R. v STIPENDIARY MAGISTRATE, ex p. Proetta and others

Supreme Court
Unsworth, C.J.
30 April 1970

Mandamus — for order that case be stated — application and affidavits treated as case stated.
Autrefois acquit — whether attempt may be charged after charge alleging substantive offence has been dismissed.
Costs — awarded against Crown, so far as increased by refusal to state case.

The applicants were charged with exporting cloth without a licence. Later, a second charge was preferred of attempting to export substantially the same goods. The prosecution offered no evidence on the first charge, which was dismissed. When the second charge was brought, the applicants pleaded autrefois acquit. This was rejected by the magistrate, who refused to state a case. The applicants applied for an order of mandamus requiring the magistrate to state a case.

Held: (i) An issue of law arose and the application and the affidavits filed would be treated as a case stated.

(ii) The dismissal of the first charge was conclusive and the second charge alleging an attempt was barred, as the applicants could on the first charge have been convicted of attempting to commit the offence.

(iii) Costs would be awarded against the Crown so far as they had been increased by the refusal of the magistrate to state a case.

Cases referred to in the judgment.

R. v Barron, [1914] 2 K.B. 570.
R. v Connelly, [1964] A.C. 1254.
R. v Craske, [1957] 2 All E.R. 772.
Commissioner of Police v Meller, The Times 17 Oct. 1963.
Great Southern and Western Railway Co. v Gooding, 14 E. & E. Digest 394.

Application

This was an application for an order of mandamus directed to the stipendiary magistrate requiring him to state a case.

A.B. Serfaty for the applicants.
J. Williams for the respondent.

5 May 1970: The following order was read—

This is an application for an order of mandamus under s. 100(6) of the Magistrates' Court Ordinance requiring the learned stipendiary magistrate to state a case in a prosecution in which he rejected a plea of autrefois acquit which had been pleaded by the applicants.

I am satisfied that there is an issue of law for the decision of the court and accordingly make the order and allow the affidavits used in support and opposition to be taken to form the case stated in accordance with the procedure referred to in RSC Ord. 53, r.1/2.

The facts relating to the application are as follows:—

(1) On 17 March 1970, the applicants were charged with two others of the offence of exporting on 16 March 1970, 5 bales containing a total of 300 dozen satin printed scarves and 5 bales containing a total of 20 rolls of cloth, these being goods the exportation of which is regulated by law, otherwise than in accordance with the regulations applicable, i.e., without a licence granted by the Financial Secretary, contrary to s. 54(3)(b) of the Imports and Exports Ordinance, (Cap. 75) (Charge No. 1).

(2) On 24 March 1970, the applicants were charged with four others of the offence of attempting to export on 16 March 1970, 2,100 dozen head scarves, 500 dozen brassieres and 650 yards of velvet cloth without a licence issued by the Financial Secretary, contrary to s. 54(3)(b) of the Imports and Exports Ordinance (Charge No. 2).

(3) On the same day, 24 March 1970, the prosecution informed the court that charge No. 2 was in substitution for charge No. 1. The applicants then pleaded not guilty to charge No. 1 and the charge was dismissed after the prosecution had offered no evidence.

(4) On 1 April 1970 the applicants were brought before the court on charge No. 2 and pleaded autrefois acquit on the ground that they had been in peril for that offence when charge No. 1 had been dealt with by the court. In this respect they relied on s. 172 of the Criminal Justice Administration Ordinance which provides that a person charged with an offence can be convicted of an attempt to commit that offence.

The principle of autrefois acquit is that a person cannot be put in peril twice for the same offence. In order to establish such a plea it must be shown either that the defendant has been previously acquitted of the same offence, or could have been convicted at the previous trial of the offence with which he is subsequently charged, or that the two offences are substantially the same (*R v Barron* [1]). The application of the principle was fully considered by the House of Lords in *R v Connelly* [2].

The issue here is whether in the circumstances of this case the applicants were in peril of a conviction for the offence on charge No. 2 when charge No. 1 was dealt with by the court.

Mr. Williams first submitted that the applicants had never been in peril as there has never been a trial in the magistrates' court. In support of this he referred to *R v Craske* [3] where it was held that an accused is entitled before any evidence has been led to withdraw his consent to summary trial. It seems to me that this is very different from the position in the present case where the substantive charge had actually been dismissed. In my view the principles on this point are covered by the decision in the *Commissioner of Police v Meller* [4] where a dismissal in similar circumstances to the present was held to be a bar to a subsequent prosecution for the same offence. The law was stated in this way by Ashworth, J., :—

> "The effect of offering no evidence was to ask for the case to be dismissed and it was impossible to say that it would not be a bar to a subsequent action. The position was analogous to proceedings on indictment where the defendant was arraigned and then the prosecution offered no evidence. The invariable practice, in such circumstances, was for the judge to direct the jury that there was no evidence and the jury would bring in a verdict of not guilty. Such proceedings were conclusive."

The second submission put forward for consideration by Mr. Williams was that there was no intention to abandon the charge of attempt. The intention was to abandon the substantive charge and substitute for it one of attempt. Mr. Williams conceded an error had been made and wrong procedure adopted but submitted that the circumstances were not such as to amount to a bar to a subsequent prosecution for attempt. It seems to me that (whatever may have been the intention of the prosecution and the magistrate) the effect of the procedure adopted was to create a bar to a subsequent prosecution either for the substantive offence on the first charge or for an attempt in accordance with the well established principles relating to autrefois acquit. The principle involved on this point of intention is similar to that which arose in the Irish case of *Great Southern and Western Railway Co. v Gooding* [5] where it was held that a dismissal of the charge, though expressed to be without prejudice, was a bar to a subsequent prosecution.

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1 [1914] 2 K.B. 570.
2 [1964] A.C. 1254.
3 [1957] 2 All E.R. 772.
4 The Times, 17 October 1963.
5 14 E. & E. Digest 394.

It is accepted by learned counsel for the respondents that the offence alleged in charge No. 2 is substantially the same as that in charge No. 1 and no issue arises on this point.

For the reasons given in this judgment I think that the plea of autrefois acquit has been established and accordingly make the following order under s. 161 of the Criminal Justice Administration Ordinance and s. 101 of the Magistrates' Court Ordinance:—

(1) A finding that a plea of autrefois acquit is hereby substituted for the finding of the learned magistrate.

(2) That the applicants be discharged.

I might add that the application of the principles of autrefois acquit to the present case may seem technical but the principle is well established and it would be wrong for me to disregard it or modify it to suit the circumstances of this case even if I had the power to do so.

If a case had been stated by the magistrate I would not have awarded costs in accordance with our practice in criminal cases.

In all the circumstances of this case I am not prepared to make an order that the Crown pay the whole of the costs of this case. The order that I make is that the Crown should pay so much of the costs in so far as they have been increased by the failure of the magistrate to state a case and also the court fees which are largely attributable to this. In view of the decision of *Meller's* case, which was produced to the magistrate, I think he should have stated a case and therefore to the extent that the costs are increased by that they should be met by the Crown.