

In the Privy Council.

No. 94 of 1946

UNIVERSITY OF LONDON  
W.C. 1  
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INSTITUTE OF ADVANCED  
LEGAL STUDIES

ON APPEAL FROM THE SUPREME COURT OF  
FIJI (CRIMINAL JURISDICTION)

44435

BETWEEN

PATESARI MAHARAJ ... .. *Appellant*

AND

THE KING ... .. *Respondent.*

CASE FOR THE RESPONDENT.

1.—This is an Appeal by Special Leave from a sentence of nine months imprisonment with hard labour which on the 18th March, 1946, was passed upon the Appellant by Thomson, J. at a trial in the Supreme Court of Fiji after two assessors had expressed the opinion that the Appellant was guilty of the possession of arms without a licence contrary to Section 4 of the Arms Ordinance, 1937, but not guilty of the unlawful possession of explosives contrary to the Defence (Explosives) Order, 1944.

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p. 17

p. 4, l. 31

10 2.—Thomson, J. appears to have regarded the two assessors as a jury, and their opinion as a verdict. He accordingly treated the Appellant as acquitted on the latter charge, and he sentenced the Appellant as a person convicted on the former charge without formally expressing his own opinion about the Appellant's guilt or innocence and without delivering any reasoned Judgment. The Crown had offered no evidence on two other counts in the indictment and on those counts Thomson J. found the Appellant not guilty.

p. 5, l. 11

p. 17, ll. 1-16

p. 6, ll. 17-21

3.—The Arms Ordinance, 1937, with amendments in force at the material time, contains the following provisions :—

Interpretation 2. In this Ordinance—

“ arms ” mean any firearm air gun air pistol automatic gun automatic pistol or any lethal barrelled weapon of any description from which

RESPONDENT'S CASE

RECORD

any shot bullet or other missile can be discharged or noxious fumes can be emitted and shall include any component part of any such weapon and any accessory to any such weapon designed or adapted to diminish the noise or flash caused by firing the weapon ;

“ pistol ” means a fire-arm or other weapon of any description from which any shot bullet or other missile can be discharged and of which the length of barrel not including any revolving detachable or magazine breech does not exceed nine inches ;

Possession of arms prohibited except under licence or permit

4.—(1) No person shall have in his possession or custody any arms except under a licence or permit in that behalf under this Ordinance and in accordance with the conditions of such licence or permit and such conditions as may be prescribed.

(2) Any person who shall have in his possession or custody any arms without such licence or permit or otherwise than in accordance with such conditions as aforesaid or who while holding such permit shall have in his possession or custody any arms in respect of which no licence is in force shall be liable on conviction on indictment to imprisonment with or without hard labour for a term not exceeding seven years or on summary conviction to imprisonment for a term not exceeding one year or to a fine not exceeding fifty pounds in respect of every such arm or to both.

Ownership

37. The occupier of any house or premises in which any arms shall be found shall be deemed until the contrary is proved to be the possessor of such arms for the purposes of this Ordinance.

The maximum penalty under Section 4 (2) had been two years imprisonment with or without hard labour or a fine not exceeding £50 or both until the 14th June, 1944, when the maximum imprisonment was increased to seven years. The period was again reduced to two years by the Law Revision Ordinance, 1945, which came into force on the 1st May, 1945.

4.—The Defence (Explosives) Order, 1944, so far as relevant, provides that “ No person shall have in his possession in the island of Viti Levu any explosive.” The Order contains no provision similar to Section 37 of the Arms Ordinance, 1937.

p. 12, ll. 2-6  
p. 15, ll. 16-30

5.—The Appellant, a man of excellent character, lived with two sons and the wife and two children of one of the sons in a compound, enclosed,

except for a gap where a track led out of it to a government road, by a fence of two or three single strands of wire. In the compound was a large wooden house, a kitchen, a stable and a bure. The fence by the bure was the boundary of the Appellant's land. The bure was built of poles and thatch with openings which could not be closed. The bure contained paddy rice and a chaff-cutting machine, and occasionally was used for sleeping in. The bure was the building nearest to the gap, and about 30-40 yards from it. The house was 12-14 paces from the bure.

p. 7, ll. 3-8 ; p. 8, ll. 29-32 ; p. 9, l. 17  
p. 7, l. 3  
p. 7, ll. 28-33  
p. 14, ll. 7-10  
p. 7, ll. 25-27 ;  
p. 13, l. 43—p. 14 l. 6  
p. 8, ll. 30-32  
p. 16, l. 3

10 6.—On the 11th May, 1945, the police, acting on information, searched the compound for arms and ammunition. None were found in the house, kitchen or stable. In the bure, however, behind one of the corner posts, a revolver of pre-1914 pattern was found concealed in the thatch of the wall. An examination of the thatch showed that it could not have been placed there from outside the bure. This revolver was the basis of the charge under the Arms Ordinance, 1937. The charge under the Defence (Explosives) Order, 1944, was based on the fact that three rounds of ammunition were found in the chamber of the revolver. The ammunition was for an automatic weapon and it is doubtful if it could be used in the revolver.

