Privy Council Appeal No. 124 *of* 1931.

Albert Godamune - - - - - - - - *Appellant*

v.

The King - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF THE ISLAND OF CEYLON.

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH NOVEMBER, 1932.

Present at the Hearing:

LORD ATKIN.
LORD TOMLIN.
LORD MACMILLAN.

[*Delivered by* LORD TOMLIN.]

This is an appeal by special leave from a judgment and order of the Supreme Court of the Island of Ceylon delivered on the 3rd March, 1931, whereby that Court by a majority answered adversely to the appellant a question of law reserved and referred for the decision of that Court by Lyall-Grant J. under Section 355 (1) of the Criminal Procedure Code of Ceylon (Ordinance No. 15 of 1898) after the conviction and sentence of the appellant at a Session of the Supreme Court in its criminal jurisdiction for the Midland Circuit held at Kandy.

Section 355 (1) of the Criminal Procedure Code of Ceylon is as follows :—

> "355 (1).—When any person has in a trial before a Judge of the Supreme Court acting in the exercise of its original criminal jurisdiction been convicted of an offence and sentenced, the Judge, if he thinks fit, may reserve and refer for the decision of a Court consisting of two or more Judges any question of law which has arisen on the trial, stating in a case signed by him such question with the special circumstances upon which the same shall have arisen."

Subsection (2) of the same section is in these terms :—

> " If the Judge reserve any such question the person convicted shall, pending the decision thereon, be remanded to prison or, if the Judge thinks fit, be admitted to bail, and the Supreme Court shall have power to hear and finally determine such question and thereupon to reverse, affirm or amend the judgment or to make such other order as justice may require."

At the close of the arguments before their Lordships' Board their Lordships were of opinion that the conclusion reached by the majority of the Supreme Court was erroneous and that the conviction of the appellant ought to be quashed, and they intimated that they would humbly advise His Majesty accordingly. The statement of the reasons for their decision was deferred.

Those reasons their Lordships now give.

The facts of the case so far as they are relevant to the matter under consideration lie in a small compass.

At all material times the appellant and one W. R. Westland were trustees of the marriage settlement of H. F. Ensor Harris, and the trust property consisted of or included a first mortgage for Rs.40,000 upon an estate called Belmont.

The mortgage had been created in 1920 by one Boyagoda as part of a transaction by which he had purchased the estate from Harris.

Under the settlement Harris was the beneficiary entitled to the income of the trust property.

On the 14th March, 1927, the interest on the mortgage was in arrear to the extent of Rs.23,000 and the appellant and his co-trustee began an hypothecary action (D. C. Kandy 34987) to enforce the mortgage.

The defendants to this action were Boyagoda and certain other persons, one of whom was named Peiris, and who are hereafter collectively called the Syndicate.

The Syndicate were joined as defendants in the action because they claimed an interest in the equity of redemption of Belmont through Boyagoda, such claim being the subject matter of then pending litigation between Boyagoda and themselves.

The Syndicate were anxious to obtain a postponement of the hypothecary action in order that they might have an opportunity of first clearing up the title as between themselves and Boyagoda.

Accordingly through their proctor Cooke they approached the appellant, and after negotiation entered into an agreement with him, the terms of which were embodied in a letter dated the 18th November, 1927, addressed to the appellant by Cooke.

The terms of the letter, which was marked " Confidential," were, omitting formal parts, as follows :—

> " I understood from you at the interview you had with Mr. C. W. Peiris at my office some days ago that provided you were paid Rs.10,000 on account accumulated interest you would get the case to lay by for one year and that during that period the balance interest should be paid from time to time as my clients were able. Further, that you would

undertake not to certify or record any payments made by my clients on account, should it become necessary for you to enforce writ for the recovery of the claim. Of course, if the amount realised by the sale of the property does not fetch the amount of your claim, then you could appropriate the moneys paid by my clients toward the deficiency. The reason for this, as explained to you, is that my clients do not wish Mr. Boyagoda or anyone else to profit at their expense, as the mortgage was one that was executed by Boyagoda. On receiving your confirmation of this I shall send you a cheque for the Rs.10,000.

At the time of this agreement the control of the hypothecary action was in the hands of the appellant in the absence elsewhere of his co-trustee Westland. At that time neither Westland nor Harris was told of the agreement, and the appellant in his evidence said :—

> " If I gave time and the interest that accumulated was above the value of the land I thought in my position as a Trustee I would be liable to make good the deficit. . . . The monies paid to me were payments to indemnify me against any risks I ran."

Four payments were made to the appellant under the terms of the letter, namely :—

1. On the 26th November, 1927, Rs.10,000.
2. On the 30th March, 1928, Rs.5,000.
3. On the 28th August, 1928, Rs.3,000.
4. On the 6th November, 1928, Rs.5,000.

