

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**CvA. No. 75 of 2001**

**BETWEEN**

**FRANCIS MERRIQUE**

**APPELLANT**

**AND**

**LIANNE LEE KIM**

**RESPONDENT**

**Panel: R. Hamel-Smith, J.A.  
M. Warner, J.A.  
A. Lucky, J.A.**

**Appearances:  
Mr. W. Campbell for the Appellant  
Ms. J. Baptiste for the Respondent**

**Date: June 25, 2002**

## JUDGMENT

### R. Hamel-Smith, J.A.

1. This appeal raises the plea of *autrefois acquit*. The appellant had been charged with a sexual offence against a girl under 14 years of age. It was alleged that he had carnal knowledge of her between 3<sup>rd</sup> and 4<sup>th</sup> July 1988 contrary to section 6 (1) of the Sexual Offences Act 1986. He was committed to stand trial at the Assizes on November 18, 1991.

2. The trial was listed for January 23, 1998. After the jury was sworn and the appellant put in their charge the State presented its first witness, the virtual complainant. She had not testified at any length before counsel for the appellant informed the trial judge that he wished to challenge the validity of the indictment. Such a challenge can be made at any time in the course of the trial but it is always preferable to raise the issue before the jury is sworn.

3. Nevertheless, the trial judge heard arguments from both sides and, after due deliberation, quashed the indictment. She then directed the jury to enter a verdict of 'not guilty' to the charge. The jury complied and the appellant was set free.

4. Another information was laid against the appellant for the same offence shortly thereafter. On his arrest and subsequent detention his attorney filed a constitutional motion alleging that the arrest and charging of the appellant was unconstitutional. The Magistrate adjourned the matter pending the determination of that motion. The thrust of the appellant's case was that he had been acquitted of the charge by a jury and as a consequence could not be charged again for the same offence. The trial judge dismissed the motion on the ground that the plea of *autrefois acquit* was not available to the appellant in the circumstances of his case.

5. The magistrate decided to proceed with the hearing of the information in light of the judge's decision in spite of a similar submission before her by the appellant's attorney. It was in respect of this decision to proceed that the appellant sought leave to apply for judicial review. Again, the gist of his case, regardless of how it was presented, the end result was that he had been acquitted by a jury of his peers and could not be retried for the same offence.

6. Leave was granted, but at the hearing of the application for judicial review the State submitted that the appellant had failed to disclose material facts when seeking leave to apply and that the application was an abuse of process since the appellant had already obtained a decision of the High Court on the issue. The judge hearing the application upheld the submissions and dismissed the application.

7. Before us, counsel for the appellant conceded that had he succeeded on the constitutional motion the effect would have been to prohibit the magistrate from proceeding with the inquiry. Similarly, had he succeeded on the application for judicial review the end result would have been the same. Whichever angle it is looked at, the issue was one of *autrefois acquit*, plain and simple, and it serves no practical purpose to suggest that the constitutional motion and the application for judicial review were different in substance.

8. Both sides also agreed that while there was no appeal against the decision of the learned judge in the Constitutional motion, in the interest of justice this Court should determine the issue of *autrefois acquit*. This was an issue before the judge in the application for judicial review but, given the course adopted by the trial judge, it was never decided.

9. The nature of the challenge to the validity of the indictment was never disclosed to the court but whatever form it took at the end of the day the trial judge found that it was an invalid indictment and proceeded to quash it. At that stage it is obvious that the trial judge, having put the appellant in the charge of the jury, had to decide the next step. She opted to direct the jury to enter a formal verdict of not guilty in favour of the appellant. The jury complied with her direction. I would have thought that since the indictment was rendered invalid and quashed that there was never a valid trial in existence and the more appropriate course was to have quashed the indictment and discharged the jury.

10. It is this very course adopted by the trial judge that has caused the difficulty. The acquittal by direction has afforded the appellant the opportunity to argue that the State is barred from laying the charge once more against him. In other words he is entitled to rely on the plea of *autrefois acquit*.

11. Kangaloo J (as he then was) in dismissing the constitutional motion, held that the appellant was never in jeopardy because the indictment was an invalid one. He was following a line of well-known authorities that decided that for the doctrine to apply the accused must have been *in peril of conviction*. Counsel for the appellant has submitted that the learned judge was wrong to go behind the acquittal to determine the reason for it. In other words, he contended that as long as the record showed that the appellant was acquitted the doctrine applied. Like Kangaloo J., I have much difficulty in accepting that submission in light of the prevailing authorities.

