IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0024 OF 2001S
(High Court Criminal Case No. HAA042 of 2001s)

BETWEEN:

SERUPEPELI CEREVAKAWALU

Appellant

AND: THE STATE

Respondent

Coram: Sheppard JA, Presiding Judge
Tompkins JA
Smellie JA

Hearing: Wednesday, 14 November 2001, Suva

Counsel: Appellant in Person
Mr. G.H. Allan for the Respondent

Date of Judgment: Thursday, 22 November 2001

JUDGMENT OF THE COURT

Introduction

This is an appeal against conviction and sentence. In the Magistrate's Court at Suva on the 11th of May 2001 the appellant pleaded guilty to what purported to be a charge laid pursuant to section 253 of the Criminal Code. He also pleaded guilty to a second charge laid pursuant to section 330 (b) of the Criminal Code. The learned magistrate erroneously believing each charge carried a maximum penalty of 10 years sentenced the appellant to 12 months on each charge. The sentences were to be served concurrently but consecutively upon a 10 year sentence the appellant was already serving.

The first charge was defective and there were errors of law in that the maximum penalties for the two offences under consideration were 7 years and 2 years respectively.

Those errors of law were not brought to the attention of the learned Judge who heard the appeal in the High Court and as a result they were perpetuated there. The sentences imposed in the Magistrates Court were upheld.

Grounds of appeal

When first lodged on 23/8/01 the grounds centred upon, first the alleged severity of the sentence. Secondly the fact the appellant had already been punished pursuant to the internal prison disciplinary procedures. In addition he had suffered an assault in prison which resulted in the loss of his left eye. The Constitution was also called in aid as was the totality principle as applied to sentencing.

On the 7th of October 2001, however, the judgment in Jone Sereka & Others -v- The State was handed down. That decision was by the same Judge who heard the appellant's appeal in this case in late July giving judgment on the 6th of August 2001. In the Sereka case which arose out of the same circumstances the defect in the charge as originally laid was recognised.

The appellant accordingly filed further submissions dated the 7th of November

2001. Properly State Counsel raised no objection to our taking these additional late submissions into account. Raised as ground number 1 is the defect in the charge purported to be laid pursuant to section 253 and the errors of law as to the maximum sentences applicable. This ground was advanced upon the basis that the court "declare the entire proceeding a nullity or substitute the conviction on the lesser charge under section 256."

Additional grounds were :

- Ground 2 offending not intentional
- Ground 3 again raised breaches of sections 25 and 28 of the Constitution
- Ground 4 again raised the point of double punishment
- Ground 5 manifestly excessive sentence.

As the appeal can be disposed of on a consideration of the first ground above the others strictly need not be considered. Grounds 2 and 3 however have no substance or merit. Ground 5 is not one which can be pursued in the Court of Appeal. We will, however, make reference to ground 4 later in this judgment.

Ground 1

Mr. Allan for the State properly conceded that this ground must succeed. He acknowledged that in the Magistrates Court and in the High Court incorrect maximum penalties had been erroneously taken into account. Counsel also conceded that the

arge which purported to be laid pursuant to section 253 of the Code was defective.

As earlier recorded the same Judge presided in the High Court on this appeal as in the Sereka appeal. In the Sereka decision the Judge recognised the defect in the charge laid pursuant to section 253 in the following passages from her judgment:

"The Charge

The Appellants were charged with "Wrongful Confinement : contrary to section 253 of the Penal Code." Section 253 reads as follows :

> *Any person who, knowing that any person has been kidnaped or has been abducted, wrongfully conceals or confines such person, is guilty of a felony, and shall be punished in the same manner as if he had kidnaped or abducted such person with the same intention or knowledge, or for the same purpose, as that with or for which he conceals or detains such person in confinement.*

However, the particulars of the offence do not reflect the provisions of section 253 of the Penal Code. The charge reads that the Appellants "knowingly and wilfully confined" the prison officers concerned. It says nothing about kidnapping or abducting. Section 256 of the Penal Code provides :

> *Whoever wrongfully confines any person is guilty of a misdemeanour, and is liable to imprisonment for one year or to a fine of four hundred dollars.*

The particulars of the charge are far more consistent with a charge under section 256. Section 256 of the Penal Code however, creates a misdemeanor with a maximum penalty of 12 months imprisonment. Section 253 carries a maximum penalty of 10 years imprisonment. There is considerable difference between the two sections."