It is to be observed that, on the 30th March, 1928, the day on which the second payment was made, a decree was taken in the hypothecary action by consent of all parties in favour of the plaintiffs for the full amount of the principal sum of Rs.40,000 and the arrears of interest without taking into account the sums then already paid by the Syndicate to the appellant under the agreement.

In November, 1928, the Syndicate had found someone who was willing to take an assignment of the benefit of the decree in the hypothecary action and were therefore not unnaturally desirous that the Rs.23,000 paid under the agreement between themselves and the appellant should be certified as having been paid under the decree so as to reduce the amount which the assignee would be entitled to recover under the decree, and on the 23rd November, 1928, their proctor Cooke wrote to the plaintiffs' proctors asking that this should be done.

Westland, however, refused to assent to this course because the appellant had not accounted to him as his co-trustee or to Harris as beneficiary entitled to the income of the marriage settlement trust for any part of the Rs.23,000. The money had apparently been utilised by the appellant in some way which made it difficult or impossible for him immediately to produce it.

However, subsequently the plaintiffs' proctors were authorised by both Westland and Harris to assent to the sum of Rs.23,000

being certified as paid in the hypothecary action and this was done on the 21st January, 1929, on which date Harris wrote to the plaintiffs' proctors a letter which, omitting formal parts, was in the following terms :—

> " With reference to the sum of Rs.23,000 paid to Mr. Godamune on account of interest D. C. Kandy 34987, and for which the defendants are now claiming credit, I beg to inform you that Mr. Godamune has settled this matter with me as life rentor by transferring Lunuwilla estate in my favour. You can therefore credit the decree in the sum of Rs.23,000."

The plaintiffs in the hypothecary action ultimately were paid or recovered all that remained due to them under the decree after the payment of Rs.23,000 had been certified.

Subsequently, however, Harris, who had apparently taken a transfer of the Lunuwilla estate from the appellant as security for the Rs.23,000 and by reason of deficiency of value or defect of title or otherwise was unable to recover from the appellant the full amount of the Rs.23,000, procured the launching of the prosecution out of which this appeal arose.

The indictment was dated the 2nd October, 1930, and as originally drawn contained seven counts, of which Nos. 1, 2 and 7 related to the first payment made by the Syndicate to the appellant of Rs.10,000, and were withdrawn by the Crown apparently because any prosecution in respect of that payment was out of time.

The remaining four counts, which were re-numbered 1 to 4, related to the second and third payments and were as follows :—

> " (1) That on a date between 30th March, 1928, and 21st January, 1929, at the place aforesaid, you did dishonestly misappropriate a sum of Rs.5,000, the property of Mr. C. W. Peiris and others ; and that you have thereby committed an offence punishable under Section 386 of the Ceylon Penal Code.
>
> " (2) That at the time and place last aforesaid, you did dishonestly misappropriate a sum of Rs.5,000, the property of Mr. H. C. Ensor Harris ; and that you have thereby committed an offence punishable under Section 386 of the Ceylon Penal Code.
>
> " (3) That on a date between the 28th August, 1928, and 21st January, 1929, at the place aforesaid, you did dishonestly misappropriate a sum of Rs.3,000, the property of Mr. C. W. Peiris and others, and that you have thereby committed an offence punishable under Section 386 of the Ceylon Penal Code.
>
> " (4) That at the time and place last aforesaid, you did dishonestly misappropriate a sum of Rs.3,000, the property of Mr. H. C. Ensor Harris ; and that you have thereby committed an offence punishable under Section 386 of the Ceylon Penal Code."

By order of the Court the second and fourth of these counts were respectively treated as alternative to the first and third of such counts.

On the 10th January, 1931, the jury found the appellant guilty on the second and fourth counts, namely, those which laid the property in the sums in question in Harris, and therefore inferentially acquitted him on the other alternative counts.

A sentence of rigorous imprisonment for one year on each count, the sentences to run concurrently, was pronounced, but a question of law having arisen and been reserved, the appellant was admitted to bail.

On the 17th January, 1931, the learned trial Judge at the request of counsel for the appellant, stated a case for the Supreme Court under Section 355 (1) of the Criminal Procedure Code, reserving and referring for the decision of the Supreme Court two questions of law which had arisen on the trial.

One question was subsequently abandoned by the appellant and need not be considered. The other question was as follows :—

" Was there evidence upon which the jury could find that the property was the property of Harris ? "

On the 2nd March, 1931, the Supreme Court by a majority (Macdonell C.J. and Dalton J.) answered the question in the affirmative and affirmed the conviction and sentence. Garvin S.P.J. dissented, holding that there was no evidence upon which the jury could have found affirmatively that the property was the property of Harris.

