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43, 1956

No. 12 of 1956.

In the Privy Council.

UNIVERSITY OF LONDON

ON APPEAL

20 FEB 1957

FROM THE COURT OF APPEAL FOR EASTERN AFRICA. ADVANCE

LEGAL STUDIES

43102

BETWEEN

ALFRED GRANVILLE ROSS *Appellant*

AND

THE QUEEN *Respondent.*

Case for the Respondent.

RECORD.

10 1. This is an Appeal from a Judgment, dated the 17th November, 1955, of the Court of Appeal for Eastern Africa (Worley, P., Bacon, J.A., and Corrie, J.), quashing the conviction of the Appellant on the 14th July, 1955, in the Supreme Court of Kenya (Windham, J., and a jury), of offences against the Income Tax and Excess Profits Tax Ordinances, and ordering that he be retried. pp. 106; 111. p. 84. p. 111.

2. The principal question in this Appeal is whether the Court of Appeal for Eastern Africa has power to order a retrial in appeals from Kenya. The statutory provisions relevant to the appeal are set out in the Appendix to this Case.

20 3. The Appellant was at all material times carrying on business as a manufacturer's agent in partnership with a man named Elliot, under the style of Ross & Elliot. The Appellant had his office in Nairobi and Elliot had his office in Birmingham. The method of carrying on the business was that the Appellant obtained orders in British East Africa and passed them to Elliot in Birmingham, and Elliot then obtained the goods and shipped them to East Africa. The profits of the business consisted principally of commissions earned on these orders, and were divided between the Appellant, who received two-thirds, and Elliot, who received one-third.

30 4. The Appellant was tried on an indictment containing 36 counts. 26 counts charged him with wilful omissions from income tax returns of income which should have been included. These counts referred to periods between 1941 and 1949. Some of them concerned returns made by the Appellant of the income of the firm, some of them returns made by him of Elliot's income, and the rest his returns of his own income. 5 of the pp. 1-15.

counts charged similar omissions under the Excess Profits Tax Ordinance. The remaining 5 counts charged fraudulent inclusion in income tax returns of figures purporting to represent expenses.

p. 88. 5. The Appellant was tried on this indictment before Windham, J., and a jury between the 11th and 14th July, 1955. At the conclusion of the trial the jury convicted the Appellant on all 36 counts. On the 15th July the learned Judge sentenced the Appellant to one year's imprisonment on each count, the sentences to run concurrently, and to pay penalties amounting to £83,948.

p. 90.
p. 92. 6. The Appellant appealed to the Court of Appeal for Eastern Africa 10 by a Notice of Appeal dated the 15th July, 1955. His grounds of appeal, set out in an amended Memorandum of Appeal dated the 19th October, 1955, alleged a number of omissions and misdirections in the learned Judge's charge to the jury, certain matters of evidence, and also a point on the sentence. These points were argued before the Court of Appeal, but the question of the power of the Court of Appeal to order a retrial was raised for the first time in the Appellant's Petition for Special Leave to Appeal to Her Majesty in Council.

pp. 106-110. 7. The Judgment of the Court of Appeal was delivered by Bacon, J.A., on the 17th November, 1955. After setting out the facts and summarising 20 the legislation under which the Appellant was charged, the learned Judge said that it had been of prime importance that the jury should have a clear understanding of the questions to be decided and should have explicit guidance about the factors to be taken into account in deciding what profits the Appellant had been obliged to include in the returns. The Court was unable to find that Windham, J., had put the relevant matters clearly to the jury; in particular he had not given them sufficiently clear guidance about what categories of income should have been returned. The considerations affecting the question whether the income had accrued in, or been derived from, Kenya, had not been brought to the jury's 30 notice. The Court could not say that the jury, if properly directed, must inevitably have convicted the Appellant. The Court had a discretion to order a new trial, and, considering that that was the only way in which justice could be done, they quashed the convictions and remitted the case to the Supreme Court of Kenya for a new trial.

8. Section 16 (1) of the Eastern African Court of Appeal Order in Council, 1950, is in these terms :—

“ 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 40 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.”

