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Judgments, 1955

UNIVERSITY OF LONDON
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INSTITUTE OF ADVANCED
LEGAL STUDIES

IN THE PRIVY COUNCIL

No. 25 of 1954

ON APPEAL FROM THE SUPREME COURT OF BERMUDA

CN4.6.2 43513

B E T W E E N :

WILLIAM FRANCIS HANS ... Appellant

- and -

THE QUEEN Respondent

CASE FOR THE APPELLANT

10 1. This is an Appeal by Special Leave in forma pauperis against the Appellant's conviction on the 23rd April, 1953 in the Supreme Court of Bermuda on an indictment containing two counts on each of which the Appellant was found guilty. Each count charged the Appellant that he, on the 29th day of March, 1953, at Pembroke Parish in the Bermuda Islands, unlawfully did aid one Frank R. Ashley a person in lawful custody to escape from such custody contrary to Section 111 of the Criminal Code.

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p.11.

20 2. The case for the Crown was that on two occasions during the night of the 29th March, 1953, the said Ashley, who was a Naval Rating serving in the Naval Forces of the United States of America stationed in Bermuda, was placed under naval arrest and shut in a patrol wagon belonging to the United States Navy and that on each occasion he was released by the Appellant who opened the wagon door from the outside and thus allowed the said Ashley to escape.

30 3. The issue to be determined in this Appeal is whether at the material time the said Ashley was a person in lawful custody within the meaning of Section 111 of the Criminal Code. This Section enacts inter alia that any person who aids any person in escaping or attempting to escape from lawful custody is guilty of a felony.

The material sections of the law of Bermuda are annexed hereto.

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- p.1.L.30. 4. The charge being one which could only be dealt with on indictment, the Appellant was brought before the learned Stipendiary Magistrate L. M. Minty, Esq. who carried out the preliminary enquiry pursuant to the Bermuda Indictable Offences Act, 1929. At the conclusion of the evidence for the Crown the learned Magistrate refused to commit the Appellant for trial on the ground that the acts of the Appellant, even if fully proved, would constitute no offence against Bermuda law. He found that the Appellant was a British subject and that the acts alleged to have been committed by him were committed entirely outside the American Naval Operations Base; that Ashley's offence of being absent without leave, being entirely an offence against American Naval discipline, would be no offence against Bermuda law; and that neither would his offence of escaping from custody of the American Shore Patrol be an offence against the law of Bermuda in respect of which any Civil Court in Bermuda could take cognisance. 10
- p.2.L.15. The learned Magistrate further held that Section 111 was a definition of what was in England the common law offence of "rescue". In Bermuda there were no common law offences and an act of any kind to constitute a criminal offence must be within the definition contained in the Criminal Code or some other Statute, or Order made by the Governor under the provisions of some Statute. In his opinion the words "lawful custody" meant "in lawful custody for having committed or reasonably suspected of having committed an offence for which he can be tried by a Bermuda Civil Court or arrested upon a warrant such as a committal warrant for debt or maintenance or a Bench warrant which compels his appearance before a Bermuda Court of Justice." To read "lawful custody" as extending to the apprehension of Ashley by the American Shore Patrol would amount to extending the term to mean any form of custody by anyone which was not "unlawful". 20
- p.2.L.46. 30
- p.3.L.21. 40
- p.3.L.43. The learned Magistrate next considered Section 18 of the United Bases (Agreement) Act, 1952 which provides inter alia that where a person, having been duly arrested in accordance with the provisions of the section, is detained by a United States constable or by a police officer, he shall be deemed to be in lawful custody until his case is disposed of or until he is released. On the true construction of this section read together with section 8(2)(a)(ii) it did not apply to Ashley. After reviewing the pattern of 50
- p.8.L.13.

