

1895.

R. v. JAMES LEE.

February 15. *Criminal Law Amendment Act, ss. 22, 24, 53, 362, 372—Assault occasioning actual bodily harm—Autrefois acquit—Previous conviction quashed—Error on record.*

Windeyer J.

Innes J.

Manning J.

The prisoner had been charged under s. 22 with maliciously wounding with intent to do grievous bodily harm. The jury found a verdict of guilty of "unlawfully wounding." On a Crown case reserved the Court held that this did not amount to a verdict of maliciously wounding without the intent under ss. 24 and 372, but was in reality no verdict at all, and the conviction was quashed on the ground of error on the record. *Held*, that the prisoner was properly afterwards tried and convicted on a charge of assault occasioning actual bodily harm arising out of the same facts.

CROWN CASE RESERVED.

Special case stated by the *Chief Justice*.

On the 1st October, 1894, the prisoner was tried before *Murray*, Acting Supreme Court Judge, on an indictment charging him under s. 22 of the C.L.A. Act, with maliciously wounding with intent to do grievous bodily harm. The jury found him guilty of "unlawfully wounding." The Full Court held, on appeal, that this did not amount to a verdict of maliciously wounding without the intent charged, which it was competent for them to find under the provisions of ss. 24 and 372 (see report of the case, *ante*, Vol. XV., p. 445), and the Court thereupon quashed the conviction. The order of the Court was drawn up as follows: "It is ordered that the conviction of the said James Lee be and the same is hereby quashed, and that the judgment given on the indictment be and the same is hereby avoided by reason of error on the record of the trial of the said James Lee."

The prisoner was then on the 12th December arraigned before the *Chief Justice* on an indictment under s. 53 of the C.L.A. Act, charging him with an assault occasioning actual bodily harm.

The prisoner demurred to the indictment (which was in the form prescribed by the Judges under the authority of s. 461 of the C.L.A. Act), on the ground that it was not sufficient in law. The *Chief Justice* overruled the demurrer.

The prisoner then pleaded (1) *autrefois acquit*, and (2) not guilty. To prove the plea of *autrefois acquit*, the record of the previous trial, and of all the subsequent proceedings, was put in evidence. Upon this record the *Chief Justice* directed the jury to find for the Crown upon the plea of *autrefois acquit*, holding that the decision of the Court in *R. v. O'Keefe* (1) did not apply, but that the case of *R. v. Drury* (2) did, and concluded the case as against the prisoner. The prisoner was therefore tried upon his plea of not guilty, and being convicted, was duly sentenced.

1895.

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R.  
v.  
LEE.

The questions for the consideration of the Court were, whether the *Chief Justice* was right in overruling the demurrer, and in holding that the record placed in evidence did not support the plea of *autrefois acquit*.

*Fealy*, for the prisoner. In the first place, the order of the Court quashing the first conviction is wrongly drawn up. The Court did not hold that there was any error on the record. They held that the words "unlawfully" and "maliciously" were not convertible terms, and that a verdict of unlawfully wounding was not the same as one of maliciously wounding. The words "avoided by reason of error" should be struck out of the order, and the word "arrested" substituted.

[WINDEYER, J. The Court may not have said so in so many words, but it meant that the verdict was bad for error on the record, and the order was specially drawn in the form in which it is to meet this very objection.]

As to the demurrer, if s. 53 does not create the offence of assault causing actual bodily harm, then that offence is unknown to our law. I submit it does not create an offence; it merely provides punishment for certain offences.

*Drury's Case* is not in force here, and such a case cannot arise under our law. A man cannot be tried a second time for an offence where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first, and in this case the evidence was exactly the same in both cases. The last part of s. 362 says that no person tried for felony in any case where *under this Act* he may be

(1) 15 N.S.W. L.R. 1.

(2) 3 C. &amp; K. 193.

1895. acquitted thereof, but be found guilty of some other offence, shall  
R. be liable to prosecution on the same facts for any such other  
v. offence. In the present case, on the first indictment, the Crown  
LEE. could have added a count for assault and the prisoner might have  
been convicted on that count, but as the Crown did not choose to  
do so, he cannot again be tried for an assault arising out of the  
same facts.

*Wade* was called upon as to the construction of s. 362. That section does not mean in general terms that a man can under no circumstances be tried for another offence on the same facts—it merely means that where a man has been charged with an offence and acquitted, where, under the provisions of such sections as 366, 367, 369, 374, it would have been competent to the jury to have found him guilty of a kindred or minor charge, then he shall not be liable to be again tried for any offence of which he might, under the sections referred to, have been found guilty. Here the prisoner was never in jeopardy of being found guilty on the first trial of an assault occasioning actual bodily harm, because there was no count in the indictment for such an offence, nor yet for a common assault, and the only alternative verdict provided for on a charge of maliciously wounding with intent under s. 22 is by s. 372, a verdict of maliciously wounding without intent under s. 24. All the section means is that where a man might have been convicted of either of two offences under an indictment, he shall not again be tried for either of them.

WINDEYER, J. As to the point taken on demurrer, I cannot conceive any argument by which it could possibly be supported. Sect. 53 clearly makes it an indictable offence to commit an assault occasioning actual bodily harm; it is a section which has been acted upon for many years past, and a form has been provided by the Judges for an information under it. The object of the section evidently is to constitute an assault occasioning bodily harm an offence upon which there may be an indictment, and upon conviction a sentence of five years, and to provide a severe punishment for the offence where it is charged as such. The language used in creating the offence is similar to that used in many Acts of Parliament.