p. 6, ll. 34-39  
p. 10, ll. 2-4  
p. 10, ll. 5-18 ;  
p. 7, ll. 30-47  
p. 7, l. 51—p. 8, l. 4 ; p. 8, ll. 37-45  
p. 4, ll. 31-37  
p. 5, ll. 11-18  
p. 7, ll. 33-38 ;  
p. 9, ll. 31-33

20 7.—When first charged the Appellant said that he did not know who placed the revolver in the bure : that he didn't know how many rounds of ammunition were in the revolver : that he didn't know how to load it : and that he didn't know anything about it. Before the Magistrate the Appellant said, " I am innocent—I wish to reserve my defence." At the trial the Appellant gave evidence on oath that he did not know anything about the revolver found in his bure. He suggested that neighbours felt a grievance against him and his sons because of an election, and that his enemies must have come in the night and put the revolver inside the bure without waking him up. Although the police saw two dogs when they  
30 searched the compound, the Appellant persisted in denying that at the time he had any dogs.

p. 10, ll. 45-50  
p. 11, ll. 29-33  
p. 4, l. 3  
p. 14, ll. 30-33 ;  
p. 16, ll. 17-19  
p. 14, ll. 10-47 ;  
p. 15, l. 31—  
p. 16, l. 7  
p. 8, l. 35  
p. 14, l. 50—  
p. 15, l. 15 ;  
p. 16, ll. 8-25

8.—According to his note of his summing up to the assessors Thomson, J. told them that the ordinary rule of burden of proof applied to the explosives charge, but that under Section 37 of the Arms Ordinance the Appellant was to be deemed in possession unless he proved the contrary, and should be convicted unless he satisfied the assessors of his lack of knowledge. Thomson, J. informed the assessors that they could believe the Appellant's denials but there was no evidence that neighbours " planted the gun "—suspicion was not enough. On the explosives charge  
40 Thomson, J. told the assessors that if the Defence had raised reasonable doubts in their minds they should acquit the Appellant.

p. 16, ll. 29-46

9.—The assessors expressed the opinion that the Appellant was not guilty on the explosives charges but was guilty of the possession of arms

p. 17, ll. 1-16

without a licence. Thomson, J. thereupon heard evidence of character and passed sentence. The Respondent submits that when the assessors expressed their opinion Thomson, J. should have delivered a reasoned Judgment and on each charge should himself have convicted or acquitted the Appellant. Unless his agreement with the views of the assessors is to be implied from the course he took, there appears to have been no proper conviction or acquittal, and the trial was not properly finished.

10.—The material provisions of the Criminal Procedure Code are as follows :

PART IV—PROVISIONS RELATING TO ALL CRIMINAL INVESTIGATIONS. 10

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JUDGMENT.

Mode of  
delivering  
judgment

✓ 156.—(1) The judgment in every trial in any criminal court in the exercise of its original jurisdiction shall be pronounced, or the substance of such judgment shall be explained, in open court either immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties and their advocates, if any :

Provided that the whole judgment shall be read out by the presiding judge or magistrate if he is requested so to do either by the prosecution or the defence. 20

(2) The accused person shall, if in custody, be brought before the court, or, if not in custody, be required by the court to attend, to hear judgment delivered, except where the court has proceeded to the determination of the case in the absence of the accused under section 195 of this Code, or where his personal attendance during the trial has been dispensed with and the sentence is one of fine only, or he is acquitted.

(3) No judgment delivered by any court shall be deemed to be invalid by reason only of the absence of any party or his advocate on the day or from the place notified for the delivery thereof, or of any omission to serve, or defect in serving, on the parties or their advocates, or any of them, the notice of such day and place. 30

Contents of  
judgment

✓ 157.—(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the court in English, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it. 40

(2) In the case of a conviction the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

(3) In the case of an acquittal the judgment shall state the offence of which the accused person is acquitted and shall direct that he be set at liberty.

(4) Notwithstanding anything hereinbefore contained, in trials by jury the court need not write a judgment but shall record the heads of the charge to the jury.

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PART VIII—PROCEDURE IN TRIALS BEFORE THE SUPREME COURT.

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MODE OF TRIAL.

Trials before Supreme Court to be by jury or with assessors

247. Trials before the Supreme Court shall be either by a judge and a jury to be composed of seven or by a judge sitting with assessors as hereinafter prescribed.

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When trial to be with assessors

248. Every trial before the Supreme Court in which the accused or one of them or the person against whom the crime or offence has been committed or one of them is a native or of native descent, or of Asiatic origin or descent, shall be with the aid of assessors in lieu of a jury, unless the presiding judge for special reasons to be recorded in the minutes of the court thinks fit otherwise to order, and upon every such trial the decision of the presiding judge with the aid of such assessors on all matters arising thereupon which in the case of a trial by jury would be left to the decision of the jurors shall have the same force and effect as the finding or verdict of a jury thereon.

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CLOSE OF HEARING.

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IN CASES TRIED WITH ASSESSORS.

