Privy Council Appeal No. 23 of 1965

Panditha Appuhamilage Dharmasena and Mallawanthanthrige Siripala Perera – – – – – – *Appellants*

v.

Inspector of Police, Kegalla – – – – – – *Respondent*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH APRIL 1967

Present at the Hearing:
VISCOUNT DILHORNE
LORD HODSON
LORD GUEST
LORD UPJOHN
SIR HUGH WOODING
[*Delivered by* VISCOUNT DILHORNE]

The appellants were tried with five other persons in the District Court of Kegalla on an indictment containing four counts which read as follows:—

"(1) That on or about the 6th February 1961 . . . you with others unknown, were members of an unlawful assembly, the common object of which was to commit robbery of Motor Car bearing registered number EL 5241 from the possession of . . . Punchi Banda and that you have thereby committed an offence punishable under section 140 of the Penal Code.

(2) At the same time and place aforesaid and in the course of the same transaction you H. P. Hendrick Appuhamy the 1st accused being a member of the unlawful assembly aforesaid were armed with a deadly weapon to wit a revolver and that you have thereby committed an offence punishable under section 141 of the Penal Code.

(3) That at the same time and place aforesaid and in the course of the same transaction one or more members of the unlawful assembly did commit robbery of the said Motor Car . . . which said offence was committed in prosecution of the common object of the said unlawful assembly aforesaid and you being members of the unlawful assembly aforesaid at the time of the committing of the said offence are thereby guilty of an offence punishable under section 380 of the Penal Code read with section 146 of the Penal Code.

(4) That at the time and place aforesaid in the course of the same transaction you the above named accused did commit robbery of the said Motor Car . . . and that you have thereby committed an offence punishable under section 380 read with section 32 of the Penal Code."

The 1st accused Hendrick Appuhamy was convicted on all four counts. The appellants and the other accused were convicted on the 1st, 3rd and 4th counts. The 1st accused was sentenced to one month's rigorous imprisonment on count 2 and to three months' rigorous imprisonment on each of the other counts, the sentences on counts 3 and 4 to run concurrently so that he had to serve a sentence of seven months in all.

The appellants were each sentenced to three months' rigorous imprisonment on counts 1, 3 and 4 with the sentences on counts 3 and 4 to run concurrently so that they were required to serve a total of six months' imprisonment.

All the accused appealed to the Supreme Court. The 1st accused died before his appeal was heard.

The Supreme Court (Sri Skanda Rajah J. and Alles J.) dismissed the appeal. Sri Skanda Rajah J. delivered a judgment with which Alles J. agreed. He said—

> " The accused were charged on four counts, the 4th being alternative to the 3rd. The 1st count was in respect of an unlawful assembly, the common object of which was to commit robbery of a car. The 2nd count was in respect of being armed with a deadly weapon, viz., a revolver, while being members of an unlawful assembly. The third was for robbery of a motor car valued at Rs.4,000/- while being members of an unlawful assembly. The 4th count was on the basis of a common intention, which will be alternative to count 3. The Judge purported to convict the accused on all four counts. The accused could be found guilty either of the 3rd or the 4th count and not on both counts. We would therefore set aside the conviction and sentence in respect of count 4.
>
> In our view the sentence passed in this case was manifestly inadequate. The accused were armed to the teeth—with revolver, iron rods, etc. On count 1 the learned District Judge purported to pass a sentence of three months' rigorous imprisonment and he purported to pass a sentence of one month's rigorous imprisonment in respect of count 2 (section 141) which is a more serious offence than count 1 and punishable with two years' imprisonment. We would alter the sentences in respect of counts 2 and 3. In respect of count 2 we pass a sentence of 6 months' rigorous imprisonment and in respect of count 3 two years' rigorous imprisonment. The sentences will run concurrently."

The appellants now appeal from the decision of the Supreme Court with special leave.

The judgment shows that the members of the Supreme Court were under the impression that the appellants had been convicted and sentenced by the District Judge on count 2. That was not the case. That count related, as has been said, only to the 1st accused Hendrick Appuhamy.

The sentence the Supreme Court purported to pass on the basis that the appellants had been convicted on count 2 when in fact they had not been charged in that count, cannot be allowed to stand and must be quashed.

