SAINIVALATI NAITALA

A

v.

REGINAM

[COURT OF APPEAL, 1976 (Gould, V. P., Marsack J. A., Spring J. A.), 22nd, 26th November]

B

Criminal Jurisdiction

Criminal law—plea—pleas of not guilty entered in Magistrate's Court by direction of magistrate—whether competent for another magistrate on a subsequent hearing, or a judge, in exercise of his powers of review, to substitute such pleas for pleas of guilty—Criminal Procedure Code (Cap. 14) *ss.* 304, 306.

C

The appellant was charged in the Magistrate's Court with a number of offences to which he pleaded guilty. In mitigation he stated that he had committed these offences whilst under the influence of alcohol. On hearing this, the senior magistrate ordered that pleas of not guilty be entered and adjourned the case for trial. On a subsequent hearing, another magistrate reviewed the pleas of not guilty and decided to deal with the appellant on his original pleas of guilty. The appellant was committed for sentence. The judge ruled that the action taken by the second magistrate in attempting to interfere with the senior magistrate's direction was in law a nullity. The judge purporting to exercise his powers of review under Criminal Procedure Code s. 306, having decided that intoxication did not provide a defence to the charges, restored the original pleas of guilty.

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E

Held: Neither a magistrate nor a judge of the Supreme Court on review, had the power to change an accused's pleas from not guilty to guilty without complying with the appropriate procedures in the Criminal Procedure Code. Accordingly the convictions were a nullity and would be set aside and the case remitted to the Magistrate's Court for trial de novo.

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Cases referred to:

R. v. Kelly [1965] 2 Q.B. 409; [1965] 3 All E.R. 162.
R. v. Hazeltine [1967] 2 Q.B. 857; [1967] 2 All E.R. 671.
R. v. Durham Quarter Sessions ex p. Virgo [1952] 1 All E.R. 466; [1952] 2 Q.B. 1.
R. v. Blandford JJs ex p. g (an infant) [1966] 1 All E.R. 1021; [1967] 1 Q.B. 82.
Ratu v. Harlow [1960] N.Z.L.R. 861.

G

Appeal against conviction and sentence by the Supreme Court for arson.

G. P. Shankar for the appellant.
D. Adams for the respondent.

Judgment of the Court (read by Spring J.A.) [26th November 1976]—

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This is an appeal brought by Sainivalati Naitala against his conviction and sentence by the Supreme Court of Fiji sitting at Lautoka on 22nd July 1976.

The facts briefly are as follows. The appellant was charged that on the 24th April 1976 he committed the following crimes namely arson, contrary to section 353*(a)* of the Penal Code, attempting to commit arson contrary to section 354*(a)*, shopbreaking and larceny contrary to section 353*(a)*, and larceny in a dwelling house contrary to section 302*(a)*. The appellant appeared before the senior magistrate at Nadi on the 26th April 1976 and consented to being tried before that court. The appellant was unrepresented by counsel, and after the charges were read and explained he pleaded guilty to all charges, except the last charge which was withdrawn, and the appellant discharged thereon. The facts were outlined to the court and admitted by the appellant.

The learned magistrate thereupon convicted the apellant on the 3 counts. Before passing sentence the appellant was asked if there were any matters in mitigation which he wished to place before the court. In the course of his remarks the appellant stated that he committed the offences under the influence of liquor; he said:

> "While after taking drinks and being under the influence thereof I was compelled to do this. I believe that if I had not taken liquor to soothe my feelings I would not have done this. I took more than enough. I have been drinking for about 6 hours that day."

The learned magistrate thereupon ordered that a plea of "not guilty" to the 3 counts be entered in order "that a full hearing of the matter is conducted". The police inspector who was prosecuting asked that "in view of this change the prosecution would be asking for a preliminary inquiry under section 210 of the Criminal Procedure Code."