10 legislation governing the apprehension of members
of the Commonwealth and Allies Armies in the
United Kingdom as made applicable by Order in
Council to Bermuda, the learned Magistrate held
that the fact that an American Naval Rating had
committed a military offence in respect of which
he was liable to arrest by the American authori-
ties did not make his arrest lawful, being an act
of State in respect of the legality of which the
courts of Bermuda could hold no enquiry, and that
a person committed no offence under section 111
of the Criminal Code in enabling him to escape
from such arrest. He had therefore come to the
conclusion that, before a person could be convict-
ed of rescue of a particular person "in lawful
custody" in contravention of section 111 of the
Code, the person detained must have been guilty
or arrested on reasonable suspicion of having
committed an offence in respect of which his ap-
20 pearance could be compelled before a Civil Court
in Bermuda by issue of a summons or warrant for
his appearance. His judgment ended as follows:-

30 "The Section was never put in the Crimi-
nal Code to facilitate the arrest of deser-
ters from the American army or navy by the
American authorities for purely naval or
military offences. Accordingly I have come
to the conclusion that the acts of Hans, even
if fully proved, would constitute no offence
against Bermuda law and the present informa-
tion is accordingly dismissed."

40 6. On the 20th April, 1953, pursuant to Sec-
tion 465(2)(c) of the Criminal Code, the Solicitor-
General for Bermuda applied to the Supreme Court
for consent to prefer a Bill of Indictment against
the Appellant charging him on two counts as afore-
said with unlawfully aiding the said Ashley to
escape from lawful custody. On the same day
Gilbert C.J. consented to the preferment of such
Bill of Indictment.

50 7. At the hearing Captain J.A. Smith of the
United States Marines deposed that he was legal
officer at the Naval Operating Base and Assistant
Security Officer there. He testified that the
arrest of Ashley was a lawful arrest according to
the law of the United States and that instructions
had been given to Chief Petty Officers, both in
writing and orally, to arrest for any offence
against United States Uniform Code of Military
Justice. At the conclusion of this witness' evi-
dence Counsel for the Appellant conceded that the

p.8.
L.43.

p.9.

p.11.
L.11.

p.13.
L.32

p.14.
L.28.

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arrest was "lawful from the American point of view".

p.15.L.1.

8. The principal witness of fact called on behalf of the Crown was Police Constable R.E.Turner, who deposed that, about midnight on Sunday, March 29th, he observed a patrol wagon in which there was a sailor. The door of the wagon was shut and secured and secured by a wire hook. He saw the Appellant tamper with the hook and the wire door swung open and released the sailor who ran down the street and stopped a taxi. The witness caught the sailor and replaced him in the police wagon and locked the door. He asked the Appellant why he had released the American sailor and the Appellant replied "I didn't think I was doing any harm". Later on the witness saw the Appellant approach the rear door of the patrol wagon. He did not see him actually tamper with the hook but he was the only person anywhere at that time. He saw the door swing open and the sailor escaped. The witness placed the Appellant under arrest. In cross-examination the witness agreed that earlier during the night he had had a small "disagreement" with a United States Marine and two civilians who attempted to jostle him and that the Appellant gave him assistance. The Marine said that the witness had no right to demand his identity card. The Appellant, however, said that he had authority to do this.

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p.16.L.8.

p.17.L.10.

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p.26.

pp.26-28.

9. Inspector A.J. Amos produced a written statement made by the Appellant after caution, in which he stated that he had opened the door for the sailor whom he had met earlier in the evening; that when asked by the Shore Patrol and the Air Police why he had done that, as the man was under arrest, he had replied "I am sorry, I did not know he was under arrest, he just asked me to let him out."; that he had gone to the Police Station of his own free will; and that next morning he had denied letting the sailor out a second time.

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10. At the close of the case for the Prosecution Counsel for the Appellant submitted that there was no case to go to the jury. The learned Assistant Justice ruled on this submission as follows:-

p.19.L.20.