12. In *R v Dabhade* [1993] QB 329, a case which was not cited before Kangaloo J. the appellant was charged with dishonestly obtaining a certain sum of money from his employers by falsely representing himself as the payee on the cheque. Before the magistrate he pleaded not guilty and on the date set for the hearing a further charge of theft of the same sum was preferred. The magistrate declined jurisdiction on the second charge and committed the appellant for trial to the Crown Court. On the same day, the prosecution offered no evidence on the first charge and the magistrate dismissed it. It was in these circumstances at the Crown Court that the appellant submitted that the court

ought not to proceed against him on the indictment because he had been acquitted of the offence therein contained. The court rejected the submission and the appellant was convicted. He appealed and it was held, dismissing the appeal, that where a charge was dismissed without a hearing on the merits on the ground that it was defective as a matter of law or because the evidence available to the prosecution was insufficient to sustain a conviction on the charges laid, it could not properly be said that the defendant had ever been in jeopardy of conviction. The court ruled that where the prosecution substituted for an original charge a new charge which was regarded as more appropriate to the facts, the consensual dismissal of the original charge did not give rise to the application of the plea of *autrefois acquit*. The court further held that the charge was so fundamentally incorrectly framed that the appellant could not have been properly convicted on it and accordingly the special plea in bar had been rightly rejected by the judge.

13. The court, in upholding the decision of the judge of the Crown Court, said that the doctrine

*was rooted in nemo debet bis vexari. A defendant is twice-vexed only when he was in peril of a valid conviction upon his first trial. Accordingly autrefois convict (and autrefois acquit) is not available unless the first trial was before a lawfully constituted court, having jurisdiction in the matter, and trying an offence known to the law in accordance with law. An acquitted defendant has been at peril if he has been at risk of such a conviction."*

14. In ***Dabhade*** the court outlined the following propositions for the application of the doctrine as follows:

- (i) The defendant must have been in jeopardy in that he must demonstrate that the earlier proceedings that he relies upon must have been commenced – i.e., by plea in summary proceedings, or by his being put in charge of the jury in a trial on indictment.
- (ii) If, thereafter, a charge or count is dismissed, albeit without a hearing on the merits, (e.g. on the basis that the prosecution are unable to proceed), there is a well-established principle that the prosecution may not thereafter institute fresh proceedings on the same or an essentially similar charge or count. (While the court cited ***R v Pressick*** [1978] Crim. L.R. 377 as an example of the application of this principle it expressed a reservation that it appeared to be more an exercise of the undoubted jurisdiction in the court to prevent an abuse of its own process rather than an application of the doctrine).
- (iii) If, however, the summary dismissal of the charge or count is because it is apparent that it is defective, either as a matter of law or because the evidence available to the prosecution on any view, given the application of proper

legal principles, is insufficient to sustain a conviction on the charge as laid, then it cannot be properly said that the defendant has ever been in jeopardy of conviction (see *Williams v DPP* [1991] 1 W.L.R. 1160).

- (iv) If, moreover, the context in which a charge is summarily dismissed is a rationalisation or reorganization of the prosecutions case, so that, no doubt in recognition of the difficulties that may lie ahead in the successful prosecution of the original charge, it is decided to substitute therefor a new charge which is regarded as more appropriate to the facts, then the consensual dismissal of the original charge, upon the substitution of the new one, will not give rise to the application of the doctrine of *autrefois acquit*.

15. In this appeal, the appellant's main plank is the fact that he had been put in the charge of the jury and that a verdict of not guilty had been entered in his favour. For all intents and purposes the trial had begun and he was in jeopardy of having a conviction recorded against him. Whether the verdict was obtained by direction or otherwise, counsel contended, did not prevent the application of the doctrine. It was a valid verdict and the court was not entitled to enquire into the circumstances that brought it about.

16. The first and second propositions set out in *Dabhade* appear to support the appellant's submission. The appellant was put in charge of the jury and pleaded to the count. The trial had actually commenced when his counsel challenged the validity of the indictment. What counsel overlooks and what sets his case apart from these propositions is the fact that the indictment was never a valid one. That counsel would wait until the trial began in earnest to challenge the indictment is something that remains a mystery but whether he took the point before or after the trial commenced the fact remains that because the indictment was invalid the trial itself was a nullity. In other words, the third proposition applies in that the appellant was never at risk and in such circumstances the plea was not available.

17. The third proposition, in my view, overrides the first two. The trial of the appellant was a nullity because of the invalid indictment and it cannot therefore be said that the appellant was in peril of conviction. In *R v Newland* [1988] 1QB 402, (cited by Kangaloo J), before arraignment counsel for the Crown conceded that the indictment which had been issued against the appellant contravened the Indictment Rules 1971 because of misjoinder. Rather than quash the indictment, the trial judge ruled that he had power to order, and did order, separate trials of the two groups of counts. The appellant was arraigned and, on conviction, appealed on the ground that the indictment being defective for misjoinder the trial was invalid. The Crown attempted to persuade the Court to uphold the convictions by application of the proviso to section 2(1) of the Criminal Appeal Act 1968. The Court declined on the ground that since the proceedings that ensued after arraignment flowed from pleas to an invalid indictment, no valid trial commenced. Accordingly, as there was no material irregularity occurring in the course of a valid trial the Court had no power to apply the proviso.

18. Accordingly, without inquiring into the grounds upon which the indictment was quashed, because there was no valid trial, it cannot be said that the appellant was in peril of conviction. In *R v Marsham* [1912] 2 KB 362, an authority which the trial judge also relied upon, the applicant was convicted by the magistrate of assaulting a police officer in the execution of his duty, but due to some inadvertence the evidence of the officer was not taken on oath. The magistrate immediately reheard the case and again convicted the applicant. On an application to quash the conviction on the ground that it was bad in that the applicant, at the time of conviction, had previously been put in peril in respect of the same offence, it was held that inasmuch as the applicant had not been legally convicted on the first hearing and had therefore not been in peril at the time of the second hearing, the second conviction would stand.