9. Section 18 of the 1950 Order in Council empowers the judges of the Court of Appeal to make Rules of Court for regulating the practice and procedure in appeals to the Court. It provides that the Rules of Court shall not take effect until they are approved by a Secretary of State, and that when so approved they shall have effect as if contained in the Order.

10. Rules of Court have been made under this Section and approved by the Secretary of State. Rule 41 provides among other things that at the hearing of an appeal the Court may confirm, reverse or vary the decision of the trial Court, or may order a retrial.

10 11. Section 378 of the Criminal Procedure Code of Kenya provides that any person convicted on a trial held by the Supreme Court of Kenya may appeal to the Eastern African Court of Appeal on the grounds described in Section 378. In addition to its original criminal jurisdiction the Supreme Court of Kenya exercises appellate criminal jurisdiction and in the exercise of this jurisdiction has power under section 354 to reverse the finding and sentence and acquit or discharge the accused, or order him to be tried by a Court of competent jurisdiction, or commit him for trial.

20 12. The Respondent submits that the power of the Court of Appeal to order a new trial in the present case may validly be derived from any of the following sources :—

(1) The grant by section 16 of “jurisdiction to hear and determine . . . appeals”.

(2) The grant by Rule 41 of the power to “order a re-trial”.

(3) The grant by section 16 of “the power, authority and jurisdiction vested in the Court from which the appeal is brought”.

30 13. As to paragraph 12 (1).—The Respondent submits that an unqualified jurisdiction to hear and determine appeals, such as that conferred by section 16, empowers the Court to make any order which may appear to it necessary for the purpose of doing justice in the appeal, including in a proper case an order for a re-trial. The order of a re-trial is a well-recognised method of determining an appeal both in England and throughout the Commonwealth. It is submitted that where the instrument conferring jurisdiction to determine appeals does not expressly or by implication limit that jurisdiction by excepting the power to order a re-trial, the instrument should be construed as conferring that power. The Order in Council does not expressly limit the jurisdiction, and neither the language of the Order nor the circumstances in which it was made warrant the implication that it was intended to deny to the Court the
40 power of ordering a re-trial.

14. The Court of Appeal for Eastern Africa was first constituted by the Eastern African Protectorates (Court of Appeal) Order in Council, 1902. Section 2 of that Order provided that the Court should exercise such appellate

jurisdiction and such other powers in relation to the High Courts and other Courts in the Protectorates as might from time to time be conferred by Ordinances passed under the provisions of the Orders in Council relating to the Protectorates.

15. The Court was re-constituted by the Eastern African Protectorates (Court of Appeal) Order in Council, 1909. Section 2 of that Order provided that the Court should have full power to determine in accordance with the Order any questions necessary to be determined for the purpose of doing justice in the case before the Court, and should exercise such appellate jurisdiction and such other powers in relation to the High Courts 10 and other Courts in the Protectorates as might from time to time be conferred by Ordinances passed under the provisions of the Orders in Council relating to the Protectorates.

16. The Court was again re-constituted by the Eastern African Court of Appeal Order in Council, 1921. Section 2 of that Order provided that the Court should have jurisdiction to hear and determine appeals (including reserved questions of law) from the Courts of the Territories in all causes and matters in which under any law for the time being in force in any of the Territories an appeal lay to the Court of Appeal, and that the Court in the exercise of its appellate jurisdiction should have full 20 power to determine any question and to pass any decree, judgment or order, the determining or the passing of which might appear necessary to the Court for the purpose of doing justice in the cause or matter before it.

17. As to Paragraph 12 (2).—The Respondent submits that Rule 41 of the Court of Appeal Rules, 1954, was validly made under section 18 of the 1950 Order in Council, which confers power to make Rules for regulating the practice and procedure in appeals to the Court. It is submitted that the nature of the order which may be made by the Court in the determination of an appeal—whether a simple order quashing the 30 conviction, the ordering of an inquiry, the alteration of the sentence, or the remission of the case for re-trial—is a matter of practice and procedure which can properly be regulated by a rule made under section 18. The Respondent will contend in the alternative that Rule 41, having been approved by the Secretary of State, takes effect under section 18 (2) as if contained in the order, and is therefore not open to challenge in any Court on the ground of *ultra vires*.

