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In the Privy Council

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

BETWEEN

ALFRED GRANVILLE ROSS . . . . *Appellant*

AND

THE QUEEN . . . . *Respondent*

Case for the Appellant

RECORD.

1. This is an Appeal by special leave from such part of a judgment of the Court of Appeal for Eastern Africa at Nairobi delivered on the 17th November, 1955, quashing certain convictions of the Appellant before the Supreme Court of Kenya on 36 counts in an Information dated the 27th June, 1955, and the sentences passed upon the Appellant in relation to each of those convictions, as adjudged that the case be remitted to the Supreme Court of Kenya for a new trial. p. 106. p. 1.

2. The main questions which arise for consideration in this appeal are :—

(i) whether Her Majesty's Court of Appeal for Eastern Africa has jurisdiction to order a re-trial in a criminal case ;

(ii) what are the principles upon which such jurisdiction (if any) ought to be exercised, and in particular whether it ought to be exercised so as to enable the prosecution to fill in important gaps in the evidence.

3. On the 15th July, 1955, the Appellant was convicted before the Supreme Court of Nairobi on 36 counts contained in an Information dated the 27th June, 1955. The Information, in effect, charged the Appellant with making false returns of income with intent to evade Kenya income tax and excess profits tax in respect of various years of assessment or chargeable accounting periods between 1941 and 1949 inclusive. p. 88. p. 1.

4. The Counts fell into three categories :—

(i) the first 26 counts under subsection (1) (*a*) of Section 75 of the Income Tax Ordinance (Cap. 254 of the Laws of Kenya, 1948) charging wilful omissions from income tax returns of income which should have been included therein ;

(ii) five counts under Section 17 of the Excess Profits Tax Ordinance (Cap. 255) charging similar omissions ; and

(iii) five counts under subsection (1) (*e*) of Section 75 of the Income Tax Ordinance charging fraudulent inclusion of alleged expenses in income tax returns.

5. The counts were also divisible into the following groups :—

(i) those relating to returns made by the Appellant declaring the income of the firm of which the Appellant was a member ;

(ii) those relating to returns made by the Appellant of his personal income ; and 10

(iii) those relating to returns made by the Appellant on behalf of his partner who was, at all material times, not resident in British East Africa.

p. 84.
p. 88.

6. The Appellant was convicted on each of the 36 counts and was sentenced to a concurrent term of one year's simple imprisonment on each count and to penalties amounting in all to £83,948.

p. 92.

7. The Appellant appealed to the Court of Appeal in East Africa against the said convictions and against the sentences imposed. The grounds of appeal are set out in the amended Memorandum of Appeal. Two main grounds of appeal material to this Appeal are as follows :— 20

(1) That the Learned Trial Judge failed to direct the Jury or alternatively failed sufficiently to direct the Jury as to the law and evidence concerning the income and profits chargeable which should have been included in the Income Tax Returns made by the Appellant.

(2) That there was no evidence to support a finding that the Appellant had omitted from any of the Returns income which ought to have been included.

(3) The Learned Trial Judge misdirected the Jury in his Summing Up as to the evidence which had been given in relation to expenses. 30

(4) The Learned Trial Judge failed to direct the Jury sufficiently in law as to the matters necessary to constitute fraud.

p. 106.
p. 111.

On the 17th November, 1955, judgment of the said Court of Appeal was rendered by virtue of which all the said convictions were quashed and the sentences imposed set aside, but it was ordered that the case be remitted to the Supreme Court, for a new trial.

8. It is submitted on behalf of the Appellant that the Court of Appeal for Eastern Africa has no jurisdiction to order a new trial in a

criminal case. This point was not taken by the Defence before the Court of Appeal. The material provisions of law relating to the jurisdiction of the Court of Appeal to Eastern Africa to direct a new trial in criminal cases are as follows :—

(A) The Eastern African Court of Appeal Order in Council 1950 (S.I. 1950 No. 1968) provides :—

Article 16 (1)—The Court shall have jurisdiction to hear and determine such appeals from Judgments of Courts of the Territories (including reserved questions of law and cases stated) and to exercise such powers and authorities as may be prescribed by or under any law for the time being in force in any of the Territories respectively, subject to the provisions of this Order or of any such law ; and, subject as aforesaid, for all purposes of and incidental to the hearing and determination of any appeal within its jurisdiction, the Court shall have the power, authority and jurisdiction vested in the Court from which the appeal is brought.

(2) The process of the Court shall run throughout the Territories and any judgment of the Court shall be executed and enforced in like manner as if it were an original judgment of the Court from which the appeal is brought.

(3) In the hearing of any appeal the law to be applied shall be the law applicable to the case in the Court from which the appeal is brought.

