~~P.C.~~
~~GL.G.~~ 2

Judgment
34/1965

IN THE PRIVY COUNCIL No. 17 of 1964.

ON APPEAL

FROM THE SUPREME COURT OF CEYLON.

B E T W E E N :

JANIS WIJESURIYA APPELLANT

80973

- v -

H. R. AMIT, GOVERNMENT AGENT RESPONDENT

CASE FOR THE APPELLANT

10. 1. This is an appeal by special leave granted upon the 9th day of March 1964 from a Judgment of the Supreme Court of Ceylon (H. N. G. Fernando J.) dated the 14th day of October 1963 which dismissed the appeal from the decision of the Magistrate sitting at Matara dated the 8th day of November 1962 whereby the Appellant was convicted and fined the sum of Rs.472/- as hereinafter appears. Record.

2. The question raised in this Appeal is whether the Heavy Oil Motor Vehicles Taxation (Amendment)
20. Act, No. 20 of 1961 made the user of a Motor Vehicle unlawful retrospectively and as a consequence whether the registered owner of a vehicle at the time of such user was made liable to be convicted and fined.

3. By a written Notice dated the 11th day of May 1962 the Respondent purported to require the Appellant to pay the sum of Rs.472/- within 7 days. The said sum was alleged to be in respect of arrears of heavy oil tax for the period from
30. September to December 1959. The Respondent also stated that he was acting by virtue of powers that were vested in him under section 4(2) of the Heavy Oil Motor Vehicles Taxation Ordinance No.56 of 1935 (1956 reprint Cap.249) hereinafter called 'the principal Ordinance') as amended by Act No.20 of 1961 (hereinafter called 'the amending Act'). pp. 1/2.

4. By a letter dated the 1st day of June 1962 the pp. 2/3.

Record.

Respondent informed the Magistrate at Matara that the Appellant had not complied with the aforesaid notice and a Certificate was enclosed signed by the Respondent alleging that the Appellant was in default as regards tax upon a certain specified vehicle. The monthly rate for the said vehicle was also shown and arrears for four months were claimed in accordance with the notice.

pp. 3/4.

5. Upon the same day as the letter and certificate referred to in the previous paragraph the Appellant was charged in the following terms:-

A. You are hereby charged that you did within the jurisdiction of this Court at Kotuwegoda, Matara on 8.9.1959 possess a heavy oil Motor Vehicle bearing registered number 22 Sri 854 in respect of which Heavy Oil Tax was not paid on the said date in contravention of Section 5(1) of the Heavy Oil Motor Vehicles Taxation Ordinance (Chapter 249) as amended by the Heavy Oil Motor Vehicles Taxation (Amendment) Act No: 20 of 1961 and thereby committed an offence punishable under Section 5(2) of the said Ordinance read with section 4(1) thereof.

p.4, l.4.

On the 6th day of September 1962 the Appellant pleaded "Not Guilty" to the said charge.

p.5,ll.26-28

6. The hearing of the proceedings took place at the Magistrate's Court, Matara in the course of which it was conceded on behalf of the Respondent that the vehicle in question was registered after 1956. The effect of this admission is that as from 12th day of July 1956 a vehicle using diesel oil, as the vehicle in question did, was not liable to pay tax under the principal Ordinance. This cameabout as a result of a Customs Ordinance operating from that day making diesel oil liable to import duty and the original ordinance only applied to uncustomed oil. It was common ground that this position remained until the passing of the amending Act in 1961 so that during the period for which tax was claimed, namely from September to December 1959, the Appellant had committed no offence.

7. On behalf of the Appellant the following

admissions were made :- Record.

B. (1) That he was the registered owner of the vehicle from September to December, 1959. p.5,11.28-39 p.20,11.21-29

(2) That the vehicle was a Heavy Oil Motor Vehicle within the meaning of Section 6(2)(c) of the Ordinance as amended by the Act.

(3) That notice of tax liability had been received and not complied with.

10. (4) That if tax was payable, the amount was as claimed.

8. The issue before the learned magistrate thus became the construction to be placed upon the amending Act when read together with the principal ordinance and the combined effect thereof as far as the Appellant was concerned. The amending Act which received the Assent upon the 25th day of April 1961 consists of two clauses the first of which concerns the title of the Act while
20. the second is in the following terms :-

C. 2(1) Section 6 of the Heavy Oil Motor Vehicles Taxation Ordinance, hereinafter referred to as the "principal enactment," is hereby amended, in sub-section (2) of that section, as follows:- p.23,l.26 to p.24, l.4.

(a) by the substitution, in the definition of "heavy oil", for all the words from "or any other oil" to the end of that definition, of the words "or Diesel Oil;";

30. (b) by the substitution, in the definition of "heavy oil motor vehicle", for the words "motor car", of the words "motor vehicle"; and

(c) by the substitution, in the definition of "registered owner", for the words "motor car", of the words "motor vehicle".

