(6)

THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

MAGISTERIAL CRIMINAL APPEAL NO. 3 of 1986

BETWEEN:

The Commissioner of Police - Appellant

and

Jonathan Freeman - Respondent

Before: The Hon. Mr. Justice Robotham - Chief Justice
The Hon. Mr. Justice Bishop
The Hon. Mr. Justice Moe

Appearances: Miss Rita Joseph for the Appellant
Mr. G. Farrara for the Respondent.

1987: Jan. 12,
June 9

JUDGMENT

MOE, J.A. delivered the Judgemetn of the Court:

On the 4th June, 1986 the respondent appeared before the Magstrate in answer to a complaint No. 304/86 which charged that on the 21st January, 1986 at Road Town in the island of Tortola in the Colony of the British Virgin Islands he had unlawful possession of a controlled substance specified in Schedule I and II of the Drugs (Prevention of Misuse) Ordinance, 1977 to wit cannabis: Contrary to Section 6 of the Drugs (Prevention of Misuse) Ordinance, 1977. He entered a plea of Autre Fois Acquit.

In support of that special plea the respondent's counsel referred to previous proceedings before the Magistrate in which the respondent had appeared to answer a complaint No. 139/86. That complaint was as follows:- "The complaint of the Chief of Police of Police Headquarters who comes before the undersigned Magistrate and complains against Jonathan Freeman of Road Town that the said Jonathan Freeman on the Thesday 21st day of January, 1986 at Road Town in the island of Tortola in the colony of the British Virgin Islands being a person having in your possession a controlled substance to wit cannabis sativa. Contrary to section 6(2) of the Drug Prevention and Misuse Ordinance No. 8 of 1977 of the Laws of the British Virgin Islands.

The record of the previous proceedings shows that on the 12th March, 1986 the respondent pleaded not guilty and before the prosecution sought to call evidence, counsel for the respondent submitted that the charge

/No. 139.....

No. 139/86 was incurably defective. The Inspector of Police who was prosecuting sought an adjournment to consult the Attorney General on the point of law raised and his application was granted. At the resumed hearing on the 1st April, 1986 the Inspector of Police indicated he was advised to withdraw the charge. The record shows that thereafter the following particulars were entered by the Magistrate.

"ORDER

> Case No. 139/86 the defendant pleading Not Guilty on the 12th March, 1986 and the Prosecution requesting that this charge be withdrawn today the 1st day of April, 1986.
>
> This matter is hereby dismissed for want of prosecution. The defendant is discharged on this charge. No order as to forfeiture of cannabis as yet."

It was counsel's submission that the second complaint No. 304/86 could not be dealt with because the identical charge had been dismissed previously by the Magistrate. He referred to section 81 of the Magistrates' Code of Procedure Ordinance Cap. 45 which provides "The Magistrate shall then consider the whole matter and determine the same and shall either dismiss the charge or convict the defendant." And then R v Benson 4 WIR 128. In Benson's case it was held that the dismissal in that case of a complaint for a summary conviction offence of unlawful wounding having been the result of the offering of no evidence, it was a dismissal on the merits and a bar to a subsequent indictment for wounding with intent and unlawful wounding. By relying on Benson the thrust of counsel's submission was that in the case No. 139/86 there being an offering of no evidence and a dismissal therefore, that dismissal is a dismissal on the merits and a Bar to any subsequent proceedings.

Counsel for the prosecution referred to Connelly V.D.P.P. (1964) A.C. 1280 and submitted as follows:- The respondent was not charged in the first complaint 139/86 with any offence known to the law and consequently could not have been acquitted of any offence. The respondent was not in jeopardy of being convicted for the offence of which he was charged in the second complaint 304/86. That the dismissal of complaint 139/86 was not a dismissal on the merits. On those grounds the plea autre fois acquit could not succeed.

In a written decision the Magistrate expressed the view that the complaint 139/86 constituted a charge upon which the respondent was put at his peril. He went on to state "In the instant case no evidence was offered and the matter was dismissed hence relying on R. v Benson and Halstead v Clarke this court holds that the plea of autre fois acquit must

/succeed. .....

succeed. He therefore dismissed the case No. 304/86. The learned Attorney General dissatisfied with that decision requested the Magistrate to state a case for the opinion of this court.

Before us Counsel for the appellant maintained the position taken by the prosecution before the Magistrate that the first complaint 139/86 was incurably defective in that it disclosed no offence and therefore there was no offence of which the respondent was acquitted on the first occasion.

Counsel for the respondent agreed that the charge 139/86 was totally bad as he had submitted before the Magistrate but contended that the order of the Magistrate i.e. "dismissed for want of Prosecution" amounted to a dismissal on the merits which operated as a bar to the second proceedings by complaint 304/86. He referred to:-

BOWEN V JOHNSON 25 WIR 60

HALSTEAD V CLARK (1944) AER 270

R. V BENSON 4 WIR 128

The circumstances in which a plea of autre fois acquit can succeed was adequately set out by Lush J in Haynes v Davis (1975) 1 K.D. 332 when he said at pg. 333.