18. As to Paragraph 12 (3).—Section 16 (1) provides that for all purposes of and incidental to the hearing and determination of any appeal within its jurisdiction, the Court shall have the power, authority 40 and jurisdiction vested in the Court from which the appeal is brought. Under section 354 (1) of the Criminal Procedure Code, the Supreme Court, from which this appeal was brought, has power in an appeal from a conviction to reverse the finding and sentence and order the appellant to be tried by a Court of competent jurisdiction. In the Respondent's submission the Court of Appeal possesses the like power in an appeal from a conviction in the Supreme Court.

19. The Respondent submits that the power to order a re-trial was properly exercised in this case. The exercise of the power was rightly regarded by the Court of Appeal as a matter not of course but of discretion. There is no ground, in the Respondent's submission, for contending that that discretion was wrongly exercised, or that the exercise of that discretion should be interfered with by any order made by Her Majesty in Council on this appeal.

20. The Respondent submits that this appeal should be dismissed for the following (among other)

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REASONS.

- (1) BECAUSE the Court of Appeal had jurisdiction to order a re-trial.
- (2) BECAUSE in this case that jurisdiction was exercised on proper grounds.
- (3) BECAUSE there is no ground for interference with the order made by the Court of Appeal.
- (4) FOR the reasons given in the judgment of the Court of Appeal.

B. MACKENNA.

J. G. LE QUESNE.

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APPENDIX.

The Eastern
African Court
of Appeal Order
in Council 1950

THE EASTERN AFRICAN COURT OF APPEAL ORDER
IN COUNCIL, 1950.

2.—(1) In this Order, unless the context otherwise requires—

* * * * *

“ judgment ” includes decree, order, conviction, sentence and
decision ;

* * * * *

4. His Majesty's Court of Appeal for Eastern Africa (which was constituted under the Eastern African Court of Appeal Orders in Council, 1921 to 1947) shall continue to be a Court of Appeal for the Courts of Aden, Kenya, Tanganyika, Uganda and Zanzibar, and in addition shall be, and 10 is hereby constituted as, a Court of Appeal for the Courts of Seychelles and Somaliland. The Court shall be a Superior Court of Record.

* * * * *

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 20 and jurisdiction vested in the Court from which the appeal is brought.

* * * * *

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 30 Secretary of State, and when so approved shall have effect as if contained in this Order :

Provided that, if it shall be certified in any Rules that it is necessary that they should take effect before such approval can be obtained, such Rules may be made to take effect accordingly ; in which case such Rules may be disallowed by a Secretary of State (without prejudice to any thing lawfully done thereunder) but shall continue to have effect unless and until they shall be so disallowed and such disallowance shall be published by the Court.

(3) Except so far as they shall be amended, added to or revoked by 40 Rules of Court made under this Order, all Rules of Court made under the

Eastern African Court of Appeal Orders in Council, 1921 to 1947, and in force at the commencement of this Order, shall remain in force, and for the purposes of this Order shall be deemed to have been made under this Order but shall be applied with any adaptations, modifications or additions which the Court or Judge may consider necessary or just in consequence of the provisions of this Order.

The Eastern African Court of Appeal Order in Council, 1950—*continued.*

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20. The Eastern African Court of Appeal Order in Council, 1921, the Eastern African Court of Appeal Order in Council, 1923, the Eastern African Court of Appeal (Amendment) Order in Council, 1947, and the Eastern African Court of Appeal (Amendment) (No. 2) Order in Council, 1947, are hereby revoked.

THE EASTERN AFRICAN COURT OF APPEAL RULES, 1954.

PART III—FIRST APPEALS IN CRIMINAL MATTERS.

The Eastern African Court of Appeal Rules, 1954.

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 :

20 Provided that for the purposes of this part of these Rules the words “ Superior Court ” shall be deemed to include the Court of a Magistrate in a special district in Kenya or Uganda acting under the provisions of section 15 of the Criminal Procedure Code of Kenya or section 12 of the Criminal Procedure Code of Uganda and any other subordinate Court from which at any time an appeal may lie directly to the Court.

