91440

1967/11

IN THE PRIVY COUNCIL No. 23 of 1965

ON APPEAL
FROM THE SUPREME COURT OF THE ISLAND OF CEYLON

BETWEEN:

PANDITHA APPURAMILAGE DHARMASENA (3rd Accused)
MALLAWANTHANTHRIGE SIRIPALA PERERA (4th Accused) Appellants

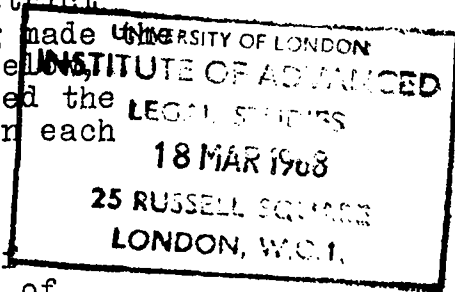
- and -

INSPECTOR OF POLICE, KEGALLA Respondent

CASE FOR THE APPELLANTS

RECORD

10 1. This is an appeal by Special Leave against the judgment and decree of the Supreme Court of Ceylon dated the 25th January, 1965 whereby, on an appeal by the Appellants against their convictions and the sentences passed on them by the District Court of Kegalla, the Supreme Court, having made the several orders referred to in paragraph 5 below, dismissed the Appellants' appeal and enhanced the aggregate sentence of imprisonment passed on each of them. — p.118 11 - p.120 1.15; pp.116-117


UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
18 MAR 1968
25 RUSSELL SQUARE
LONDON, W.C.1.

20 2. The Appellants and 5 other persons were tried on indictment by the District Judge of Kegalla on three charges (counts 1, 3 and 4 of the indictment) which were as follows:-

"1. That on or about 6th February, 1961 at Andirimada in the division of the Kegalla within the jurisdiction of this court they with others unknown were members of an unlawful assembly the common object of which was to commit robbery of Motor car bearing 30 registered No. EL 5241 from the possession of E.M. PunchiBanda - an offence punishable under section 140 of the Penal Code." — p.2 11.16-25

"3. At the same time and place aforesaid one or more members of the unlawful assembly did — p.3 11.8-30

RECORD

> commit robbery of the said motor car valued at Rs. 4000/- which offence was committed in the prosecution of the common object of the said unlawful assembly and therefore guilty of an offence punishable under section 380 of the Penal Code read with Section 146 of the same code."
>
> "4. At the same time and place aforesaid the above named accused did commit robbery of the said motor car belonging to E.M.PunchiBanda an offence punishable under Section 380 read with section 32 of the Penal Code." 10

The first accused (Hendrick Appuhamy) was, in addition, charged with a fourth offence which was as follows:-

p.3 ll.1-7

> "2. At the same time and place aforesaid and in the course of the same transaction the 1st accused being a member of the said unlawful assembly was armed with a deadly weapon to wit a revolver - an offence punishable under Section 141 of the Penal Code." 20

p.105 l.25- p.108 l.13

3. All the accused were found guilty on counts 1, 3 and 4 of the indictment and were sentenced to 3 months rigorous imprisonment on each count, the sentences on counts 3 and 4 to run concurrently. The 1st accused was also found guilty on count 2 of the indictment and was sentenced to 1 month's rigorous imprisonment on that count. 30

pp.109-115

4. The Appellants and the 1st accused appealed to the Supreme Court, and the Supreme Court heard the appeals except the appeal of the 1st accused who had died pending the hearing of the appeal.

p.116 ll.29-32

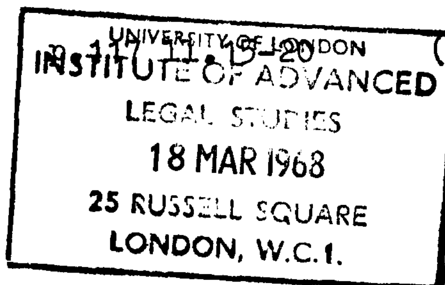
pp.116-117

5. By its judgment dated the 25th January 1965, the Supreme Court

(a) dismissed the appeals in respect of count 1

p.117 ll.15-20

(b) acquitted both the Appellants on count 4 of the indictment on the ground that this 40



UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
18 MAR 1968
25 RUSSELL SQUARE
LONDON, W.C.1.

91440

RECORD

count was alternative to count 3;

(c) recorded convictions against both the Appellants on count 2 of the indictment and sentenced each of them to 6 months' imprisonment on that count and

p.117 ll.21-37

(d) enhanced the sentence on count 3 from 3 months' to 2 years' rigorous imprisonment.

6. The principal grounds on which the Appellants rely are

10 (a) that they were convicted of an offence (count 2) with which they were never charged;

(b) that both the Courts below failed to consider in respect of Counts 1 and 3 the evidence in the case which, it is submitted, involved in doubt a necessary ingredient in the offence of robbery, namely a dishonest intention.

(c) that, in any event, the order enhancing
20 the sentence on count 3 is unjustifiable for the reason that the order was consequential on the invalid convictions referred to in sub-paragraph (a) above.

7. In regard to ground 6(a), it is respectfully submitted that the convictions on count 2 are contrary to natural justice and to the imperative provisions of Chapter 19 of the Criminal Procedure Code (Chapter 20 of the Legislative Enactments of Ceylon, 1956 Edition) relating to trials,
30 particularly, section 204 which is as follows:

> "204. When the court is ready to commence the trial the accused shall appear or be brought before it and the indictment shall be read and explained to him and he shall be asked whether he is guilty or not guilty of the offence charged."