The appellant was remanded in custody pending trial; the matter was adjourned from time to time until the 3rd June 1976 when the prosecution informed the court that it was not asking for a preliminary inquiry. On 28th June 1976 the matter came before another magistrate and the appellant remained unrepresented; Crown counsel appeared for the prosecution and outlined the evidence that it proposed to adduce at the trial of the appellant. For some inexplicable reason the magistrate proceeded to review the action taken by the senior magistrate in ordering that pleas of not guilty be entered to the 3 counts. At the conclusion of the opening remarks by the Crown and after the appellant had addressed the court the magistrate ruled that the court should deal with the appellant on the original pleas of guilty entered by him on the 26th April 1976; however, the magistrate decided that in view of this limited jurisdiction the appellant should be sent to the Supreme Court for sentence. On 22nd July 1976 the appellant appeared, unrepresented by counsel, before the Supreme Court at Lautoka for sentence.

The learned judge ruled, quite properly in our view, that the action taken by the second magistrate in attempting to review the proceedings of the senior magistrate lacked jurisdiction, and in law was a nullity. At the stage that the appellant appeared before the Supreme Court the only pleas extant before the Magistrate's Court on the 3 counts were pleas of "not guilty". The learned judge in the Supreme Court proceeded to consider at length the defence of drunkenness in so far as it affected crimes committed in Fiji. At the conclusion thereof the learned judge stated that in exercise of his powers of review under Section 306 of the Criminal Procedure Code he would strike out the "erroneously entered" pleas of not guilty and restore the original pleas of guilty in respect of counts I and II (we are not concerned with count III). He stated

further that the pleas of not guilty were erroneously entered due to the learned magistrate considering that intoxication provided a defence to the charges. The appellant appealed to this court and requested legal aid which was duly granted. The grounds of appeal requiring consideration by this court may be summarised:

(1) That the plea of guilty entered by the appellant in the Magistrate's Court had been expunged when the magistrate entered a plea of "not guilty" and

(2) That before the Supreme Court could proceed on a plea of guilty it was necessary to take the appellant's fresh election and plea. Failure to do so has rendered the proceedings a nullity.

Dealing with the first ground of appeal; it is clear that when the magistrate ordered pleas of "not guilty" be entered to the three counts the pleas of guilty previously entered by the appellant were withdrawn, if not expressly, at least impliedly. In *R. v. Kelly* [1965] 2 Q.B. 409 the facts were as follows: On a count charging malicious damage to a number of chattels the accused pleaded guilty in respect of one glass only. The plea was not accepted and the trial proceeded on the whole count and the accused was acquitted. He was then sentenced, however, on the plea recorded in respect of the glass. It was held that there had been an implied withdrawal of the plea of guilty.

Lord Parker C.J. at p. 411 said:

> "The true position here, as it seems to this court, is that although the record was not formally altered at the time that the defendant was put in charge of the jury, there was clearly an implied withdrawal of the plea of guilty, and that in view of the verdict of the jury, the judge at the end should have ordered that the record be corrected by entering a plea of not guilty to that count. In the result, this court will quash the conviction and set aside the sentence."

In *R. v. Hazeltine* [1967] 2 Q.B. 857 at p. 861 Salmon L.J. said:

> "In the view of this court, however, that statutory provision did not get rid of the rule that there can be but one plea to one count should the trial proceed on that count. Accordingly if an accused pleads not guilty to wounding with intent but guilty to unlawful wounding and counsel for the prosecution or the judge takes the view that that plea ought not to be accepted and the trial proceeds, the plea of guilty to unlawful wounding is deemed to be withdrawn and the only plea is the plea of not guilty to wounding with intent."

and at p. 862 he said.

> "The conclusion, however, is inescapable, that there cannot be more than one effective plea to any count in respect of which an accused is put in charge of the jury. The only effective plea here was a plea of not guilty."

In *Ratu v. Harlow* [1960] N.Z.L.R. 861 Haslam J. said at p. 863—

> "Leave to withdraw a plea of guilty under s. 42 (which is a new provision in this setting), may be given at any time before 'the defendant has been sentenced or otherwise dealt with'. As the magistrate can grant such leave at any time before the final stage of the hearing, I think that as an obvius corollary the conviction (if any) must thereby be vacated and the earlier proceedings expunged for all purposes." Therefore when the learned magistrate decided that the

A appellant should change his plea from "guilty" to "not guilty" it follows as a necessary consequence that the plea of guilty and the convictions thereon are vacated and expunged for all purposes.

