[SUPREME COURT]

Freetown
May 3,
1963

Dobbs Ag.J.

REGINA . . . . . *Respondent*

v.

RICHARD B. SAWYERR, ANNIE R. SAWYERR AND SAMUEL B. THOMAS . . . . . *Applicants*

[C.C. 124/63]

Criminal Law—Application for order of prohibition—Nolle prosequi—Whether formal discharge necessary—Whether defendants lawfully before court—Summary Conviction Offences Act (*Cap.* 37, *Laws of Sierra Leone*, 1960).

Nolle prosequi—Whether bar to antecedent charge of same offence on same facts—Meaning of "subsequent proceedings" in section 37 *of Criminal Procedure Act* (*Cap.* 39, *Laws of Sierra Leone*, 1960).

On January 22, 1963, the applicants appeared before the police magistrate at Freetown on charge No. 313, which alleged that they had assaulted one Boyzie John at Regent Village on January 1. They pleaded not guilty, and the case was adjourned to February 6 and then to March 7. On March 7, the applicants appeared, and the case was adjourned to March 21. As they were leaving the dock, a police sergeant arrested them inside the court. They went into the dock again and were there joined by two other defendants. Charge No. 1002, which was the same as charge No. 313, was read out to the five of them, and they all pleaded not guilty. The case was adjourned to March 21, on which date both cases were adjourned to April 3.

On April 3, case No. 313 was called first, and the magistrate announced that a nolle prosequi had been entered by the Acting Attorney-General. When case No. 1002 was called, counsel for the applicants objected that the nolle prosequi covered this case also. The magistrate reserved his decision until April 11, when he held that the nolle prosequi applied only to case No. 313. Case No. 1002 was then adjourned to May 10.

The applicants then applied to the Supreme Court for an order of prohibition to be directed to the police magistrate and the Commissioner of Police prohibiting them from proceeding further with the cases. They also asked that they be discharged from the charges.

Held, dismissing the application, (1) that the applicants were lawfully before the magistrate on charge No. 1002, since, "if a party is before a magistrate and he is then charged with the commission of an offence within the jurisdiction of that magistrate, the latter has jurisdiction to proceed with that charge without any information or summons having been previously issued, unless the statute creating the offence imposes the necessity of taking such a step."

(2) That the nolle prosequi effectively terminated case No. 313, even though the applicants were not formally discharged; and

(3) That case No. 1002 was a subsequent proceeding within the meaning of section 37 of the Criminal Procedure Act so as not to be banned by the entry of the nolle prosequi.

Cases referred to: *Reg.* v. *Hughes* (1879) 4 Q.B.D. 614; *Poole* v. *Reginam* [1960] 3 All E.R. 398.

Solomon A. J. Pratt for the applicants.

John H. Smythe, Acting Attorney-General (*Constant Davies* with him) for the respondent.

A. E. DOBBS AG.J. This is an application by Richard B. Sawyerr, Annie R. Sawyerr and Samuel B. Thomas that an order of prohibition directed to the police magistrate at Police Court No. 3, Freetown, Sierra Leone, and to the Commissioner of Police, Freetown, Sierra Leone, doth issue to prohibit them from further proceeding in the cases entitled "Regina *versus* Richard B. Sawyerr, Annie R. Sawyerr and Samuel B. Thomas" (Magistrates' Court Reference No. 313) and that entitled "Regina *versus* Richard B. Sawyerr, Annie R. Sawyerr, Samuel B. Thomas, Mildred Thomas and Dandeson Thomas" (Magistrates' Court Reference No. 1002) and that the said Richard B. Sawyerr and Annie R. Sawyerr and Samuel B. Thomas be discharged from the charges in both these cases now pending before the said Police Magistrates' Court No. 3, Freetown.

The grounds of the application are as follows:

(1) The nolle prosequi dated March 27, 1963, and entered April 3, 1963, and the oral amendment thereof by the Acting Attorney-General on April 3, 1963, and the further oral application by the Acting Attorney-General in court are a bar to all antecedent charges of the identical offence on the identical facts then subsisting or pending before the learned police magistrate.

(2) That on the date of the nolle prosequi, the cases No. 313 and No. 1002 were pending against the applicants for common assault before the Police Magistrates' Court at Freetown.

(3) That in any case, the applicants were not lawfully before the court in respect of case No. 1002 in that they had been brought before the court by an illegal process, if indeed they had been brought before the court by any process at all.

Both charges, No. 313 and No. 1002, allege that the persons accused on Tuesday, January 1, 1963, at No. 2, Winchester Street, Regent Village, did assault one, Boyzie John.

The facts in the main are not in dispute and are set forth in the affidavit of the applicants sworn on April 11, 1963.

Briefly, the relevant facts are as follows:

The applicants appeared before the learned police magistrate in Court No. 3, at Freetown, on Charge No. 313, on January 22, 1963, and pleaded not guilty. The case was adjourned to February 6, 1963, and again to March 7, 1963. On March 7, 1963, the applicants again appeared and their case was adjourned to March 21, 1963. As they were leaving the dock, Sergeant Nimrod of the police arrested them inside the court and ordered them into the dock again. They went into the dock and were there joined by the said Mildred Thomas and Dandeson Thomas.

Charge No. 1002 was read out to the five of them and they all pleaded not guilty. The case was also adjourned to March 21, 1963.

On March 21, 1963, both cases were called and both were adjourned to April 3, 1963.

On April 3, 1963, the Acting Attorney-General appeared for the prosecution.

Case No. 313 was first called and the learned trial magistrate announced that a nolle prosequi had been entered by the Acting Attorney-General.

After rectification orally of the written notice of nolle prosequi it was clear that the Acting Attorney-General was not proceeding with the charge against the applicants contained in case No. 313.