8. In regard to ground 6(b), it is respectfully submitted as follows:

RECORD

(a) Dishonesty is an essential ingredient of the offence of robbery; and by definition (section 22 of the Penal Code) "dishonesty" necessarily implies an intention to cause unlawful loss or unlawful gain.

(b) Neither the Trial Court nor the Supreme Court considered the issue whether the vehicle in question was removed with the intention of causing wrongful loss or wrongful gain. Neither of the Courts below has recorded a finding of fact against either Appellant on this vital issue. 10

(c) According to the prosecution evidence car EL 5241, the subject matter of the alleged robbery, came into the possession of the complainant PunchiBanda in circumstances recounted by the trial judge as follows:-

p.101 l.13 - p.102 l.4

"PunchiBanda stated that he had known the 1st accused for some time. He was a car broker. In 1959 he the witness was in possession of a Ford car. In 1960 the 1st accused promised to sell his car and get him another car. In the meanwhile he had asked him to use an A40 car. Some time later the 1st accused said that he could give him Morris Minor Car No. EL 5241 in exchange for his Ford Prefect car. The 1st accused also said that that in addition he could have cash Rs. 500/-. This transaction was entered upon on 16.10.60 but he did not take the Morris Minor car as he had to return the Austin car to the 1st accused. The 1st accused came to his house a few days later and stated that the payment of Rs.500/- in addition to the exchange was too much for a Ford Prefect car and he wanted him to return the money. Before this the 1st accused had sent him the Morris Minor car along with the transfer forms and 20 30 40

RECORD

> the registration certificate. He refused to give back the Rs.500/-. The 1st accused thereupon uttered a threat that he would remove this car before long.
>
> "However he perfected the transfer forms and sent them to the Registrar of Motor Vehicles. He produced the certificate of registration which was marked P3. According to P3 the Morris Minor car No. EL 5241 was transferred to PunchiBanda on 20.12.60. The witness stated that on the day in question he was in possession of car No. EL 5241 and those accused robbed of him of this car".

10

These circumstances are further complicated by certain additional facts admitted by PunchiBanda. He stated that the Austin A40 car which the 1st accused had lent him was damaged in an accident on the 6th November, 1960, while it was being driven by the complainant. He also gave the following evidence in regard to the transaction of the 16th October, 1960:-

20

p.18 ll.9-19

"Q. The transfer forms were handed to you on this day? A. Yes.

p.31 ll.12-29

Q. This receipt (P4) was handed to you? A. Yes. P4 was handed to me on the day the transfer forms were handed to me.

30

Q. The Morris Minor was available to you on this day? A. Yes.

Q. Why did you not bring it back to Kegalla on this day? A. Hendrick Appuhamy told me that till I returned the A40 he will not give the Morris Minor car.

Q. If the A40 had (not) met with the accident on 6.11.60 on this day the car should have been available? A. Yes."

40

RECORD

(d) Even if the facts established by the prosecution could support the view that the property in the vehicle had passed to the complainant PunchiBanda before it was retaken by the 1st accused, they do not establish beyond reasonable doubt that the Appellants were aware of the dishonest intention of the 1st accused when they helped him to retake the car. 10

9. Sections 366 and 379 of the Penal Code (Chapter 19 of the Legislative Enactments of Ceylon, 1956 Edition) are as follows:-

"366. Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit "theft"."

"379. In all robbery there is either theft or extortion. 20

Theft is "robbery", if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt or of instant wrongful restraint." 30

10. In regard to ground 6(c), it is respectfully submitted that -

(a) the findings of the trial judge on count 2 do not in any way implicate the Appellants; and

(b) the fact the 1st accused alone was charged with the offence in count 2 indicates that the Prosecution did not allege that the Appellants were aware, at the time they joined the 1st accused, 40

RECORD

that he was armed with a revolver. In the circumstances, it was wrong to treat the evidence relevant to count 2 against the 1st accused as evidence which the Appellants were called upon to rebut at the trial.

11. It is respectfully submitted that the judgment of the Supreme Court is wrong and that the Appellants ought to be acquitted for
10 the following among other

REASONS

(1) BECAUSE the intention to commit the offence of robbery has not been proved against the Appellants.

(2) BECAUSE the Courts below did not consider the question whether the conduct of the 1st accused or of the other accused was dishonest.

(3) BECAUSE the Supreme Court was wrong in
20 convicting the Appellants of an offence with which they were not charged.

(4) BECAUSE the Supreme Court was wrong in enhancing the sentences on count 3 of the indictment.

E. F. W. GRATIAEN

WALTER JAYAWARDENE

No. 23 of 1965

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON

B E T W E E N:

PANDITHA APPUHAMILAGE DHARMASENA (3rd accused) and MALLAWANTHANTHRIGE SIRIPALA PERERA (4th accused) Appellants

- and -

INSPECTOR OF POLICE, KEGALLA Respondent

C A S E FOR THE APPELLANTS

WILKINS NEWMAN AND CO.,
27a Sloane Square,
London S.W.1.
and
10 Adam Street,
Strand, London W.C.2.

Solicitors for the Appellants