It is to be noted that under the counts of this indictment the property in the case of each of the two sums was laid in the Syndicate as the first alternative and in Harris as the second alternative. The appellant has been acquitted so far as the first alternative is concerned. If, therefore, there was no evidence upon which the jury could find that the property was in Harris, the only charge on which the appellant was tried and not acquitted falls to the ground and the proper result in the circumstances of this case must, in their Lordships' judgment, be the quashing of the conviction. The case is not one, therefore, in which it is necessary or proper for their Lordships to consider the extent of the powers of the Court under Section 355 (2) of the Code of Criminal Procedure.

Now, the meaning of the letter of the 18th November, 1927, is, in their Lordships' opinion, the critical point in the case.

By Section 244 (1) (*b*) of the Criminal Procedure Code it is the duty of the Judge to decide upon the meaning and construction of all documents given in evidence at the trial.

The learned trial Judge did not construe the letter or give to the jury any direction in regard to its meaning. On the contrary, he admitted evidence of intention from Peiris and Cooke, witnesses on the part of the prosecution, and from the appellant himself, evidence which, in their Lordships' judgment, was not admissible at all, and then left the matter to the jury at large with only such direction as is indicated in the following passage from the case stated :—

> " I instructed the Jury that if they found it proved that the money in question was paid to the accused as Mr. Harris' agent for the purpose of being handed over to Mr. Harris and that the property had passed from Peiris and others, they might consider it to be the property of Mr. Harris

from the time it reached the hands of the accused. That ruling has been objected to and it is argued that there was no evidence on which Jury could have been directed to find that it was the property of Mr. Harris."

Now, the meaning of the letter regarded in the light of the surrounding circumstances, of which evidence was properly admissible, is reasonably clear. The money was to be paid to the appellant in consideration of his getting the case postponed for one year. As he ran some personal risk in doing that he was to be covered in this way, that if, on the ultimate sale, the proceeds were insufficient to provide for capital and all arrears of interest, he could make up the deficiency out of the monies paid to him so far as they went. Except in this event the monies so paid were not to go against what was owing on the mortgage at all, and if ultimately such monies were not required to make up any deficiency they would have had to be paid or accounted for to the Syndicate. The references in the letter to "accumulated interest" and "interest" are nothing more than references for the purpose of fixing a measure of the amount of money to be paid.

On this view of the letter it is plain, in their Lordships' judgment, that it afforded no evidence that the monies were paid to the appellant as agent for Harris or that such monies by reason of the payment to the appellant became Harris' property. On the contrary, it was an essential feature of what was done that the arrangement should remain a private one between the appellant and the Syndicate, of which no one else was to know anything. If the appellant had paid the money over to Harris he would clearly have committed a breach of his obligations to the Syndicate.

If any regard is to be paid to the evidence of Cooke and Peiris, called on the part of the prosecution, it supported the view of the letter, which has been indicated, and no other view.

Cooke said, "I would have objected to the accused having paid the money to Mr. Harris. . . . Accused was to hold the money pending further instructions from me." Peiris said, "I still say that the terms of the arrangement were fully set out in Mr. Cooke's letter. . . . He (*i.e.*, the appellant) was to hold that money at our disposal. . . . I intended that he should not pay the money to Mr. Harris."

Reference has been already made to the appellant's statement as to his understanding of the position, which accorded with that of Cooke and Peiris, the witnesses for the prosecution.

The fact that the Syndicate consented on the 30th March, 1928, to a decree in the hypothecary action against themselves for the full amount of the interest in arrear without regard to the payments already made to the appellant under the letter of the 18th November, 1927, is a significant fact impossible to reconcile with the property in the monies paid having passed to Harris.

The prosecution did not suggest that the letter did not represent the real bargain between the parties. The witnesses called by

the prosecution said it did. When once, therefore, the meaning of the letter has been ascertained in the sense which, as already indicated, their Lordships think it bears, there remains nothing which could have been placed before the jury to found the conclusion that the monies paid to the appellant were paid to him as agent for or were otherwise the property of Harris, and the verdict of guilty upon the second and fourth counts cannot be supported.

For these reasons their Lordships reached the conclusion which was stated at the close of the arguments.

Before parting with the case their Lordships desire to call attention to the fact that they were at some inconvenience during the hearing of the appeal from not having had available any full note of the learned Judge's summing up. Their Lordships understand that no such note was available to the Supreme Court. Their Lordships cannot but think that in cases under Section 355 (1) of the Criminal Procedure Code it is desirable that there should be available for the tribunal dealing with the reference a full note of the Judge's summing up.

In the Privy Council.

ALBERT GODAMUNE

v.

THE KING.

DELIVERED BY LORD TOMLIN.

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