Privy Council Appeal 37 of 1991

Lloydell Richards *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH OCTOBER 1992

Present at the hearing:-

LORD KEITH OF KINKEL
LORD BRIDGE OF HARWICH
LORD GOFF OF CHIEVELEY
LORD LOWRY
LORD SLYNN OF HADLEY

*[Delivered by **Lord Bridge of Harwich**]*

The appellant was charged on indictment with the murder of Sharon Lewis on 8th or 9th March 1982. When he appeared in the Home Circuit Court at Kingston before Theobalds J. on 26th September 1983 both counsel invited the judge to see them in chambers and he agreed to do so. It may be inferred from what the judge said on a later occasion that counsel indicated that the Crown was prepared to accept a plea of guilty to manslaughter and the judge did not dissent from that course. So it was that when the appellant was arraigned he pleaded guilty to manslaughter and counsel stated in open court that the Crown was prepared to accept that plea. Ironically, in the light of later events, defending counsel then sought an adjournment in order to call character witnesses in mitigation. The case was adjourned to 3rd October 1983.

For reasons which cannot affect any legal issue arising for determination and which, therefore, their Lordships do not need to examine, the Director of Public Prosecutions ("DPP"), in whom the power to discontinue any criminal proceedings at any stage before judgment is delivered is vested by section 94(3)(c) of the Constitution of Jamaica, considered that the plea of guilty to manslaughter should not have been accepted and decided to discontinue the proceedings in this case in order that the appellant might

be charged with the murder on a fresh indictment. Accordingly, at the adjourned hearing before Theobalds J. on 3rd October a *nolle prosequi* was duly entered by direction of the DPP pursuant to section 4 of the Criminal Justice (Administration) Act. The appellant was charged with the murder of Sharon Lewis on a fresh indictment on which he was tried before Parnell J. and a jury. On 13th December 1983 he was convicted of murder and sentenced to death. He appealed to the Court of Appeal on various grounds, but the only ground pursued was that the prosecution on the second indictment was in contravention of section 20(8) of the Constitution of Jamaica which provides, so far as relevant:-

> " (8) No person who shows that he has been tried by any 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 made in the course of appeal proceedings relating to the conviction or acquittal;"

The Court of Appeal dismissed the appeal on 10th April 1987. The appellant appeals to Her Majesty in Council by special leave granted in February 1991.

It is common ground between the parties and their Lordships readily accept as correct that section 20(8) of the Constitution of Jamaica is simply intended to embody the common law doctrines of autrefois convict and autrefois acquit. The central issue raised by the appeal is whether a plea of autrefois convict can be sustained by anything less than evidence that the offence with which the defendant stands charged has already been the subject of a complete adjudication against him by a court of competent jurisdiction comprising both the decision establishing his guilt (whether it be the decision of the court or of the jury or the entry of his own plea) and the final disposal of the case by the court by passing sentence or making some other order such as an order of absolute discharge. If this issue is resolved negatively, then the plea of autrefois convict could not be sustained in this case. But Mr. Thornton forcefully submits that no more is required to sustain the plea than that the court before whom the defendant had previously been charged should have decided his guilt, whether by the court, where it is the tribunal of fact, announcing its decision to that effect, by the return of a guilty verdict by the jury or by the "acceptance" of a plea of guilty. If he is right in this, then a subsidiary issue arises as to what constitutes for this purpose a sufficient "acceptance" of the plea.

With respect to the central issue there is a curious conflict of authority which their Lordships must now resolve. It has been said many times that the word "conviction" is ambiguous and it has sometimes been construed in a statutory context as referring to nothing

more than a finding of guilt. But, in the absence of something in the context which suggests that narrower meaning, the authorities in the 19th century and earlier all seem to point to the conclusion that the requirement to establish a conviction requires proof not only of the finding of guilt but also of the court's final adjudication by sentence or other order. Thus in *Hale's Pleas of the Crown* (1778) Vol. 2 ch. 32, p.251, it is said:-

> "If A be indicted and convict of felony, but hath neither judgment of death, nor hath prayd his clergy, this is no bar of a new indictment for the same offence, if the first were insufficient ... and it seems, tho it were sufficient, yet it is no bar without clergy or judgment."

In *R. v. Harris* (1797) 7 Dun. and E. 238 Lord Kenyon C.J. said:-

> "A conviction is in the nature of a verdict and judgment, and therefore it must be precise and certain. And notwithstanding some old cases in *Salkeld* and in other books to the contrary, I take it that the judgment is an essential point in every conviction, let the punishment be fixed or not."

By section 11 of the Criminal Law Act 1827 (7 and 8 Geo. 4, c.28) it was provided that:-

> "In an indictment for any such felony committed after a previous conviction for felony ... a certificate containing the substance and effect only ... of the indictment and conviction for the previous felony ... shall be sufficient evidence of the previous conviction."