(2) The amendment made in the principal enactment by paragraph (a) of sub-section (1)
40. shall be deemed to have come into effect on the thirteenth day of July, 1956.

Record.

(3) The amendment made in the principal enactment by paragraphs (b) and (c) of sub-section (1) shall be deemed to have come into effect on the first day of September 1951.

9. The learned magistrate delivered judgment upon the 8th day of November 1962 the last part of which was in the following terms:-

p.11, ll.32-41.

"On the authority of Mr. Justice Nagalingham (this was a reference to the judgment in Kathirithamby v. Subramanium 52 (sic) NLR 62) I have come to the conclusion that in this case Act No.20 of 1961 operates as if it had been enacted together with the main ordinance and that it operates retrospectively in respect of the entire ordinance. I accordingly hold that the accused must be deemed to have been in default when tax was not paid for the four months September to December 1959 and that the Government Agent is entitled to have this amount levied as a fine."

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pp.13,l.14

10. Upon the 14th day of November the Appellant lodged a petition of appeal to the Supreme Court against the said judgment. The grounds of appeal were set out as follows :-

D. (a) The said order is contraryto law.

(b) As the Heavy Oil Motor Vehicles Taxation Ordinance is "an ordinance to impose a tax on motor vehicles using uncustomed oil as fuel", no tax is payable in respect of the aforesaid vehicle, since it used diesel oil which ceased to be an uncustomed oil as after 13th July 1956.

30.

(c) The said vehicle is one registered under the Motor Traffic Act, and the Heavy Oil Motor Vehicles Taxation Ordinance does not apply to vehicles registered under the said Act.

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(d) the amount sought to be recovered by the complainant-respondent being of the nature of arrears of tax, he could not have issued a certificate

under Section 4(1) of the said Ordinance, since a certificate thereunder can be issued only where default is made in the payment of the tax but not for the recovery of any arrears of tax.

(e) The defaulter-appellant has made no default within the meaning of Section 4 of the said Ordinance, since no tax fell due on him in September-December 1959 in the manner set out in section 2 thereof.

(f) The complainant-respondent could not in any event have proceeded to recover the said sum of money since there is no provision either in the principal enactment or in the amending Act of 1961 which requires the defaulter-appellant to pay any arrears of tax.

11. The said appeal was argued upon the 13th day of May 1963 and judgment was delivered upon the 14th day of October 1963. The learned judge dismissed the appeal incorporating the reasons given in the case of Assenkudhoos Abdul Basir v. The Government Agent, Puttalam, which was decided upon the same day by the same judge and raised the same issues as the instant case. The ratio decidendi would appear to be that the Supreme Court had held in R. v. Liyanage 65 NLR 75, 84 that certain legislation which was said to be in similar language to the amending Act had created a penal offence retrospectively. It was thus held that since a taxing statute could not be construed more strictly than a penal statute the former must also operate in a retrospective manner and accordingly the Appellant was guilty of the offence charged.

12. The Appellant contends that the reasoning and findings of both the Courts below are wrong. As appears from paragraph 9 above, the learned Magistrate based his decision specifically upon one authority but this case was overruled by a full bench of five judges in Akilandanayaki v. Sothinagaratnam 58 NLR 385 with the result that the amending Act there construed was held not to operate retrospectively.

Record.

The learned judge, it is submitted, fell into error in holding that because a certain penal statute operated retrospectively it therefore followed that the amending Act in the instant case so operated. As the learned judge appreciated, the subject matter of the legislation was different but the appellant contends that it is not sufficient to establish a similarity in the time element relating to the operation of amending acts to hold that they must operate similarly in all respects.

13. The Appellant also contends that the Courts below should have considered the scheme of taxation contained in the principal ordinance and how far, if at all, such scheme could operate retrospectively. Such a consideration would have shown (inter alia)

(a) that by s.2(2) the tax due was payable in advance either annually or monthly. If payment was made annually it had to be made before the seventh day of January but if made monthly it had to be made before the seventh day of each month.

(b) s.2(4) provided for a refund or set-off in respect of non-user during a period in respect of which tax had been paid in advance.

(c) s.2(5) made provision for a reduced rate of tax paid in advance beyond certain periods.

(d) s.3 set out a scheme for the issue and endorsement of a payment card whose form was prescribed in the Second Schedule to the Ordinance and which had to be carried on the vehicle and was to be produced upon the demand of either a police officer or an examiner of motor vehicles.