Article 18 (1)—Subject to the provisions of this Order, the President and any two other Judges of the Court selected by the President, may make Rules of Court for regulating the practice and procedure (including that in any Court from which appeals are brought) in appeals to the Court, whether before or after final judgment in the Court, including the right of audience in the Court and the legal representation of persons concerned, the duties of the Officers of the Court, the costs of, and fees in respect of, proceedings therein and any matters relating to the matters aforesaid.

(2) Rules of Court shall not take effect until they are approved by a Secretary of State and when so approved shall have effect as if contained in this Order.

(B) " The Eastern African Court of Appeal Rules, 1954 " (published in the Kenya Official Gazette Supplement No. 35 of the 13th July, 1954. Proclamations, Rules and Regulations of the Colony of Kenya, 1954. Vol. 33, p. 451) provide :—

" THE EAST AFRICAN COURT OF APPEAL RULES, 1954.

We, the President of the Eastern African Court of Appeal and two other Judges of the said Court selected by the President, in exercise of the powers conferred on us by Section 18 of the

Eastern African Court of Appeal Order in Council, 1950, and of all other powers thereunto us enabling hereby make the following Rules of Court :—

1. These Rules of Court may be cited as the Eastern African Court of Appeal Rules, 1954, and shall come into force on the 1st day of August, 1954.

PART III.

FIRST APPEALS IN CRIMINAL MATTERS.

24. This part of these Rules shall apply only to appeals from a Superior Court acting in its original jurisdiction in criminal cases and to matters related thereto . . . 10

25. In any case not provided for by this part of these Rules the practice and procedure for the time being of the Court of Criminal Appeal in England shall be followed as nearly as may be.

41. (1) At the hearing of an appeal the Court shall hear the appellant or his advocate, if he appears, and, if it thinks fit, the respondent or his advocate, if he appears, and may hear the appellant or his advocate in reply, and the Court may thereupon confirm, reverse or vary the decision of the trial 20 Court, or may order a re-trial or may remit the matter with the opinion of the Court thereon to the trial Court, or may make such other order in the matter as to it may seem just, and may by such order exercise any power which the trial Court might have exercised :

Provided that the Court may, notwithstanding that it is of opinion that the point or points raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred." 30

(c) Section 378 (1) of the Criminal Procedure Code of Kenya (Laws of Kenya Revised 1948 Cap. 27) provides :—

"378. (1) Any person convicted on a trial held by the Supreme Court may appeal to His Majesty's Court of Appeal for Eastern Africa—

(*a*) against his conviction on any ground of appeal which involved a question of law alone ; and

(*b*) with the leave of such Court of Appeal and upon the certificate of the Judge who tried him that it is a fit case for appeal on any ground of appeal which involves 40 a question of fact alone or a question of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of Appeal ; and

(*c*) with the leave of such Court of Appeal against the sentence passed on conviction unless such sentence is one fixed by law."

9. It is submitted on behalf of the Appellant that :—

(A) The only power to make Rules of Court under Article 18 of the Eastern African Court of Appeal Order in Council is for the purpose of " regulating the practice and procedure . . . in appeals to the Court."

(B) The conferring of a power to direct a re-trial in a criminal case goes far beyond a matter of " practice and procedure."

(C) If the words " practice and procedure " are apt to comprise a power to direct a new trial, then it would follow that by virtue
10 of Section 18 of the Criminal Appeal Act, 1907, in force in England such a power might be conferred on the Court of Criminal Appeal in England without new legislation contrary to the assumption made by different Judges in the Court of Criminal Appeal in England from time to time (See *Rex* v. *Dyson* [1908] 2 K.B. 454, *Rex* v. *Colclough* (1909), 2 C.A.R. 84 and *Rex* v. *Ellsom* (1911) 7 C.A.R. 4).

(D) There is no other power which confers upon the Court of Appeal of Eastern Africa the power to make such a rule.

(E) Accordingly the said rule, insofar as it purports to confer a power to direct a new trial, is *ultra vires*.

20 (F) If the Rules of Court are to be read as if they were contained in the Order in Council then, insofar as the Rules of Court purport to confer a power to order a re-trial this provision must be disregarded and not be given any effect as being inconsistent with the Order in Council that the Rules of Court made pursuant to the powers conferred by the Order in Council shall be Rules of Court regulating the practice and procedure on appeals to the Court.

10. It is submitted in the alternative that the Court of Appeal exercised its jurisdiction to order a new trial in the present case upon wrong principle and in circumstances which make such an order contrary
30 to justice.

11. It is submitted that such a power should only be exercised rarely and in exceptional cases (*R.* v. *Stoddard* 2 C.A.R. 245) and that in particular it should not be exercised so as to enable the prosecution to fill in important gaps in the evidence.

12. One of the material facts to be proved by the Respondent in all of the counts against the Appellant was that there was certain income which should have been included in the returns made by the Appellant and that this was in excess of the income that was in fact included in the returns made by the Appellant.