It was held in a number of cases that the certificate required by this Statute must state the judgment of the court: see *R. v. Ackroyd and Jagger* and *R. v. Spencer* (1843) 1 Car. and K. 158, and *R. v. Stonnell* (1845) 1 Cox C.C. 142. In the latter case Patteson J. said:-

> "The question, therefore is, what is required by the words 'substance and effect'? Now, they must mean not only the fact of the conviction by the jury, but also the sentence of the Court, for till judgment there is no perfect conviction. There must be the finding of the Court as well as that of the jury and that is what is meant by the 'substance and effect of the conviction'."

Burgess v. Boetefeur and Brown (1844) 7 Man. and G. 481 was concerned with a statute which provided a reward to be paid to inhabitants of any parish who informed and in due course provided evidence against any person keeping a disorderly house. The crucial words were:-

> "And in case such person be convicted, the overseers [of the parish] are forthwith to pay £10 to each of such inhabitants."

The plaintiffs were the informers against the keepers of the disorderly house who had first pleaded guilty and then later been called up for judgment and sentence. In the time that had elapsed between the date of plea and the date of sentence the overseers of the parish had changed. It was held by the Court of Common Pleas that the plaintiffs were entitled to be paid the reward due to them by the overseers who were in office at the date of sentence on the ground that until the keepers of the disorderly house had been sentenced there had been no conviction. This decision turned, of course, on the provisions of the particular statute but, in the course of giving judgment, Tindal C.J. said, at p. 505:-

> "A plea of autrefois convict or autrefois acquit can only be supported by proof of a judgment."

Wemyss v. Hopkins (1875) L.R. 10 Q.B. 378 was not a case of autrefois convict in the strict sense. The defendant had been convicted under two different statutes of two offences which both arose out of essentially the same facts. Allowing his appeal against the second conviction, the court applied by analogy what their Lordships take to be the principle which underlies the doctrine of autrefois convict. Explaining that principle, Blackburn J. said at p.381:-

> "The defence does not arise on a plea of autrefois convict, but on the well-established rule at common law, that where a person has been convicted and punished for an offence by a Court of competent jurisdiction, *transit in rem judicatam*, that is, the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter; otherwise there might be two different punishments for the same offence."

In *R. v. Miles* (1890) 24 Q.B.D. 423 it was held that a person who had been convicted of an assault by a court of summary jurisdiction, but had been discharged, without any sentence of fine or imprisonment, on giving security to be of good behaviour, could not afterwards be convicted on an indictment for the same assault. This decision throws no light on the present issue, since the order of the court, although imposing no punishment, was nevertheless a final adjudication and disposal of the case.

In *R. v. Blaby* [1894] 2 Q.B. 170 it was held that the word "convicted" in sections 9 and 12 of the Coinage Offences Act 1861 referred to no more than a finding of guilt. Reference to those sections shows that the narrower interpretation of the word "convicted" was clearly required by the context in which it was used. Accordingly this case also is of no assistance with reference to the issue which their Lordships have to decide.

It was not until 1936 that any court sustained a plea of autrefois convict on the basis of a finding of guilt alone. The first such case was *R. v. Sheridan* [1937] 1 K.B. 223 where the defendant appeared before justices charged with

two offences of dishonesty, consented to be tried summarily and pleaded not guilty. After hearing the evidence the justices announced that they found him guilty, but on hearing of his previous convictions they decided that they would not deal with the case and committed him for trial to quarter sessions. There he was in due course tried on indictment, convicted and sentenced for the offences. On appeal to the Court of Criminal Appeal his conviction was quashed on the ground that the finding of guilt by the justices supported a plea of autrefois convict as a bar to his trial on indictment. A few weeks later the same court in *R. v. Grant* [1936] 2 All E.R. 1156 followed it's own decision in *Sheridan* and applied it to facts which differed from those in *Sheridan* only in that the defendant had there consented to be tried by a stipendiary magistrate and had pleaded guilty before the magistrate decided to commit him for trial on indictment.

The judgment of the court in *Sheridan*, delivered by Humphreys J., referred to only three authorities. The first two were *R. v. Miles* and *R. v. Blaby (supra)*. It seems to their Lordships, for the reasons they have already indicated, that these cases provide no support for the decision of the court in *Sheridan*. The third case was *R. v. Hertfordshire Justices* [1911] 1 K.B. 612 where it was held that a defendant had been validly committed for trial by justices notwithstanding that they had previously embarked on a summary trial but decided before the summary trial was concluded that in the circumstances they should not deal with the case and should commit the defendant for trial. In the course of his judgment Pickford J. said:-

> "Undoubtedly if the justices had proceeded to adjudicate on the case either by convicting or by acquitting the defendant, that would have afforded ground for a good plea to the indictment, but I cannot see why the fact that the justices at first said they would deal summarily with the case and afterwards changed their minds should be said to have deprived quarter sessions of jurisdiction."

This dictum does, of course, support the decision in *Sheridan* but is itself, in turn, unsupported by reference to any earlier authority.

