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14, 1956

IN THE PRIVY COUNCIL

No. 20 of 1955

ON APPEAL

FROM THE SUPREME COURT OF CEYLON

B E T W E E N:

S. K. SUBRAMANIAM Appellant

- and -

THE QUEEN Respondent

UNIVERSITY OF LONDON
 19 FEB 1957
 INSTITUTE OF CRIMINAL
 LEGAL STUDIES

15080

CASE FOR THE RESPONDENT

RECORD.

1. This is an appeal, by special leave granted, from an order made by Mr. Commissioner of Assize Barr. Kumarakulasinghe on the 18th March, 1954, under Section 440(1) of the Criminal Procedure Code of Ceylon, while presiding over the Criminal Sessions of the Supreme Court of Ceylon held at Jaffna.

2. Section 440 provides as follows :-

(1) If any person giving evidence on any subject in open court in any judicial proceeding under this Code gives, in the opinion of the Court before which the judicial proceeding is held, false evidence within the meaning of Section 188 of the Penal Code it shall be lawful for the Court, if such Court be the Supreme Court, summarily to sentence such witness as for a contempt of the Court to imprisonment either simple or rigorous for any period not exceeding three months or to fine such witness in any sum not exceeding two hundred rupees; or if such Court be an inferior Court to order such witness to pay a fine not exceeding fifty rupees and in default of payment of such fine to undergo rigorous imprisonment for any period not exceeding two months. Whenever the power given by this section is exercised by a Court other than the Supreme Court the Judge or Magistrate of such Court shall record the reasons for imposing such fine.

RECORD.

(2) Any person who has undergone any sentence of imprisonment or paid any fine imposed under this section shall not be liable to be punished again for the same offence.

(3) Any person against whom any order is made by any Court other than the Supreme Court under sub-section (1) of this section may appeal to the Supreme Court and every such appeal shall be subject to the provisions of this Code. 10

(4) In lieu of exercising the power given by this section the Court may if it thinks fit transmit the record of the judicial proceeding to the Attorney-General to enable him to exercise the powers conferred on him by this Code or proceed in manner provided by Section 380.

(5) Nothing in this section contained shall be construed as derogating from or limiting the powers and jurisdiction of the Supreme Court or the Judges thereof. 20

Section 188 of the Penal Code provides as follows :-

Whoever, being legally bound by an oath or affirmation, or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true. is said to give "false evidence". 30

Wherever in any Ordinance the word "perjury" occurs, such Ordinance shall be read as if the words "giving false evidence" were therein used instead of the word "perjury".

3. (a) The circumstances under which the learned Commissioner came to make the order in question were as follows: The case of Queen v. Veerakathay Tharuman. alias Tharmalingam (S.C.4. Pt. Pedro 16525) resulted in the accused being acquitted on the ground that there was no evidence against him on the charge on which he had been indicted, viz., murder. 40

(b) The Appellant, the Village Headman of Karavetti North, was a witness for the prosecution. He gave evidence inter alia, that he had obtained information at about 7.30 p.m. on the 27th November, 1952, that an offence had been committed at a place called Nelliadi Junction and that it took him about ten minutes to arrive on the scene. Upon arriving on the scene he found the injured man lying at a spot which was within the jurisdiction of the Headman of Karavetti West, to whom at about 8.15 p.m. he sent a letter asking for his car to remove the injured man but that the said Headman refused to accept his letter. He stated that this letter had been put by him in a file which he maintained. He said that he did not want the Headman of Karavetti to come and investigate; when this Headman arrived on the scene at about 9 p.m. he did not ask him why he had refused to accept the letter.

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He further stated that the junction at which the incident occurred was a busy one and that usually there were a number of cars parked at the junction, but that no car on that day was available in which to convey the injured man to hospital. He stated that he had stopped two cars and a bus and requested the drivers to convey the injured man to hospital but they had refused.

He said that he made inquiries at the scene with a view to ascertaining the identity of the assailants of the injured man, who in fact died at about 8.30 p.m. on the day concerned, but that none of the persons who were present volunteered to make a statement.

pp. 35-47.

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At a later stage in the trial he stated that he was unable to produce the letter referred to above. He further said that he was unaware that allegations had been made against him that he had suppressed evidence in this case. He said that at the instance of one Inspector Alagiah he had taken the prosecution witness Thamgammah to the Point Pedro Police Station on the 28th March, 1953, but that he did not know the reason why he was asked to do so.

pp. 54-62.

RECORD.