In view of the above four matters and upon consideration of the scheme of taxation as a whole the Appellant respectfully submits that it is unable to operate retrospectively because if it did so operate a liability would be incurred by vehicle owners in a manner which could not be fully or accurately ascertained, in particular, in that such owners would, or might, not be fully

aware of whether they had used or caused to be used any oil and vehicle between the 13th day of July 1956 and the 25th day of April 1961 such as would create a liability to tax in accordance with the provisions of the amending Act. Record.

14. The Appellant further respectfully submits that section 2 of the amending Act is unclear and imprecise, in particular, in that in Section 2(1)(a) there is doubt whether the words "or any other oil" are to be included or excluded in the amending definition. Further, that the amending Act purports to amend Section 6 of Cap.190 of the Legislative Enactments of Ceylon, 1938, Revision, but this Act had already been replaced, as amended, by Cap.249 of the Legislative Enactments of Ceylon, 1956 Revision. Both the learned Magistrate and the learned Judge construed the reference in the amending Act to the "Principal Enactment" as being a reference to the said Cap.249. The Appellant respectfully submits that they erred in so doing because (inter alia) this would render Sections 2(1)(b) and 2(1)(c) otoise and redundant because the definition of "Heavy Oil Motor Vehicle" in the said Cap.249 already contains the words "Motor Vehicle" which are the words sought to replace other words. The word "vehicle" in this context is not contained in the said Cap.190 but the word "car" is used. p.24,l.11 to p.26,l.1.

15. That the Appellant further submits that in view of the matters set out in the preceding paragraph recourse should have been had for the purposes of interpretation to the preambles of both Cap.190 and Cap.249 which are in identical terms as follows :-

> "An Ordinance to impose a tax on motor Vehicles using uncustomed oil as fuel."

and that the amending Act ought not in these circumstances to be held to operate in a manner thatis repugnant to the said preambles.

Additional difficulties are caused in this and other respects in that the definition of "Registered Owner" in Cap.190 is as follows :-

> "(f) 'Registered owner' means the person registered as the owner of a Motor car

Record.

under the provisions of the Motor Car Ordinance."

whilst in Cap.249 the following definition appears :-

"(f) 'Registered owner' means the person registered as the owner of a Motor Vehicle under the provisions of the Motor Traffic Act."

(Note: The Motor Car Ordinance was repealed by the Motor Traffic Act on the 1st September, 1951)

16. The provisions of Section 6(3)(a) and (b) of the Interpretation Ordinance (1956 reprint Cap.2.) are to the following effect :-

"6. (3) Whenever any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected -

(a) the past operation of or anything duly done or suffered under the repealed written law;

(b) any offence committed, any right, liberty, or penalty acquired or incurred under the repealed written law."

(c) .....

The Appellant submits that the language of the amending Act does not make or purport to make any "express provision" retrospectively amending any part of Section 2(2), 3, 4 or 5 of the original Ordinance. Accordingly the amending Act does not affect the Appellant's lawful possession or use of the vehicle during the period September, 1959 to December, 1959 inclusive or the right acquired and enjoyed by him under the Original Ordinance to use his vehicle during that period without incurring liability to pay tax or to be punished or penalised thereunder.

17. The question as to whether amending legislation in Ceylon has retrospective effect is regulated by Section 6(3) of the Interpretation

Ordinance (1956 reprint Cap.2) which provides as follows :- Record.

> (3) Whenever any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected -
>
> (a) the past operation of or anything duly done or suffered under the repealed written law;
>
> (b) any offence committed, any right, liberty, or penalty acquired or incurred under the repealed written law;
>
> (c) any action, proceeding, or thing pending or incompleted when the repealing written law comes into operation, but every such action, proceeding, or thing may be carried on and completed as if there had been no such repeal.
>
> (4) This section shall apply to written laws made as well before as after the commencement of this Ordinance.

The Appellant submits that there are no express words in the amending Act which retrospectively make the user of a vehicle unlawful in respect of a period during which such user did not consitute an offence.

18. In view of the matters aforesaid the Appellant submits that both the learned Magistrate and the learned Judge in the Supreme Court of Ceylon came to a conclusion that was wrong in law and that the Appeal ought to be allowed for the following (among other)

R E A S O N S

1. That the amending Act No.20 of 1961 did not operate retrospectively so as to make the Appellant liable to

Record.

tax either as claimed by the Respondent or at all

2. Because the right of the Appellant to use his vehicle lawfully without payment of tax during the relevant period was not expressly affected by the subsequent amending Act.

3. That at no time was the Appellant a defaulter having failed to pay tax due so as to be liable to be prosecuted by the Respondent in respect of arrears. 10.

E. F. N. GRATIAEN.

JOHN A. BAKER.

No.17 of 1964.

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B E T W E E N :-

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- v -

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Respondent

CASE FOR THE APPELLANT

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