"I ruled that there was a case to go to the jury. I stated that in my view the phrase 'lawful custody' in section 111 of our Criminal Code was sufficiently broad in meaning to cover a case in which the United States authorities had lawfully arrested a United States citizen who was a member of their armed

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forces; even though that arrest took place outside the confines of the U.S. Naval Base and was in respect of an act or omission which was an offence under United States Law but not under Bermuda Law. I pointed out that if Mr. Barnard's argument was sound and his client was entitled to assist American sailors to escape after they had been lawfully arrested by the U.S. authorities, one could easily imagine a situation that would lead to the absurd result that, if the U.S. authorities used force to prevent such assistance, they might lay themselves open to an action for assault."

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The Appellant deposed that he had released the sailor because he "figured they had picked him up to give him a lift and that in the excitement over the Marine incident they had left him there". He was not aware that this sailor had been under arrest. He never saw the sailor again after he was put back in the wagon the first time.

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p.20,L.8.

P.21,L.3.

11. In the absence of a Court shorthand reporter no verbatim report was made of the judge's charge to the jury but it appears, from the judge's own summary, that he directed them that Bermuda law differed from English law and that it was for them to decide whether the original arrest of the sailor Ashley by the Shore Patrol was a lawful arrest under United States law. He added that, if the question had been for him to decide, he would have had no doubt that the arrest was a lawful one and he thought that they would probably have little difficulty in coming to the same conclusion.

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p.22,L.8.

The learned judge further directed the jury that if, on considering the whole of the evidence, they believed the accused's statement that he honestly did not realise that Ashley was in custody (or if they were in real doubt about this and thought his statement might be true) they must find him "Not Guilty" on the first count. If they were convinced that his statement was false then they must find him "Guilty". He further directed them that, if they believed the Appellant's story or were in real doubt and thought it might be true, they must find him "Not Guilty" on the second count but that, if they were convinced that his story was false and that it was P. C. Turner who was telling the truth, they must find him "Guilty" on the second count. The jury returned a verdict of Guilty on both counts. The Appellant was then remanded in custody until the 9th May,

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p.23,L.6.

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p.21,L.32.

p.23,L.28.

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1953 when he was sentenced to pay a fine of £10 on each count.

12. The Appellant respectfully submits that his conviction should be set aside and the verdict should be quashed for the following amongst other

R E A S O N S

(1) Because at the time when he was released by the Appellant the American sailor Ashley was not in lawful custody within the meaning of Section 111 of the Bermuda Criminal Code:

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(2) Because the learned Magistrate was right in holding that the acts of the Appellant, even if lawfully proved, would constitute no offence against Bermuda Law and because the learned Chief Justice was wrong in consenting to the preferment of the Bill of Indictment;

(3) Because the learned Assistant Justice wrongly held that the phrase "lawful custody" in the said Code was sufficiently broad to cover a case in which the United States authorities had lawfully arrested a United States citizen who was a member of their armed forces:

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(4) Because the learned Assistant Justice wrongly directed the jury that it was for them to decide whether the original arrest was a lawful arrest under United States Law.

DINGLE FOOT.

GILBERT DARE.

A N N E X U R EThe Criminal Code

16. - (1) A person cannot be punished for doing or omitting to do an act unless the act or omission constituted an offence under the law in force when it occurred; nor unless doing or omitting to do the act under the same circumstances would constitute an offence under the law in force at the time when he is charged with the offence.

CHAPTER XIV.

109. - (1) Any person who by force rescues or attempts to rescue from lawful custody any other person is guilty of a felony.

(2) If the person rescued or whose rescue is attempted is under sentence of death, or is charged with, or suspected of, or committed for, any offence punishable with death, the offender is liable to imprisonment for five years, with or without solitary confinement. In any other case the offender is liable to imprisonment for three years.

(3) If the person rescued, or whose rescue is attempted, is in the custody of a private person, the offender must have notice of the fact that he is in such custody.

110. - Any person who, being in lawful custody, escapes from such custody -

(1) Is, if he has been convicted of, or is charged with, or suspected of, or committed for, a felony, guilty of a felony, and is liable to imprisonment for three years;

(2) Is, in any other case, guilty of a misdemeanour, and is liable to imprisonment for two years.