The Judge went on to record that both counsel (for the appellant and the

respondent) appeared to agree the charge was defective and she added:

> *"the charge is indeed defective. It does not particularise the ingredients of the offence, and at the time of pleading guilty the Appellants were probably under the impression that they were pleading guilty to Wrongful Confinement under section 256 of the Code."*

Her Ladyship then went on to discuss the facts of that case which arose out of the same incident giving rise to the charges in the case before this court and said:

> *"Thus the facts were capable of sustaining a section 253 charge. However, that is not an issue when considering whether the plea to a charge was an equivocal plea. The issue is whether the accused pleaded guilty without understanding the nature of the charge, or without intending to admit that he was guilty of what was alleged. (R -v- Forde (1923) 2 KB 400).*
>
> *It is clear on a reading of the charge on Count 1, that the Appellants would have thought that they were pleading guilty to a charge of Wrongful Confinement. This is because the Statement of Offence read "Wrongful Confinement" and the Particulars of the Offence make no mention of abduction or kidnapping. For these reasons I find that the pleas were equivocal in the sense that they were to the lesser charge of Wrongful Confinement under section 256 of the Penal Code."*

Counsel for the State agreed that the factual circumstances in this appeal are the same as those in the Sereka appeals.

We agree with the reasoning of the learned Judge set out above in the Sereka appeal but not with the manner in which she disposed of the appeal. We shall return to this latter subject later in this judgment.

So far as this appeal is concerned the errors of law which have emerged in relation to convictions and sentences are such that we have no doubt the proper course is to declare the entire proceedings a nullity and quash both the convictions and sentences.

We add, however, that it was made clear to the appellant during the hearing that this procedure would not necessarily prevent the State from laying fresh charges and as the entire proceeding was a nullity, pleas of autrefois convict, would not be available in respect of any such fresh charges.

The Sereka Decision

Counsel requested that the court comment on the way the Sereka appeal was disposed of since further appeals to this court in respect of the seven prisoners dealt with in that case are pending. Indeed there is also another case Baleloa & Others -v- The State where appeals are pending in relation to a further 9 prisoners also involved in the same incident.

In those circumstances although not strictly necessary for the disposal of this appeal it is appropriate that we accede to Mr. Allan's request.

At the end of her judgment in Sereka the Judge said this :

"What could the learned Magistrate have done? He could have asked the prosecution to choose the charge it wished to proceed with and to amend it

accordingly, or he could have convicted of the lesser offence under section 256, as he was entitled to do pursuant to section 169 of the Criminal Procedure Code. However the defect was not noticed until it was raised by Counsel at the hearing of this appeal. And in fairness to the learned Magistrate, I did not notice the defect myself in Serupepeli Cerevakawalu & Anr. Crim. App. No. HAA042 of 2001S.

Having discovered the defect, this court can either declare the entire proceedings a nullity and remit the case to the Magistrates Court for a rehearing, or it can substitute a conviction on the lesser charge and proceed to hear mitigation. In the interests of efficiency, I consider the second option to be preferable. Section 319 of the Criminal Procedure Code allows the High Court to "exercise any power which the Magistrates Court might have exercised."

The convictions of all Appellants on Count 1 are substituted with convictions under section 256 of the Penal Code. I will now proceed to hear mitigation."

With respect as the entire proceeding was a nullity the convictions and sentences should have been quashed. Neither option considered in the above passages was open to the learned Judge. Remitting for a re-hearing in the Magistrates Court or exercising a power originally vested in the Magistrate was to ignore the incurable invalidity of what had happened.

Punished twice (the appellant's fourth ground)

It is understandable that the appellant as a lay person should feel aggrieved on this point. He had been penalised pursuant to the Prisons Act by the appropriate authorities and not unreasonably has seen the consecutive sentences of imprisonment originally imposed (but now quashed) as a doubling up.

The law in this area however is very clear. In the House of Lords decision in Connely v. The Director of Public Prosecutions [1964] AC 1254 at 1255/6 head note reads:

> ***"Held: that the plea of autrefois acquit must be given a limited scope and it was not a bar to C. being tried afresh on the robbery charge. This case did not come within the proposition that the plea of autrefois can arise whenever in order to prove the offence alleged in the second indictment the prosecution must prove that the accused has committed an offence of which he has previously been either convicted or acquitted."***

Lord Morris of Borth - y - Gest added that on a plea of autrefois acquit it must be considered whether the crime charged in the later indictment is the same, or in effect the same, as the crime charged in the former indictment and it is immaterial that the facts under examination or the witnesses called in the later proceedings are the same as those in the earlier proceedings.

It is inescapable on the facts in this appeal, that although the factual background was the same for both the internal prison disciplinary procedures and the charges laid under the Criminal Code, the offences themselves are quite different. For that reason had it been necessary to consider this particular ground on its own the appeal would have failed.

Conclusion

The appeal succeeds. The convictions entered and sentences passed on the

appellant in the Magistrate's Court are quashed because the errors of law discussed in this judgment and the entire proceeding is declared a nullity.

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Sheppard JA, Presiding Judge

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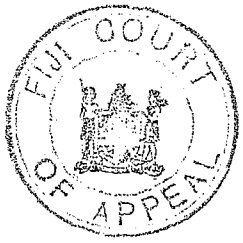
Tompkins JA



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Smellie JA

Solicitors:

Appellant in Person
Office of the Director of Public Prosecutions, Suva for the Respondent

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