Privy Council Appeal No. 26 of 1938

Chung Chi Cheung - - - - - - *Appellant*

v.

The King - - - - - - - *Respondent*

FROM

THE FULL COURT OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND DECEMBER, 1938.

Present at the Hearing:

LORD ATKIN.
LORD MACMILLAN.
LORD PORTER.
SIR LANCELOT SANDERSON.
SIR GEORGE RANKIN.

[*Delivered by* LORD ATKIN.]

This is an appeal from the Full Court of Hong Kong dismissing an appeal by the appellant from his conviction and sentence at a trial in the Supreme Court of Hong Kong before the Chief Justice, MacGregor C.J., and a jury. The appellant was convicted of the murder of Douglas Lorne Campbell and was sentenced to death. The murder was committed on board the Chinese Maritime Customs cruiser "Cheung Keng" while that vessel was in Hong Kong territorial waters. Both the murdered man and the appellant were in the service of the Chinese Government as members of the officers and crew of the cruiser. The former was captain: the appellant was cabin boy. Both were British nationals. At the trial the point was taken that as the murder took place on an armed public vessel of the foreign Government, the British Court had no jurisdiction in the matter. The contention was overruled by the Chief Justice at the trial, and on appeal his decision was upheld by the Full Court over which he presided.

In order to elucidate the legal position it will be necessary to make a short statement of the material facts. On 11th January, 1937, the accused shot and killed the captain. He then went up the ladder to the bridge and shot at and wounded the acting chief officer, and then went below and shot and wounded himself. The acting chief officer as soon as he was wounded directed the boatswain to proceed to Hong Kong at full speed and hail the police launch. He wanted, he said, help to arrest the accused from the Hong Kong police. Within a couple of hours the launch of the

Hong Kong water police came alongside in answer to the cruiser's signal. The police took the wounded officer and the accused to hospital. They took possession of the two revolvers with which the accused had armed himself, of the spent revolver bullets and expended shells, and of some unexpended cartridges. On 25th February, extradition proceedings were commenced against the accused on the requisition of the chairman of the Provincial Government of Kwangtung alleging murder and attempted murder on board the Chinese Customs cruiser " within the jurisdiction of China while the said cruiser was approximately one mile off Futaumun (British waters)." This appears to be an allegation that the vessel had not at the time reached British territorial waters. The fact that the crime was in reality committed within British waters is not now in dispute. After many adjournments the magistrate decided, on evidence called for the defence, that the accused was a British national and that the proceedings therefore failed. The accused was at once rearrested and charged with murder " in the waters of this colony " and duly committed. At the hearing before the magistrate and at the trial the acting chief officer and three of the crew of the Chinese cruiser were called as witnesses for the prosecution. Police witnesses produced and gave evidence as to the revolvers, cartridge cases and bullets. As has already been stated the accused was convicted and sentenced to death.

On the question of jurisdiction two theories have found favour with persons professing a knowledge of the principles of international law. One is that a public ship of a nation for all purposes either is or is to be treated by other nations as part of the territory of the nation to which she belongs. By this conception will be guided the domestic law of any country in whose territorial waters the ship finds herself. There will therefore be no jurisdiction in fact in any Court where jurisdiction depends upon the act in question or the party to the proceedings being done or found or resident in the local territory. The other theory is that a public ship in foreign waters is not and is not treated as territory of her own nation. The domestic Courts in accordance with principles of international law will accord to the ship and its crew and its contents certain immunities, some of which are well settled, though others are in dispute. In this view the immunities do not depend upon an objective exterritoriality, but on implication of the domestic law. They are conditional and can in any case be waived by the nation to which the public ship belongs.

Their Lordships entertain no doubt that the latter is the correct conclusion. It more accurately and logically represents the agreements of nations which constitute international law: and alone is consistent with the paramount necessity expressed in general terms for each nation to protect itself from internal disorder by trying and punishing offenders within its boundaries. It must be always remembered that so far at any rate as the Courts of this country are concerned international law has no validity save

in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals. What then are the immunities of public ships of other nations accepted by our Courts and on what principle are they based?

