kaliamma's son disclosed that his evidence did not substantiate the third count whereupon, under the provisions
H of section 192 of the Ciminal Procedure Code, the third count was withdrawn and the appellant was acquitted in respect thereof. The trial then proceeded in respect of the first count only, and upon being put on his defence the appellant very properly confined his unsworn statement to the circumstances of the first count.

However, in his judgment the trial Magistrate found himself unable to determine on the evidence directly relevant to the first count whether or not the ingredients of the offence had been established and went on to say :

> " In order to answer this question I have to accept either the prosecution evidence or that of the Accused. On this point there is no truly independent evidence but if this transaction was part of a series of transactions I am entitled to look at the evidence given on the other Counts even though dismissed. There is long-standing authority that the evidence is relevant if showing a course of conduct on the part of the Accused *R. v. Orris* 1902, 2 Q.B. 758 C.C.R., where the matter was considered by a court of 9 Judges and the principle was confirmed with only one dissentment, and the observation of Grantham and Channel JJ are particularly succinct). I have therefore considered the evidence given in the Second Count relating to Kaliamma, by herself and her son. "

There is in fact no such case as *R. v. Orris* decided in 1902, and this would appear to be a lapsus calami, the case which the trial Magistrate had in mind being *R. v. Ollis* [1900] 2 Q.B. 758. The circumstances of that case were that the defendant was indicted for obtaining by false pretences, the complainant having been given a cheque by the defendant which was dishonoured, the defendant contending that he had expected in good faith to have the funds to meet the cheque. After the recorder had directed the jury on the meaning of intent to defraud and that, if at the time the defendant gave the cheque he had reasonable expectation that money would be paid in to his account to meet it and bona fide believed that the cheque would be cashed on presentation this would be a defence to the charge, the jury returned a verdict of not guilty. The defendant was subsequently tried on another indictment in respect of three other offences of obtaining by false pretences relating to three other cheques, and at this trial the prosecution called as a witness the complainant who had given evidence in the first trial at which the defendant had been acquitted in order to give the same evidence as he had given in the first trial for the purpose of shewing a systematic course of dealing on the part of the defendant and as negativing any reasonable belief on the part of the defendant that there was money at the bank to meet the cheques the subject matter of the subsequent indictment. The defendant was convicted in respect of the offences charged in this indictment and a case was stated to the Queen's Bench Division (Crown Cases Reserved) as to whether the evidence of the complainant which was the subject of the first indictment was legally admissible upon the trial of the second indictment for the purpose of proving guilty knowledge.

The decision of the Queen's Bench Division turned entirely on whether, in respect of the second indictment, the defendant had already been put in peril on the earlier indictment ; whether the prosecution was estopped from calling as a witness in respect of the second indictment the complainant in the earlier indictment on which the defendant had been acquitted ; and whether the principle of res judicata applied. It was held that, in respect of the offences forming the subject matter of the second indictment, the defendant had never been in peril, as the earlier indictment related to an entirely different offence, that the evidence was legally admissible, and the conviction was affirmed.

It is quite clear from the judgments delivered in *R. v. Ollis* that the defendant had every opportunity on the second and subsequent indictment of putting forward his defence and directing his evidence to meet the testimony of the witness who had been the complainant on the first indictment. The decision was based on the fact that there were separate and distinct trials in respect of each indictment and that on the second indictment the defendant had not been imperilled by the first indictment (Grantham J. at p. 765 referring to the

question of whether or not evidence given against a prisoner on one charge on which he has been acquitted can be *afterwards* used against him on another charge ; Wright J. at p. 768 referring to the question of whether the evidence ought to have been excluded on the ground that it was part of the evidence given for the prosecution at the *former* trial ; and Darling J. at p. 779 referring to the question of whether or not the evidence was again admissible having already been given in the *first* trial). Had it been a case of the defendant being charged under one indictment with all four offences, and had the prosecution at some stage during the prosecution case withdrawn one or other of those offences from the jury (e.g. by entering a nolle prosequi in respect thereof) the jury would, most certainly, have had to be directed that they could not take into account in regard to the remaining offences the evidence given in respect of the offence or offences which had been withdrawn, as the defendant had had no opportunity to meet that evidence.

I have related the circumstances of *R. v. Ollis* to shew that they are clearly distinguishable from the circumstances appertaining to the trial the subject matter of this appeal. Had the appellant been charged with an offence of obtaining by false pretences, tried, and acquitted in respect thereof, and had he subsequently been charged with additional offences of obtaining by false pretences, the evidence given in the first trial may well have been relevant on the second trial and if so would have been admissible. But this is not the position in which the trial Magistrate found himself. The trial Magistrate had before him at one and the same trial the evidence of two prosecution witnesses, namely Kaliamma and her son, pertaining to two offences in respect of which the appellant was acquitted during the course of the trial. The appellant had no opportunity to, and was not required to, direct his evidence in defence to meet the evidence of those witnesses. So far as those witnesses were concerned, the trial Magistrate had only heard their side of the story, was not in a position to adjudicate upon their credibility and could not, under the circumstances, take their evidence into account in any way when deciding whether the appellant had the requisite mens rea and whether it had been proved beyond reasonable doubt that he committed the offence to which the first count related. The trial Magistrate applied *R. v. Ollis* in circumstances in which it was of no relevance and erroneously took into account against the appellant evidence which the appellant had no opportunity to answer.

There can be no question of this Court exercising the proviso to section 300(1) of the Criminal Procedure Code, as it is perfectly clear from the judgment of the trial Magistrate that, without taking into account the inadmissible evidence, he would have been left with a reasonable doubt as to the guilt of the appellant on the first count. Nor, in the circumstances, is it a suitable case for ordering a retrial.

The misdirection of the trial Magistrate being fatal to conviction, the conviction is quashed and the sentence set aside.

Appeal allowed.