40 13. The factual background of the case was summarised by the Court of Appeal as follows :—

p. 107, l. 4.

" Throughout the material period the Appellant was in partnership with one Thomas Lea Elliott under an agreement in writing made on the 1st January, 1927, in the business of manufacturers' agents and representatives. Elliott and the Appellant

conducted the partnership business from the offices in Birmingham, England and in Nairobi respectively. The partnership held a number of agencies for English manufacturers covering British East Africa. Broadly speaking, the method of conducting most of the business was that the Appellant convassed for orders from customers in the British East African territories, he then passed the orders to the office in Birmingham, and Elliott made the arrangements for the supply and shipment of the goods. The profits of the business were thus—if not entirely, at any rate very largely—earned in the form of commissions on the orders thus 10 obtained and fulfilled, that is to say, on offers to buy made in British East Africa and acceptances of those offers given in England. In general terms it may be said that the business was carried on by the co-operation of the partners operating at a distance. By Clause 7 of the partnership agreement "the net profits, that is the balance remaining after deduction of all business expenses from the income derived by way of commission and any other source earned by the said partnership business" were to be divided between the partners as to one-third to Elliott and as to two-thirds to the Appellant. Accounts were settled annually on the footing of 20 figures supplied by the Appellant to the Birmingham office and figures worked out in that office thereafter."

14. The Respondent assumed throughout, but did not prove that the whole of the profits of the partnership were assessable as East African Income. This is shown by the following extract from the cross-examination of George Whitmore Brown, an Assistant Commissioner of Income Tax in the Investigations Branch and in charge of the case :—

p. 48, l. 44.

"*Q.* You have prepared various comparative tables which in effect are a summary of the accusations against the Accused ?—*A.* That is so. 30

Q. Based on the assumption that the various documents which you have received are correct ?—*A.* Yes.

Q. And based, I suggest, on two further assumptions. First that all the profits of the partnership, whether due to Elliott's efforts in Birmingham or Ross' in Nairobi are Returnable as the income of a partnership in Kenya ?—*A.* Based on the assumption that they are derived from or received . . .

Q. Isn't that exactly what I asked you ?—*A.* Yes.

Q. That the entire profits whether due to Elliott's efforts in Birmingham or Ross' in Nairobi are all returnable here, all 40 assessable as Eastern African income ?—*A.* It is based on that and of course in 1940 and 1950 and 1951 the partnership returns were rendered on that basis.

Q. Have you any basis for that assumption beyond the fact that the Accused (inaudible) ?—*A.* I have no evidence or belief that the profits are not assessable in Kenya.

Q. Have you any evidence either way ?—*A.* I think I have the evidence of the three years.

Q. Have you anything else ?—*A.* The Partnership Agreement says the same (reads).

Q. Or elsewhere does it say ?—*A.* It says Sean's Chambers, or other such place or places in B.E.A.

Q. I do not want to challenge what you think or what I think, but you knew in the course of your investigation that there was an office of Ross & Elliott in Birmingham ?—*A.* No.

Q. What did you think the £500 was in respect of ?—*A.* I conceived it to be in respect of expenditure on Elliott's own office.

10 *Q.* You knew he had an office in Birmingham ?—*A.* T. L. Elliott & Company or Mr. Elliott.

Q. If the deduction of £500 a year was reasonable at all the inference is you realised or your Department did that Elliott was engaging amongst his other activities in earning part of the profits in Birmingham ?—*A.* He was not working on partnership business in Birmingham.

Q. I ask you again have you any basis in fact on the facts found out by you apart from the three years in which the whole partnership accounts were returned in Kenya for assuming that all 20 the profits were assessable in East Africa as Eastern African income tax ?—*A.* I hold the opinion that the business is transacted in East Africa. I could be wrong but that is my opinion."

15. At the trial it was contended on behalf of the Appellant that there was no evidence to prove what part, if any, of the partnership profits represented the income of any person accruing in, derived from or received in Eastern Africa "so as to be assessable under s. 71 of the Income Tax Ordinance."

16. In his summing up to the jury the trial judge stated as follows :—

p. 80, l. 5.