Section 111 as amended by Prisons Act, 1950.

111. - Any person who aids any other person in

escaping or attempting to escape from lawful custody is guilty of a misdemeanour and is liable to imprisonment for 2 years.

112. - (1) Any person who, being an officer in either of His Majesty's gaols in these Islands, or a police officer, wilfully permits a person within his lawful custody to escape is guilty of a felony.

(2) If the person who escapes is under sentence of death, or is charged with, or suspected of, or committed for, any offence punishable with death, the offender is liable to imprisonment for five years. 10

(3) In any other case the offender is liable to imprisonment for three years.

113. - Any person who, being an officer of either of His Majesty's gaols in these Islands, or a police officer, negligently permits a person within his lawful custody to escape, is guilty of a misdemeanour, and is liable to imprisonment for two years or to a fine of £100. 20

114. - Any person who harbours, maintains, or employs, a person who is to his knowledge an offender under sentence of such a kind as to involve deprivation of liberty, and illegally at large, is guilty of a misdemeanour, and is liable to imprisonment for two years, or to a fine not exceeding £100.

116. - Any person who wilfully obstructs or resists any person lawfully charged with the execution of any writ, order, or warrant of any Court, is guilty of a misdemeanour, and is liable to imprisonment for one year. 30

UNITED STATES BASES (AGREEMENT) ACT 1952

10 Section 8 (1) (e) the expression "United States interest offence" means an offence which (excluding the general interest of the Government of these Islands in the maintenance of law and order therein) is solely against the interests of the Government of the United States of America or against any person (not being a British subject or local alien) or property (not being property of a British subject or local alien) present in these Islands by reason only of service or employment or of use in connection with the construction, maintenance, operation or defence of the Bases.

Section 8 (2) The Government of the United States of America shall have the right to exercise the following jurisdiction in respect of offences committed in these Islands, that is to say -

20 (a) where the accused person is a member of the United States Forces -

(i) if a state of war exists, then exclusive jurisdiction in respect of all offences wherever committed;

30 (ii) if a state of war does not exist, then exclusive jurisdiction in respect of security offences wherever committed and in respect of United States interest offences committed within a Leased Area, and concurrent jurisdiction in respect of all other offences wherever committed;

Section 9 (1) United States service courts and the authorities of the United States of America may exercise within these Islands in relation to members of the United States Forces, in matters concerning discipline and internal administration, all such powers as are conferred upon them by or under the law of the United States of America:

40 Provided that, subject to the provisions of section eight of this Act, nothing in the foregoing provisions of this sub-section shall be construed so as to affect the jurisdiction of any court of these Islands to try a member of the United States Forces for any act or omission which

constitutes an offence against the law of these Islands.

Section 18(1) Without prejudice to the provisions of sub-section (1) of section nine of this Act, a United States constable shall have -

- (a) within a Leased Area, all the powers and privileges of a police officer; and
- (b) within a Leased Area, and elsewhere in these Islands on a fresh pursuit from any such area, power to arrest without warrant any person who he has reasonable cause to believe has committed an offence with respect to which the Government of the United States of America has jurisdiction by virtue of section eight of this Act.

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Section 18 (2) A United States constable effecting an arrest in any case where the person arrested is not released forthwith and is not to be dealt with by a court of the United States of America, shall without delay, and in any event within twenty-four hours, deliver him in custody, or cause him to be delivered in custody by another United States Constable, to a police officer, and thereupon he shall, for the purposes of any provision of law, be treated as if he had just been arrested by a police officer.

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Section 19 (3) Where any person, having been duly arrested in accordance with the foregoing provisions of this section, is detained by a United States constable or by a police officer he shall be deemed to be in lawful custody until his case is disposed of or he is sooner released.

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COURT OF BERMUDA

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THE QUEEN

CASE FOR THE APPELLANT

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