Delivery of opinions by assessors

308.—(1) When, in a case tried with assessors, the case on both sides is closed, the judge may sum up the evidence for the prosecution and the defence, and shall then require each of the assessors to state his opinion orally, and shall record such opinion.

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(2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.

(3) If the accused person is convicted, the judge shall pass sentence on him according to law.

(4) Nothing in this section shall be read as prohibiting the assessors, or any of them, from retiring to consider their opinions if they so wish, or, during any such retirement or at any time during the trial, from consultation with one another.

#### PASSING SENTENCE.

Calling upon  
the accused 309. If the jury find the accused person guilty, or if the judge convicts him, or if the accused person pleads guilty, it shall be the duty of the registrar or other officer of the court to ask him whether he has anything to say why sentence should not be passed upon him according to law, but the omission so to ask him shall have no effect on the validity of the proceedings. 10

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Sentence 311. If no motion in arrest of judgment is made, or if the court decides against the accused person upon such motion, the court may sentence the accused person at any time during the session.

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Objections  
cured by  
verdict 314. No judgment shall be stayed or reversed on the ground of any objection, which if stated after the information was read over to the accused person, or during the progress of the trial, might have been amended by the court, nor because of any error committed in summoning or swearing the jury or any of them; nor because any person who has served upon the jury was not qualified to sit as a juror, nor because of any objection which might have been stated as a ground of challenge of any of the jurors, nor for any informality in swearing the witnesses or any of them. 20

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#### PART XI—SUPPLEMENTARY PROVISIONS. 30

##### IRREGULAR PROCEEDINGS.

Proceedings  
in wrong  
place 380. No finding, sentence or order of any criminal court shall be set aside merely on the ground that the inquiry, trial or other proceeding, in the course of which it was arrived at or passed, took place in a wrong district or other local area, unless it appears that such error has in fact occasioned a failure of justice.

Trial by Jury  
of offence  
triable with  
assessors 381.—(1) If an offence triable with the aid of assessors is tried by a jury, the trial shall not on that ground only be invalid. 40

Trial with  
assessors of  
offence  
triable by  
Jury

(2) If an offence triable by a jury is tried with the aid of assessors, the trial shall not on that ground only be invalid, unless the objection is taken before the court records its finding.

RECORD  
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11.—The Respondent submits that Sections 308, 156 and 157 of the Criminal Procedure Code, direct what the trial judge should do when the assessors have given their opinions. It is for the judge and not for the assessors to decide what evidence to accept or to disbelieve, and to find the accused guilty or not guilty on each charge. The Code has numerous provisions relating to irregular proceedings, but there appears to be no provision which sufficiently deals with the judge's failure to observe these sections.

12.—Up to the time when the assessors gave their opinions the trial was regular in all respects. The Respondent submits that the record shows no grounds for holding that Thomson, J. misdirected the assessors or himself on any point of law or fact. It appears from the note of the summing up and the opinions of the assessors that the assessors thought it doubtful whether the Appellant knew of the revolver and ammunition but considered that the Appellant had failed to prove that he was not the possessor of the revolver. On the evidence it was clearly possible for the assessors reasonably to have come to these conclusions.

13.—The last paragraph of the judge's note of his summing up and the sentence he imposed imply that Thomson, J. took the same view as the assessors. If this be the proper inference the Respondent submits that no injustice was done to the Appellant by the fact that Thomson, J. did not formally state that he convicted the Appellant on the second count and acquitted the Appellant on the fourth count and did not comply with Sections 156 and 157 of the Criminal Procedure Code.

14.—If on the other hand it is not proper to infer that Thomson, J. took the same view as the assessors, the Respondent submits that the result is that the Appellant's trial has not been completed; that the Appellant was neither convicted nor acquitted of either charge, and that no sentence should have been passed upon him unless and until he had been convicted. The Respondent submits that, in this event, the sentence should be quashed and the case remitted to the Supreme Court of Fiji in order that Thomson, J. may complete the trial by giving judgment in accordance with Section 308 (2) of the Criminal Procedure Code and by sentencing or discharging the Appellant according as the judge finds him guilty of one or both charges or acquits him of both charges.

15.—The Respondent submits that the criticisms of the proceedings contained in the petition for special leave to appeal are unfounded and that either this appeal should be dismissed or the case should be remitted to the Supreme Court of Fiji for the trial to be completed, for the following amongst other

**REASONS.**

1. Because by virtue of Sections 4 (2) and 37 of the Arms Ordinance, 1937, the Appellant was guilty of an offence unless he proved that he was not in possession of the revolver found in his bure.
2. Because the Appellant did not prove that he was not in possession of the revolver.
3. Because Thomson, J. made it sufficiently clear that he agreed with the assessors.
4. Because if he did so the failure of Thomson, J. strictly to 10 comply with the Criminal Procedure Code caused no injustice.
5. Because if agreement between the judge and the assessors cannot properly be inferred, the trial is incomplete and should be completed.

**FRANK GAHAN.**



In the Privy Council.

No. 94 of 1946.

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BETWEEN

PATESARI MAHARAJ ... *Appellant*

AND

THE KING ... .. *Respondent.*

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CASE FOR THE RESPONDENT

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