"Now we will turn to the question of whether, if there was a 30 short declaration as to profits made, that was in contravention of the Ordinance, that is to say, whether there was a failure to disclose what ought to have been disclosed in the return ; and it has been suggested for the defence that there is nothing to show that shortfall in profits for each year was a shortfall which would fall to be taxed in E. Africa. It is suggested perhaps some of these profits would be taxable in the U.K. and therefore there was no obligation to show them in Kenya or E. Africa. Well now, we will first of all turn to the law—Section 7 (1) of the Income Tax Ordinance which is Section 8 of the replacing Act without 40 any material alteration says : 'Tax shall be charged in respect of each year of income upon the income of any person accruing in, derived from, or received in E. Africa.' So you must be satisfied that the income which was not declared, if you feel it was not declared—these commissions—you must be satisfied that it was income which would be taxable in E. Africa, that is to say, it accrued in, was derived from or was received in E. Africa. We have had evidence that some commissions were paid in the U.K. and you

must apply your mind to the question whether these particular shortfalls have been proved beyond reasonable doubt to have been commissions on which income tax could possibly be chargeable in E. Africa. Now Mr. Brown in his evidence when he was dealing year by year with these various shortfalls in each case said that the shortfall commission items were those described here as ' local commission ' or as ' payable direct to Nairobi ' and if you go through the evidence you will see that it is so in each case. I have been through it and I have checked up on that but you may remember yourself. If that is so then you may feel that these particular shortfalls certainly would relate to commission which accrued in, derived from or was received in E. Africa." 10

17. Before the Court of Appeal it was further contended on behalf of the Appellant that the question whether the partnership income or any part of it was derived in or accrued from or received in Eastern Africa was a question of fact for the jury and that there was no evidence (A) of any remittances to Eastern Africa; (B) that control of the business was located in Eastern Africa rather than in England; (C) that the capital was adventured in Eastern Africa rather than in England; (D) that such evidence as there was pointed to the fact that most of the partnership income had an English source; (E) that accordingly the prosecution had failed to prove a vital fact upon which all the charges depended. 20

18. Upon this point the Court of Appeal held as follows :—

p. 108, l. 14.

" In our view it was of prime importance that the jury should have a clear understanding of the precise questions of fact to which they should address their minds, that they should clearly distinguish between the two classes of alleged offences and know the elements constituting each class and that they should have explicit guidance in particular as to the factors which ought to be taken into account by them in determining what profits of the partnership business the Appellant was obliged by law to include in the returns of income. 30

In the case of the 31 counts charging omission of profits the elements of the offence are these: first, that there was a certain income which should have been included in the returns; secondly, that that income was omitted; thirdly, that it was the accused whom omitted it; fourthly, that he omitted it wilfully, that is to say, deliberately; and lastly, that he did so with intent to evade tax.

In the case of the five counts relating to expenses, the elements of the offence are, first, that a false item of expenses allegedly incurred by the partnership in the course of earning the income 40 concerned was included in the return; secondly, that it was the accused who included it; thirdly, that he did so wilfully; fourthly, that in so doinghe made use of a fraud, that is to say, was consciously dishonest; and lastly, that he did so with intent to evade tax.

Accordingly, the first question which arises on this appeal is as to whether the learned Judge put those matters clearly to the jury. We are unable to find in the summing up a satisfactory

answer. There was, we think, no clear direction on a number of essential points. The elements constituting the offences were not explained or even enumerated. In particular, no sufficiently clear guidance was given on the question of what categories of income should have been included in the returns, although this was a question of fact for the jury (see *Commissioner of Income Tax* v. *P. Co. Ltd.* (1954) 1 E.A.T.C. 131 at p. 148 and at p. 162). On the case presented for the Crown it was the basic issue as regards 31 out of the 36 counts and was the subject of such prolonged
10 discussion at the trial as may well have left the jury wondering how the matter stood; the various considerations affecting this issue such as the location of the control of the business, the place or places where the capital was adventured and the source or sources of the partnership income were not brought to the jury's notice; and any mention of that part of the income which was actually received in the United Kingdom and might be found not to have accrued in or been derived from British Eastern Africa was only a passing reference.

We must further point out that the Learned Judge's calculation
20 of the fine imposed on the Appellant was based, not on any finding of the jury to whom the question was never put, but on the assumption that the whole profits of the partnership were chargeable for tax under the Ordinances."

19. That it is submitted that in the circumstances the Court of Appeal ordered a new trial when the prosecution had failed to lead sufficient evidence to prove the offences alleged.

20. It is humbly submitted on behalf of the Appellant that that part of the Order of the Court of Appeal for Eastern Africa which directed a new trial was wrong and should be set aside for the following among
30 other

REASONS

(1) BECAUSE the Court of Appeal for Eastern Africa has no jurisdiction to order a new trial in a criminal case.

(2) BECAUSE the conferring of a power to direct a new trial in a criminal case and thus to put a man in peril a second time on the same charge is not a matter of practice and procedure.

(3) BECAUSE such a power exists it is one that ought only to be exercised rarely and in exceptional cases
40 and ought not to be exercised, as in the present case, where the prosecution has failed to prove the necessary ingredients of the offences.

(4) BECAUSE the Court of Appeal for Eastern Africa had jurisdiction to order a new trial it was contrary to justice to exercise it in this case.

JOHN FOSTER.

MARK LITTMAN.

No. 12 of 1956

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