The demurrer being overruled, a plea was entered by the prisoner setting up a previous conviction under the circumstances already stated, and the finding of the jury that he was guilty of unlawfully wounding. It further set out that on the case coming before the Supreme Court it avoided judgment by quashing the conviction, thereby determining such last-mentioned conviction. To this the Attorney-General replied that there was no record of the said supposed conviction of the kind alleged in the prisoner's plea, and averred that the conviction referred to had been avoided and quashed by the Supreme Court by reason of an error on the record of the trial. The replication certainly does not go on to say what the error on the record was; but the Court, which is cognisant of its own proceedings, knows that the error was a statement on the record that this verdict of unlawfully wounding had been returned by the jury. The order of the Court correctly states "that the conviction of the said James Lee is hereby quashed, and the judgment given on the indictment is hereby avoided by reason of error on the record of the trial of the said James Lee." It might perhaps have been better if the order had gone on to state the nature of the error which was upon the record, but that is clearly not a matter of which the prisoner can avail himself, as the provisions of s. 423, that the judgment is not to be set aside except for some substantial wrong or miscarriage of justice, would apply. The previous trial was in point of fact an abortive one which resulted in no verdict, and the case went for trial before the *Chief Justice*, just as if no verdict had been returned in the previous trial at all. The distinction between a judgment being set aside by the Court upon the ground of an error on the face of the record and one set aside by reason of some mistake made by a Judge as to the admission of evidence or the like is clearly pointed out in the case of *R. v. O'Keefe* (1). There is no doubt, as the Court held in that case, that when the Court sets aside a conviction upon the ground of the improper admission of evidence against a prisoner, and discharges him upon that ground, the decision of the Court is final, and the case cannot be re-opened. If a prisoner is again put upon his trial under circumstances of that

1895.

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R.  
v.  
LEE.*Windeyer J.*

(1) 15 N.S.W. L.R. 1.

1895. sort, it is quite clear that he could plead a plea to the jurisdiction of the Court to try him again. The old plea of *autrefois acquit* might not be exactly an apt one, but it would be a plea to the same effect, founded upon the fact that the matter was *res judicata*. In such a case the principle upon which the law is founded is that a man is not to be prosecuted and stand in jeopardy twice for the same offence; but here, as no legal verdict was returned in the first trial, the prisoner never was in jeopardy and might be tried again. This has been too often laid down for there to be any doubt about it, and no case can be cited here to shew that where a verdict has been returned which it is not competent to the jury to find, the prisoner may not be tried again. The object of our criminal law is no doubt finality, but if no verdict has been returned there has been no final decision in the matter. I may refer on this point to the remarks of *Cockburn, C.J.*, in *R. v. Charlesworth* (1):—"It appears to me when you talk of a man being twice tried that you mean a trial which proceeds to its legitimate and lawful conclusion by verdict; that when you speak of a man being twice put in jeopardy you mean put in jeopardy by the verdict of a jury, and that he is not tried, that he is not put in jeopardy until the verdict comes to pass, because if that were not so it is clear that in every case of defective verdict a man could not be tried a second time, and yet it is admitted that in the case of a verdict palpably defective, although the jury have pronounced upon the case, yet if the verdict be defective it will not avail the party accused if he is a second time put on his trial."

R.  
v.  
LEE.  
*Windeyer J.*

For these reasons it appears to me that a man may be tried a second time for an offence where there is an error on the record which makes the former trial no trial at all. I cannot follow the argument which has been addressed to the Court as to the law laid down in the case of the *Queen v. Drury* (2) not being in force here. It appears to me that as it was acted upon in the case of *R. v. O'Keefe* (3), the Court is justified in acting upon it here.

We have still to consider another point raised before us, though it does not appear to have been taken before the *Chief*

(1) 9 Cox C.C. at 53.

(2) 3 C. & K. 193.

(3) 15 N.S.W. L.R. 1.

*Justice*—as to the construction to be placed on the latter part of s. 362 of the Criminal Law Amendment Act. It was argued that inasmuch as the prisoner was originally indicted for wounding with intent to inflict grievous bodily harm, and might also, on the facts before the Court, have been indicted for assault and inflicting actual bodily harm, he was not liable to prosecution under the information which we are now considering. This contention appears to me to be founded upon an erroneous interpretation of the words of the section, which clearly point to the conclusion that what the Legislature intended to forbid was the prosecution of a prisoner a second time for an offence of which he might have been convicted when first put upon his trial upon the same evidence as had been adduced on the second occasion. The final words of s. 362 are as follow: "And no person tried for felony in any case where, under this Act, he may be acquitted thereof, but be found guilty of some other offence, shall be liable to prosecution on the same facts for any such other offence." Those words are equivalent to saying that he shall not be tried on the same facts for any offence of which he might have been found guilty upon the information when he was first tried. It is only reasonable that the Legislature should provide that when a man ran the risk of being convicted of this other offence, and the jury had power to convict him of that offence, and did not choose to do so, but simply returned a general verdict of acquittal, he should not be harassed by being put upon his trial again for an offence of which the jury virtually acquitted him when they refused to convict him by returning an alternative verdict. For these reasons I am of opinion that the conviction must be sustained.

1895.

R.  
v.  
LEE.*Windeyer J.*

INNES, J. I am of the same opinion, and the only doubt I have ever felt in regard to the case is as to the meaning of s. 362. That section is certainly awkwardly expressed, and the words not unfairly give rise to the contention put forward for the prisoner. I think, however, there can be no doubt that what it means is that where, on such former trial, he might, under an alternative verdict, have been found guilty of some other offence, then he cannot again be put on his trial for the other offence.

MANNING, J., concurred.

*Conviction affirmed.*