19. Avory J., in concurring with the court in dismissing the application, rested his judgment on the principle of *autrefois acquit* and *autrefois convict* where it must appear that the defendant had been legally acquitted or legally convicted. He referred to Chitty's on Criminal Law 2<sup>nd</sup> Ed, (455) that:

*“the point in discussion always is whether in fact the defendant could have taken a fatal exception to the former indictment; for if he could, no acquittal will avail him”. Further, “if a judgment in favour of a prisoner be reversed, he may be arraigned and tried de novo.”*

It was also laid down in Chitty's (463) that the plea of *autrefois convict*-

*“will be of no avail when the first indictment was invalid, and when on that account no judgment could have been given, because the life of the defendant was never before in jeopardy”.*

20. Attorney for the appellant relied almost entirely on *R v Middlesex Quarter Sessions ex parte Director of Public Prosecutions* [1952] 2QB 758. There, the facts were completely different because the trial was a perfectly legal one and the appellant had been put in the charge of the jury and entered a plea of not guilty. The trial was underway when the Chairman made some inappropriate remarks to the jury and recommended that the appellant be acquitted. Before the prosecution could lead any evidence he asked the foreman of the jury if they wished to hear any evidence. The foreman replied that they did not and a verdict of not guilty by direction was entered. It was held that it was only where the whole proceedings were a nullity that a retrial could be ordered but that was not the case here. The trial was a perfectly legal one and however improperly the acquittal verdict was obtained, the court had no power to order a retrial. In other words the plea of *autrefois acquit* would apply.

21. In light of the authorities, it cannot be said that the appellant was ever in jeopardy of conviction. Counsel was under a duty to take the point in limine before the trial commenced by having the jury sworn and the appellant put in its charge. Whether he did

so from a tactical point or not it seems that once the trial judge quashed the indictment as being invalid that was sufficient to deprive the appellant of the plea. It follows that Kangaloo J. was quite correct to hold that the appellant was never in peril of conviction and the verdict by direction was of no consequence.

22. It is plain that whether the appellant proceeded by way of constitutional motion or by way of judicial review, at the end of the day the relief he sought was an order preventing the court from hearing the second charge against him based on the plea of *autrefois acquit*.

23. Rajnauth-Lee J. who heard the judicial review application, found that it was an abuse of process as the appellant had failed to disclose the fact that he had proceeded by way of a constitutional motion for similar relief and had failed. The magistrate had adjourned the inquiry to await Kangaloo J.'s ruling on the issue of *autrefois acquit* and counsel for the appellant conceded before this Court that had he succeeded on the constitutional motion the magistrate could not have continued the inquiry. It is true that Rajnauth-Lee determined the application for judicial review on a preliminary point, as she was entitled to, but in hind-sight it may have been advisable to express her view on the issue of *autrefois acquit* as it was squarely before her. I say so because it seems that the appellant depended entirely on his legal advisers for guidance on the issue and counsel, rather than appeal the decision of Kangaloo J., took the unusual step of attempting to have two bites of the cherry.

24. It was out of an abundance of caution therefore, that counsel before us were asked to agree that the real issue of *autrefois acquit* be determined once and for all, rather than simply confine the appeal to the findings of Rajnauth-Lee J. In this way there would be certainty as to the appellant's position *vis-à-vis* the acquittal by direction. If by chance the decision of Kangaloo J. were wrong then a serious injustice would have been done to the appellant through no real fault of his own. It raised the possibility of his facing another trial without being entitled to raise the plea simply because of the unusual and unwarranted step adopted by his advisors.

25. In light of the decision arrived at, no useful purpose is served by deciding whether Rajnauth-Lee J was correct to dismiss the application for the reasons she has given, but I express the view that had she been inclined to determine the issue of *autrefois acquit* in favour of the appellant a more desirable course would have been to allow the application but to deprive the appellant of his costs on the grounds of non-disclosure and abuse of process. More to the point would have been to give serious consideration to the question of whether or not attorney for the appellant should have been required to pay the costs personally in the circumstances.

26. It is difficult to understand why the opportunity to file an appeal against the order of Kangaloo J. was not grasped by counsel and a further application made to the magistrate to stay the enquiry pending that appeal. That was the reasonable course to adopt and his concession is ample proof that this was not lost on him. Any other course

leads to the impression of a deliberate attempt to frustrate the proceedings before the magistrate, which I am sure was not the intention of counsel.

27. Given the extent of the delay in the prosecution of the original charge, the view expressed by Kangaloo J in the final paragraph of his judgment is commendable. I would dismiss the appeal with costs.

R.Hamel-Smith  
Justice of Appeal.

I have read the judgment of Hamel-Smith, JA and for the reasons given I would dismiss the appeal with costs.

M. Warner  
Justice of Appeal

I have read the judgment of Hamel-Smith, JA and for the reasons given I too would dismiss the appeal with costs.

A. Lucky  
Justice of Appeal