Section 347 of the Criminal Procedure Code gives the Court power on the hearing of an appeal, *inter alia,* to:—

> " alter the verdict maintaining the sentence, or with or without altering the verdict increase or reduce the amount of the sentence or the nature thereof."

The Supreme Court had therefore power to increase the sentence passed on the appellants on count 3 from 3 months' to 2 years' rigorous imprisonment just as they would have had power if the appellants had been convicted on count 2 and sentenced to 1 month's rigorous imprisonment to increase that sentence to 6 months.

In *Hardtmann v. R.* [1963] A.C. 746, their Lordships refused to interfere in a case in which the sentence passed appeared to them excessive. Lord Morris of Borth-y-Gest, delivering the judgment of the Board, cited the following passage from the observations made by Viscount Simon L.C. in *Muhammad Nawaz v. The King-Emperor* (L.R. 68 I.A. 126 at p. 127):

> " The Judicial Committee is not a revising court of criminal appeal: that is to say, it is not prepared, or required, to re-try a criminal case, and it does not concern itself with the weight of evidence, or the conflict of evidence or with inferences drawn from evidence . . . ."

Lord Simon in that case also observed that broadly speaking the Judicial Committee will only interfere where there has been an infringement of the essential principles of justice.

In this case it was proved that the 1st accused was armed with a deadly weapon, a revolver, for he was convicted on count 2.

Punchi Banda was asked in the course of his examination in chief whether any of the accused had anything in his hand. He said—

> " They had clubs. The 1st accused had a pistol. The 3rd accused and some others pulled me out of the car. Then I fell into a drain. Some of them had iron rods also."

In cross-examination, he said—

> " One or two persons had iron rods. Someone raised an iron rod but I cannot remember who it was."

The 2nd witness for the prosecution, a passenger in the car with Punchi Banda when the car was seized, said that about 12 to 15 persons got out of the van which held them up and that they were armed with iron rods. In cross-examination he said that he could not remember what weapons they had. Another passenger in the car EL 5241 said he could not remember " whether these people were armed with any weapons ".

There was thus some evidence before the District Judge of the carrying of iron rods by members of the unlawful assembly. There was no evidence that any blow was struck with the iron rods.

If in this case the only question was whether in deciding to increase the sentences passed on the appellants on the 3rd count, the Supreme Court was entitled to attach importance to this evidence, their Lordships would not think it right to interfere. Sri Skanda Rajah J. said that in the view of the Supreme Court the sentences passed were manifestly inadequate. The possibility cannot be excluded that in reaching this conclusion the minds of the learned Judges were affected by their erroneous belief that the appellants had been convicted on count 2 and had only received a sentence of 1 month's rigorous imprisonment for that offence which was, as they pointed out, a more serious offence than that charged in count 1.

The Supreme Court not only purported to increase the sentence on count 2 from 1 month's to 6 months' rigorous imprisonment but also increased the sentence on count 3 from 3 months' to 2 years' rigorous imprisonment with the result that the appellants instead of having to serve a total of 6 months will now have to serve 24 months.

It would in their Lordships' view be manifestly unjust and an infringement of the essential principles of justice if it were the case that this substantial increase of sentence was in part due to the erroneous belief that the appellants had been convicted on count 2.

In their Lordships' opinion this case should be remitted to the Supreme Court for further consideration of the appropriate sentence the appellants should receive on count 3 having regard to all the circumstances, to the fact that the District Judge who heard the witnesses, did not appear to attach importance to the evidence in relation to the carrying of iron rods and to the fact that the appellants were not charged with or convicted of an offence against section 141 of the Penal Code.

Counts 3 and 4 were treated by the Supreme Court as alternative counts. Their Lordships agree with this conclusion.

For the reasons stated their Lordships will humbly advise Her Majesty that this appeal should be allowed to the extent that the sentences on count 2 passed on the appellants should be quashed and that the case should be remitted to the Supreme Court for further consideration of the sentence on count 3.

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In the Privy Council

PANDITHA APPUHAMILAGE DHARMASENA AND MALLAWANTHANTHRIGE SIRIPALA PERERA

v.

INSPECTOR OF POLICE, KEGALLA

DELIVERED BY
VISCOUNT DILHORNE

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