4. At the conclusion of the trial, the learned Commissioner called upon the Appellant (among others) to show cause as to why he should not be dealt with as for contempt of Court under Section 440(1). Counsel for the Appellant thereupon enquired of the learned Commissioner as to the particular points in respect of which the Appellant had, in his opinion (i.e. the learned Commissioner's) given false evidence. The Commissioner replied that in his opinion that whole of the Appellant's evidence was false and further indicated that he was not regarding the Appellant's evidence as false because it was in conflict with the testimony of other witnesses, but that taking the evidence of the Appellant by itself, it was clearly false.

p. 108 - L.30.

p. 108 - L.31.

p. 109 - L.11.

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During the course of the address by Counsel for the Appellant the learned Commissioner pointed out that the Appellant had stated that he had found an injured man in a place within the jurisdiction of another Headman, that he had assumed jurisdiction, that there was no man there who was prepared to say who had assaulted the injured man, that he had implied that there was a conspiracy among the persons at that place, that he had not recorded the statement of the man whose boutique was opposite the place where the injured man was lying and that he had not followed up clues which were available to him. Learned Counsel thereupon expressed the opinion that the learned Commissioner's view that the Appellant had not acted bona fides was correct.

pp.110-113 and
pp.128-133.

p. 132 - L.27.

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The learned Commissioner further informed learned Counsel for the Appellant that he would permit him to call any evidence which he might wish. Learned Counsel submitted, inter alia, that the matter should be forwarded to the Attorney-General under sub-section (4) of the said Section 440.

pp. 136-144.

5. Having heard the submissions of learned Counsel for the Appellant the learned Commissioner made the Order the subject of this Appeal.

pp. 142 - L.5.

pp. 142 - 144.

During the course of the making of this said Order the Appellant was given the opportunity of showing cause as to why he should not be punished for giving false evidence. The Appellant's replies to all the points raised by the learned Commissioner was that the evidence which he had given was true.

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6. The said Order of the learned Commissioner concluded with the following paragraph :-

p.144 - L.17-32.

10 "Court to witness: Your case is unprecedented for more than one reason. I do not think that in any other case the witness was given such a long time to shew cause. I had very great assistance from your Counsel in testing the view I had formed with regard to your evidence. I had thought seriously even before your Counsel addressed me about adopting some other way of dealing with you. It is very unpleasant duty but I have to do my duty. I cannot say how I can make any distinction between you and Police Sergeant Hameen who had put in about 33 years service. Both of you had suppressed the evidence in this case and given false evidence in Court to explain the absence of evidence in this case as to who the assailants were. I sentence you to one
20 (1) months' rigorous imprisonment."

7. By a Petition dated the 4th March 1955, the Appellant prayed for Special Leave to Appeal against the said Order of the learned Commissioner.

By paragraph 25 of the said Petition it was submitted that -

30 25. (1) The discretion vested in the Trial Court by Section 440(1) of the Criminal Procedure Code summarily to sentence a witness who, in the Court's opinion, has given false evidence should not, in the circumstances of this case as outlined above, have been exercised at all.

(2) There were no grounds or alternatively no sufficient grounds upon which the learned Trial Judge was entitled to exercise his discretion under the said section or to hold that your Petitioner had given false evidence within the meaning of Section 188 of the Penal Code.

40 (3) Alternatively, if the circumstances were such as to bring the exercise of the discretion within the contemplation of the learned Trial Judge then it was vital to the validity of his Order that it was made in the

RECORD.

exercise of a judicial discretion and in accordance with law and natural justice, and not arbitrarily as, in your Petitioner's respectful submission, did actually occur.

(4) That in refusing to permit your Petitioner's Counsel to enquire into the unfavourable opinion of Your Petitioner's evidence which the learned Trial Judge said that he had formed and to advance explanations which might well have caused a revision of that opinion. the learned Judge, in effect, denied to Your Petitioner an opportunity of defending himself and in doing so departed seriously from a universally accepted rule of natural justice.

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(5) That in being sentenced to imprisonment, and in serving his sentence, Your Petitioner has suffered, and, because of the disadvantages that flow from a criminal record, will continue to suffer, grave injustice which is deserving of investigation with a view to possible rectification.

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The Respondent was not represented when the said Petition was considered by the Judicial Committee of the Privy Council.

8. On the 7th day of April 1955 the Order in Council was passed, granting Special Leave to Appeal.

9. When considering the Commissioner's said Order, it is submitted that it would be proper to ascertain in the first instance what is the ambit of the provision of law under which the learned Commissioner acted, viz. Section 440(1) of the Criminal Procedure Code.