The cases of *Sheridan* and *Grant* represent the high watermark of Mr. Thornton's forceful submissions. But, though they have never been overruled, they have attracted strong adverse criticism. This was in *S. v. Recorder of Manchester* [1971] A.C. 481. The issue before the House of Lords was whether a court of summary jurisdiction, having once accepted a plea of guilty, had jurisdiction to allow the defendant to change his plea to not guilty. As Lord Reid pointed out at page 488:-

> "It has long been the law that when a man pleads guilty to an indictment the trial judge can permit him to change his plea to not guilty at any time before the case is finally disposed of by sentence or otherwise."

The House of Lords held unanimously that a court of summary jurisdiction has a similar discretion, overruling *Reg. v. Guest, ex parte Anthony* [1964] 1 W.L.R. 1273 and *Reg. v. Gore Justices, Ex parte N. (An Infant)* [1966] 1 W.L.R. 1522 which were two decisions of the Divisional Court to the contrary effect. Because the reasoning in those decisions had relied on the reasoning in *Sheridan* and *Grant*, the House was invited by counsel for the appellant to overrule those cases also. This invitation was only accepted by one of their Lordships, Lord Upjohn, who, after a review of the authorities, said at p. 507:-

> "My Lords, it seems to me clear that the law plainly took the wrong turning in *Sheridan's* case [1937] 1 K.B. 223. The court, whether High Court, quarter sessions or a court of summary jurisdiction, retains full jurisdiction over all matters before it until sentence, that is, until the final adjudication of the matter; and the reasoning in *Sheridan's* case and the cases of *Grant* [1936] 2 All E.R. 1156; *Guest* [1964] 1 W.L.R. 1273, and *Gore Justices* [1966] 1 W.L.R. 1522, which followed that reasoning must be treated as overruled."

The others did not find it necessary, in reaching their decision that the cases of *Guest* and *Gore Justices* had been wrongly decided, to pronounce upon the correctness or otherwise of the decisions in *Sheridan* and *Grant*. But Lord Reid, with whom Lord Guest agreed, was certainly critical of those decisions and pointed out, as their Lordships have also done, that they relied on authorities which did not support their conclusion. He added at page 490:-

> "I do not think it necessary to enter upon the technicalities of autrefois convict. Other authorities cited to us strongly suggest that this is not a good plea unless the earlier case was carried to a conclusion. But even if *Sheridan's* case was rightly decided and a 'conviction' in the narrower sense will support a plea of autrefois convict, that does not appear to me to lead to the conclusion that a 'conviction' in the narrower sense must end the power of the court to allow a plea to be changed."

Mr. Thornton submits that this passage supports his argument for the appellant in the instant case, but it seems to their Lordships that it is at best neutral.

Their Lordships' conclusion, in agreement with Lord Upjohn, is that the law did take the wrong turning in *Sheridan* and that *Sheridan* and *Grant* were wrongly decided. They reached this conclusion both on consideration of the authorities and on principle. The underlying rationale of autrefois convict, as explained by Blackburn J. in *Wemyss v. Hopkins*, is to prevent duplication of punishment. But

if the plea can be supported by a finding of guilt alone, a defendant might escape punishment altogether. Where a defendant is tried before judge and jury, both have their roles to play and together they constitute the court of trial. If, in any case following trial and conviction by the jury, the judge were to die before passing sentence, there would be no court seized of the case by which sentence could be passed. The defendant, it seems to their Lordships, would in those circumstances have to be rearraigned before another court and if he again pleaded not guilty would have to be retried. But it would be absurd that he should be able to plead the jury's verdict in the first trial as a bar to the second. In the case of autrefois acquit the position is, of course, different, because the jury's verdict of not guilty is a final adjudication and disposal of the case and the judge has no further function to perform.

The need for finality of adjudication by the court whose decision is relied on to found a plea of autrefois convict is even more clearly apparent where a defendant has pleaded guilty. Not only may the defendant be permitted, in the discretion of the court, to change that plea at any time before sentence, but, when a plea of guilty to a lesser offence than that charged has initially been accepted by the prosecutor with the approval of the court, there can, it appears to their Lordships, be no finality in that "acceptance" until sentence is passed. In *R. v. Emmanuel* (1982) 74 Cr.App.R. 135 where the defendant was charged in the indictment with alternative counts, the judge approved a proposal by the prosecutor to offer no evidence on the more serious charge and to accept a plea of guilty to the less serious. But, on hearing the facts opened, he changed his mind and withdrew his approval. The defendant was rearraigned and the trial proceeded on both counts. The defendant was convicted of the more serious offence. On appeal it was held that there had been no material irregularity in the proceedings. Their Lordships consider that this case was rightly decided.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. They think it right, however, to express their opinion that, in all the circumstances and having regard, in particular, to the lapse of time between trial and the determination of this appeal, it would be wholly appropriate that the death sentence should now be commuted.