> "It has been constantly laid down, perhaps in somewhat different terms, that there are three conditions which must be fulfilled before the plea of autre fois acquit can be successfully raised, those three conditions being stated in Russell on Crimes Vol. II pg. 1982. There the author, after saying that at common law a man who has once been tried and acquitted for a crime may not be tried again for the same offence if he was "in jeopardy" on the first trial proceeds as follows; "He was so "in jeopardy" if (1) the court was competent to try him for the offence; (2) the trial was upon a good indictment on which a valid judgment of conviction could be entered; and (3) the acquittal was on the merits, i.e. by verdict on the trial, or IN SUMMARY CASES by dismissal on the merits, followed by a judgment or order of acquittal."

No question arises in this appeal as to whether the first condition was satisfied. It is arguable whether the respondent was before the Magistrate on a good charge as the Magistrate appears to have held or whether that charge was incurably defective but in view of the concession by the respondent the question does not strictly arise for our determination. Such a determination is not essential to our disposal of the appeal and there having been no argument on the point we do not deal with it in this case.

What has really fallen for our determination is whether the third

/condition....

condition was satisfied, that is, whether dismissal of complaint 139/86 in the circumstances of that case amounted to a dismissal on the merits which can be pleaded as a bar to subsequent proceedings. It must first be made clear that the phrase "For want of prosecution " does not say much. As Dixon J pointed out in Broome v Chenoweth (1946) 73 C.L.R. 583 the expression is "not an expression with any distinct meaning or consequence in proceedings before justices. It is not a term of art or a recognized form of judgment.....the expression amounts to no more than a statement of the reason for the order". In order to determine the true legal affect of the Magistrate's order we must be clear as to what transpired on the 1st April, 1986.

Counsel's reference to section 81 of Cap. 45 directed the Magistrate's mind to his power either to dismiss or convict and the Magistrate dismissed. By that provision he was required to do so even although the prosecution had sought leave to withdraw the charge. There are authorities which show that withdrawal of a complaint may take place with leave of the court and even after a plea has been entered or issue joined. Depending on the circumstances and ground of withdrawal the withdrawal may amount merely to an absence of adjudication and would be no bar to subsequent prosecution.

In Davis v Morton (1913) 2 K.B. 470 Ridley J expressed the opinion at pag. 485 that "the withdrawal of a summons is not equivalent to the dismissal of a summons" and at page 486 Pickford J said "where the withdrawal of the summons has not been on the merits of the case but upon a preliminary point the withdrawal is not equivalent to a dismissal or acquittal." Dismissal in both passages read to mean dismissal on the merits. This was adverted to by Persaud J in R v Benson (Supra) at pg. 130 where he drew the distinction between a dismissal simpliciter and a dismissal on the merits. In R. v Phipps, Ex Parte Alton (1964) 1 AER 472 Lord Parker C.J. took the view that an application for withdrawal and the consent to the withdrawal is in no sense a part of an inquiry if it be an indictable offence or of a summary trial, if it be a summary offence.....".

The record of the proceedings after the Inspector's indication of advice to withdraw the charge does not show any decision by the Magistrate in respect of the application for leave to withdraw to the complaint. There was certainly no objection by the counsel for the respondent to the proposed withdrawal. There was clearly no refusal to give leave to withdraw and thus no call on the prosecution to support the charge then before the Magistrate. An accused person has the right to object to a suggested withdrawal and it is always a matter for the discretion of the court whether it allows the process to be withdrawn. See R. v Phipps

/(Supra).....

(Supra). In this case it cannot be really said that there was a failure on the part of the prosecution to offer or adduce evidence for it was never called upon to do so.

From the circumstances as outlined it seems clear that the complaint 139/86 was dismissed merely as a convenient way of dealing with the matter then before the Magistrate and not as a final disposition of it. The fact that the Magistrate specifically ordered as he did in relation to the cannabis mentioned in the complaint is an indication of what was in his mind at the time and strongly supports the view we take.

We are of opinion that a dismissal in this way does not amount to a dismissal on the merits. There not having been a determination on the merits of the first complaint 139/86 the plea of autre fois acquit to the second complaint 304/86 was not good. We therefore hold that in the particular circumstances of this case the Magistrate was wrong to hold that the plea succeeded and we must allow the appeal. We set aside the order of the Magistrate dismissing case No. 304/86 and refer the case back to him for hearing and determination if the prosecution is still minded to proceed with the charge.

GEORGE C.R. MOE
Justice of Appeal

L.L. ROBOTHAM
Chief Justice

E.H.A. BISHOP
Justice of Appeal