Case No. 1002 was then called up and Mr. Pratt, counsel for the applicants, objected that so far as the applicants were concerned the nolle prosequi covered this case as well. The learned magistrate reserved his decision to April 11, 1963, when he held that the case No. 1002 should proceed. This case No. 1002 was then adjourned to May 10, 1963.

Before this court, Mr. Pratt is proceeding on the assumption that both cases, No. 313 and No. 1002, are pending in the magistrates' court. The records of both cases were put in evidence. Mr. Pratt says there was no formal discharge of the applicants in case No. 313 and, therefore, it is still pending. I do not agree with him on this. The learned magistrate quoted the relevant portion of section 37 of Cap. 39 as follows: ". . . the accused shall be at once discharged in respect of the charge for which the nolle prosequi is entered." I doubt whether in view of these words a formal discharge is necessary but it is quite clear from the record that the learned magistrate considered that the proceedings in case No. 313 were at an end and, therefore, not still pending before him.

It, therefore, falls to be considered whether an order of prohibition can issue in respect of case No. 1002.

According to the notes to the English Rules of the Supreme Court, 1957 edition, at page 1357, an order of prohibition lies to restrain an inferior court from exceeding its jurisdiction. In this case I doubt whether the magistrate's court is exceeding its jurisdiction and that an order of prohibition is appropriate. The charge is one of common assault and is certainly within the jurisdiction of the magistrate. I think the more correct course would have been an appeal against the ruling of the magistrate given on April 11, 1963. However, it may well be that the excess of jurisdiction is intended to be covered by ground No. 3, that the applicants were not lawfully before the court in respect of case No. 1002. I agree that as the charge was not one justifying arrest without warrant and there appeared to be no warrant of arrest or summons the applicants were brought before the court in an irregular manner. They did, however, plead to the charge which was clearly within the jurisdiction of the court to try. It is quite clear on the authority of *The Queen* v. *Hughes* (1879) 4 Q.B.D. 614 that if a party is before a magistrate and he is then charged with the commission of an offence within the jurisdiction of that magistrate, the latter has jurisdiction to proceed with that charge without any information or summons having been previously issued, unless the statute creating the offence imposes the necessity of taking such step. In my view, the statute creating the offence, viz., Cap. 37, does not impose the necessity of taking some such step. I, therefore, hold that ground No. 3 has no substance.

Mr. Pratt has argued that because section 37 of Cap. 39 provides that the entry of a nolle prosequi shall not be a bar to subsequent proceedings against him on account of the same facts, then it must be a bar to proceedings on account of the same facts antecedent to the entry of the nolle prosequi. Although it is clear that at the time of the entry of the nolle prosequi two sets of proceedings on account of the same facts were subsisting against the applicants, with respect I do not agree with this contention. In my view, the nolle prosequi applies only to the proceedings in respect of which it is specifically entered and does not affect other proceedings even though on account of the same facts. The word "subsequent" as used in the section does not in my opinion strictly denote time and certainly is not limited to proceedings commenced after the time of the entry of the nolle prosequi. If I had any doubts

in the matter I think they would be dispelled by the case of *Poole* v. *Reginam* [1960] 3 All E.R. 398 where the corresponding provision of the Kenya Criminal Code relating to entry of nolle prosequi, which is similar in wording to our section 37 of Cap. 39, was considered. The one information was subsisting and another had been signed before the nolle prosequi was entered. The Privy Council held that the only proceedings which were discontinued as a result of the entering of the nolle prosequi were the proceedings under the information in which it was entered, and that if the second information took effect from the date of signature, it was not rendered invalid by the existence at that moment of the former information. It is true that in that case the nolle prosequi was entered later on the same day as the second information was signed and that the second information was filed after the nolle prosequi had been entered. I do not, however, think this affects the matter and I hold that case No. 1002 was a subsequent proceeding within the meaning of section 37 of Cap. 39 so as not to be barred by the entry of the nolle prosequi.

The application is accordingly dismissed.

Counsel may address me on the question of costs.

Freetown
May 8,
1963
Bankole Jones
J.

[SUPREME COURT]

HASSAN D. FAWAZ *v.* COMMISSIONER OF POLICE THE ATTORNEY-GENERAL *v.* HASSAN D. FAWAZ

[Magistrate Appeal 23/63]

Criminal Law—Dealing in diamonds contrary to terms of licence—Purchase of diamonds from unauthorised persons—Dates of purchases matter of speculation—Credibility of witnesses.

Unlawful possession of diamonds—Whether licensed dealer can be in unlawful possession of diamonds within dealing area—Length of possession of diamonds—Burden of proof.

Alluvial Diamond Mining Act (*Cap.* 198, *Laws of Sierra Leone*, 1960), *ss.* 2, 12 (9), 18 (3), 21, 24.

The accused was charged in a magistrates' court on twelve counts with violating certain sections of the Alluvial Diamond Mining Act (the Act). After a trial, he was found guilty on counts two through six and discharged on the others. Accused appealed to the Supreme Court against his conviction. and the Attorney-General appealed against accused's discharge on counts seven through eleven.

In counts two through six, accused was charged with dealing in diamonds contrary to the terms of his alluvial diamond dealer's licence in violation of sections 18 (3) and 24 of the Act. Section 12 (9) (*a*) of the Act provides that the holder of a dealer's licence is entitled to purchase diamonds either from another holder of a dealer's licence or from the holder of a mining licence, and it was alleged that accused had purchased diamonds from unauthorised persons on January 14, and February 2, 23 (twice) and 27, 1963. Accused's records indicated that he had purchased diamonds on January 14 and February 2 and 23 from one Bachilly, and on February 23 and 27 from one Kondeh. Both Bachilly and Kondeh were persons from whom accused lawfully could purchase, but Bachilly testified that he had sold to accused only once in