* * * * *

30 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 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.

(2) At the hearing of an appeal the Court may, if it thinks that a different sentence should have been passed, and whether or not an appeal has been brought against sentence, quash the sentence passed by the trial Court and pass such other sentence warranted in law (whether more or less severe) in substitution therefor as it thinks ought to have been passed.

40 (3) The Court shall in no case make any order as to payment of costs of any appeal governed by the provisions of this part of these Rules to or by the appellant or respondent.

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THE CRIMINAL PROCEDURE CODE
(Laws of Kenya, 1948, Chapter 27)

354.—(1) The Supreme Court shall then send for the record of the case, if such record is not already in court. After perusing such record and hearing the appellant or his advocate, if he appears, and the Attorney-General, if he appears, the court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—

(a) in an appeal from a conviction—

(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction, or commit him for trial ; or 10

(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence ; or

(iii) with or without such reduction or increase and with or without altering the finding, alter the nature of the sentence ;

(b) in an appeal from any other order, alter or reverse such order, and in either case may make any amendment or any consequential or incidental order that may appear just and proper. 20

(2) (a) An appellant, notwithstanding that he is in custody, shall be entitled to be present, if he desires it, at the hearing of the appeal :

Provided that where the appeal is on some ground involving a question of law alone, he shall not be entitled to be present, except with the leave of the Supreme Court.

(b) The right of an appellant who is in custody to be present at the hearing of the appeal shall be subject to his paying all expenses incidental to his transfer to and from the place where the court sits for the determination of the appeal :

Provided that the court may direct that the appellant be brought before the court in any case where in the opinion of the court his presence is advisable for the due determination of the appeal, in which case such expenses shall be defrayed out of the general revenues of the Colony. 30

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360. Any party to proceedings under this Part, other than proceedings by way of revision under sections 361 to 366, may appeal to the Court of Appeal for Eastern Africa on a matter of law (not including severity of sentence) but not on a matter of fact.

A judge of the Supreme Court may in his discretion in any case in which an appeal to the Court of Appeal for Eastern Africa is filed grant bail pending the hearing of such appeal. 40

Every such appeal shall be entered within thirty days of the date of the order appealed against and the provisions of sections 350 to 359 inclusive shall apply *mutatis mutandis* to appeals from the Supreme Court to the Court of Appeal for Eastern Africa.

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Appeals From Supreme Court.

The Criminal
Procedure Code
(Laws of Kenya,
1948, Chapter 27)
—continued.

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—

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- (a) against his conviction on any ground of appeal which involves a question of law alone ; and
 - (b) with the leave of such Court of Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal on any ground of appeal which involves 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.
- (2) A judge of the Supreme Court may in his discretion in any case in which an appeal to the Court of Appeal for Eastern Africa is filed, grant bail pending the hearing of such appeal.

INCOME TAX ORDINANCE

(Laws of Kenya 1948, Chapter 254)

Income Tax
Ordinance (Laws
of Kenya, 1948,
Chapter 254).

20 7.—(1) Income tax shall, subject to the provisions of this Ordinance, be payable at the rate or rates specified hereafter for the year of assessment commencing on the 1st January, 1937, and for each subsequent year of assessment upon the income of any person, who is not resident in the Colony, accruing in, derived from, or received in, the Colony, and upon the income of any person who is resident in the Colony, accruing in, derived from, or received in, the Colony and/or another East African territory in respect of—

- (a) gains or profits from any trade, business, profession or vocation for whatever period of time such trade, business, profession or vocation may have been carried on or exercised ;

EXCESS PROFITS ORDINANCE

(Laws of Kenya 1948, Chapter 255)

Excess Profits
Ordinance (Laws
of Kenya, 1948,
Chapter 255).

30 4.—(1) The profits chargeable with excess profits tax shall be all profits derived by any person from any business chargeable with income tax under the Income Tax Ordinance.

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ON APPEAL

from the Court of Appeal for Eastern Africa.

BETWEEN

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AND

THE QUEEN *Respondent.*

Case for the Respondent

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