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10. Reference in this connection is requested to the decision of the Judicial Committee of the Privy Council in the case of CHANG HANG KIN and OTHERS v. SIR FRANCIS T. PIGGOTT and ANOTHER (1909) A.C.312. That appeal concerned the construction of Section 31 of the Hong Kong Supreme Court Ordinance 1873, a section substantially identical to the section under which the learned Commissioner acted. The judgment of their Lordships Board was delivered by Lord Collins and may be summarised as follows :-

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(i) That the Ordinance did not contemplate the accusation being formulated in a series of specific allegations of perjury and that in that case the gist of the accusations had been made sufficiently clear.

10 (ii) That as the Ordinance in that case did not dispense with giving the Appellants an opportunity before sentence of explaining or correcting misapprehensions of their statements, it was essential that it should be accorded to them.

11. Subsequent to the above decision of the Judicial Committee of the Privy Council, the Supreme Court of Ceylon had occasion to adjudicate on the ambit of Section 440(1). The first occasion was in the case of THE KING v. AMADORU ET AL. (CEYLON) 14 N.L.R. 481. Decided on the 13th June, 1911. The convictions in that case under Section 440(1) were by a District Court. The relevant portions of the judgment of Mr. Justice Wood Renton as he then was may be summarised as follows:-

30 That there was nothing in Section 440 of the Criminal Procedure Code which prevented a Court from adopting the summary method provided by that Section for punishing a witness for giving false evidence, even in cases where the false evidence charged disclosed a serious criminal offence. That all that Section 440 required was that the accused person should have given evidence in a judicial proceedings, which in the opinion of the Court before which the proceeding was held, was false.

Another occasion was in the case of BANDA v. SADA (Ceylon) 17 N.L.R. 510 decided on the 27th October, 1914. The conviction appealed from was from a Magistrates Court. Chief Justice Renton concluded his judgment with the following passage at p.512 -

40 "The true interpretation of the scope of section 440 of the Criminal Procedure Code appears to be this. The Legislature has left the Courts quite free as a matter of law to deal under that section with any form of "false evidence" within the meaning of section 188 of the Penal Code, and if we attempt to

fetter that discretion by rigid general rules as to the class of cases in which it may or may not be exercised, we shall be acting rather in a legislative than in a judicial capacity, and running the risk of paralysing the operation of a statutory power, the maintenance of which in full working order is essential to the administration of justice in this country. But there is ancient and sound authority for the proposition that "all things that are lawful are not expedient", and we have every right to consider ourselves, in the exercise of our original jurisdiction, and in the exercise of our appellate jurisdiction, to inquire whether this statutory power can be safely exercised in any particular case that has come before us". 10

12. The Respondent submits that the procedure contemplated by Section 440(1) is a summary procedure as distinct from the normal procedure for which also provision exists under the law of Ceylon. By making provision for two sets of procedure the legislature must have intended to provide for a particular situation where measures ostensibly peremptory were nevertheless necessary for the due administration of justice. 20

13. The Respondent submits that the learned Commissioner had a full discretion to act in the way in which he did and that the procedure followed by him complied with the requirements contemplated by Section 440(1). 30

14. The circumstances in which your Lordships' Board will review a criminal appeal were stated in the case of *IN RE ABRAHAM MALLORY DILLET* (1887) 12 A.C. 459 where it was stated that Her Majesty will not review or interfere in the course of criminal proceedings unless it be shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice and otherwise substantial and grave injustice have been done. 40

15. The Respondent submits that, while a view other than the one taken by the learned Commissioner of the Appellant's evidence given at the trial may perhaps be permissible, the circumstances of this case are not such as would warrant the interference of Your Lordships' Board, having regard to the principles enunciated above.

16. The Respondent therefore humbly submits that this Appeal should be dismissed for the following among other

R E A S O N S

1. Because the evidence of the Appellant was such that the learned Commissioner was entitled to arrive at the opinion which he in fact did on that evidence.
- 10 2. Because the learned Commissioner was entitled to exercise his discretion to act in this matter under the provisions of sub-section (i) of Section 440 of the Criminal Procedure Code as opposed to acting under Sub-section (4) of that Section.
3. Because the learned Commissioner having decided to act under Section 440(1) of the Criminal Procedure Code complied with the requirements of that Section.

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BETWEEN:

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- and -

THE QUEEN Respondent

C A S E

FOR THE RESPONDENT

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