The learned judge considered that the pleas of "not guilty" had been erroneously entered when the appellant stated to the magistrae that at the time of the alleged offences the appellant was under the influence of liquor. There is a consistent line of authority, however, which establishes that if an accused person
B who has pleaded guilty, and later puts forward a statement which, if true, would be a defence to the charge then in such circumstances a magistrate should invite the accused to change his plea, or order that a plea of not guilty be entered. *R. v. Durham Quarter Sessions Ex parte Virgo* [1952] 1 All E.R. 466; *R. v. Blandford Justices* [1966] 1 All E.R. 1021.

C The learned judge in the Supreme Court stated that he intended to treat these proceedings as being brought before the Supreme Court by way of review. The question that arises for our determination—Is the learned judge in the exercise of his powers of review authorised to alter the pleas of the appellant from "not guilty" to "guilty".

It is provided in section 304 of the Criminal Procedure Code:

D "304. The Supreme Court may call for and examine the record of any criminal proceedings before any Magistrate's Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such Magistrates' Court."

The learned judge cannot, as a matter of review, substitute pleas of "guilty" for pleas of "not guilty" on the premise that the appellant had previously pleaded guilty
E in the Magistrate's Court; those original pleas have, in our view, been withdrawn, if not expressly, at least impliedly when the magistrate ordered pleas of "not guilty" to be entered; the pleas of guilty have been expunged along with the convictions entered thereon; Neither the pleas of guilty nor the convictions can be revived by the learned judge.

Further, on a review from the Magistrate's Court the Supreme Court can make
F such orders in its revisional capacity as were capable of being properly made in the Magistrate's Court; A magistrate cannot change an accused person's plea from "not guilty" to "guilty" without complying with the appropriate procedures in the Criminal Procedure Code and, a fortiori, a judge of the Supreme Court is in no different position. We do not overlook that in section 306(1) *(b)* of the Criminal Procedure Code it is stated that the judge may—

G "In the case of any other than an order of acquittal, alter or reverse such order."

But though the section entitled the judge to reverse the order made by the magistrate that a plea of not guilty should be entered, it did not empower him to revive that which the magistrate's order had already expunged—that is the pleas of guilty and the convictions thereon.

H When the appellant appeared in the Supreme Court he appeared or sentence—although as we have stated there were no convictions extant on which he could be sentenced—and the only pleas which were properly before the court were pleas of "not guilty".

In these circumstances it would not be competent for a judge using his powers of review, to substitute pleas of guilty for pleas of not guilty. In fact the learned judge reminded himself of this fact when he said: A

> "It should be noted that this is not a case in which I am changing the accused's plea. If an accused is permitted to change his plea from guilty to not guilty then this court will not interfere but that is not what happened."

The learned judge believed that when he struck out the plea of not guilty, which he said had been entered erroneously, he was able to restore the original pleas of guilty and the convictions thereon. In our view, he could not restore the pleas of guilty nor the convictions as they had been expunged from the record for all purposes. B

The conclusion is inescapable that there were no effective pleas in respect of counts I and II, nor were there any convictions upon which the judge could sentence the appellant. The only effective pleas to counts I and II were those of not guilty. Therefore, for the reasons given, we are satisfied that the appeal should be allowed. C

Accordingly, the convictions are a nullity and we set them aside; we quash the sentences: we order that the informations against the appellant be remitted to the Magistrate's Court for hearing de novo: and, it will of course be necessary for the appellant to make a fresh election and plea. D

In the circumstances we do not find it necessarily to consider the second ground of appeal; nor do we propose to say anything about the facts or the case generally as it would be improper, in our view, so to do.

Appeal allowed. Case remitted to Magistrate's Court for trial de novo.

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