The principle was expounded by that great jurist Chief Justice Marshall in *The Exchange*, 7 Cranch 116 (1812), a judgment which has illumined the jurisprudence of the world:—

> "The jurisdiction of the Courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. . . . All exceptions therefore to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. In the latter case it is less determinate, exposed more to the uncertainties of construction: but if understood not less obligatory. The world being composed of distinct sovereignties possessing equal rights and equal independence whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates, and its wants require, all sovereigns have consented to a relaxation in practice in cases under certain peculiar circumstances of that absolute and complete jurisdiction within their respective territories which sovereignty confers. . . .
>
> "This perfect equality and absolute independence of sovereigns and this common interest impelling them to mutual intercourse and an interchange of good offices with each other have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation."

The Chief Justice then proceeds to illustrate the class of cases to which he has referred. He takes first "the exemption of the person of the sovereign from arrest or detention within a foreign territory." Second, "standing on the same principles as the first is the immunity which all civilised states allow to foreign ministers":—

> "Whatever may be the principle on which this immunity is established whether we consider him as in the place of the sovereign he represents or by a political fiction suppose him to be extra-territorial and therefore in point of law not within the jurisdiction of the sovereign at whose court he resides; still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of extra-territoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it."

The judgment then proceeds to the third case "in which a sovereign is understood to cede a portion of his territorial jurisdiction," namely, "where he allows the troops of a foreign power to pass through his dominions." The Chief

Justice lays down that " the grant of a free passage implies a waiver of all jurisdiction over the troops during this passage and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require." He points out that differing from the case of armed troops where an express license to enter foreign territory would not be presumed, the private and public vessels of a friendly power have an implied permission to enter the ports of their neighbours unless and until permission is expressly withdrawn. When in foreign waters private vessels are subject to the territorial jurisdiction:—

> " But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation: acts under the immediate and direct command of the sovereign: is employed by him in national objects. He has many and powerful motives for preventing these objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license therefore under which such vessel enters a friendly port may reasonably be construed and it seems to the Court ought to be construed as containing an exemption from the jurisdiction of the sovereign within whose territory she claims the rights of hospitality. It seems then to the Court to be a principle of public law that national ships of war entering the port of a friendly power open for their reception are to be considered as exempted by the consent of that power from its jurisdiction."

This conclusion is based on the principles expounded in the extracts from which the Chief Justice summarised at p. 143 of the report:—

> " The preceding reasoning has maintained the proposition that all exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory: that this consent may be express or implied; and that when implied its extent must be regulated by the nature of the case and the views under which the parties requiring and conceding it must be supposed to act."

The judgment then proceeded to apply the principles stated to the case before the Court and held that the former owners of *The Exchange* which had been captured by the French and entered the port of Philadelphia under stress of weather could not have a decree to recover the vessel which must be treated as an armed public vessel of the Emperor of the French whose title could not be controverted in the American Court.

The extreme doctrine of exterritoriality was not in issue in *The Exchange*: and neither the principles enunciated by Marshall C.J. nor his application of them appears to support it. In this country the question arose in acute form in 1875 over instructions issued by the Admiralty to commanders of Her Majesty's ships in respect of the treatment of fugitive slaves. They were attacked by Sir William Vernon Harcourt, then Whewell Professor of International Law at Cambridge and Liberal M.P. for Oxford in two letters to *The Times* under the title " Historicus." He there stated, 4th November, 1875, that

> " he had seen with much surprise that the doctrine of the absolute immunity of a public ship and all persons and things on board of it from local jurisdiction and the operation of local law where lying in the territorial waters . . . has been treated as a doubtful proposition. I had certainly supposed that in the whole range of public

> law there was no position more firmly established by authority, more universally admitted by Governments, or one which had been more completely accepted in the intercourse of States as unquestioned and unquestionable."

The Government appointed a Royal Commission to report on the whole question as to the reception of fugitive slaves, which included such eminent lawyers as Sir Alexander Cockburn C.J., Sir Robert Phillimore, Mr. Montague Bernard, Mr. Justice Archibald, Mr. Alfred Thesiger K.C., Sir Henry Maine, Mr. James Fitzjames Stephen K.C., and Mr. Henry C. Rothery, the Registrar in Admiralty. The lawyers were not agreed as to the doctrine of international law, and the Commission were able to report without expressing any decided opinion about it. The lawyers, however, wrote memoranda which were annexed to the report. Sir Robert Phillimore, Mr. Bernard and Sir Henry Maine appeared to favour the more extreme doctrine, but admitted it must have qualifications. Sir Alexander Cockburn, in a memorandum which is worthy to be compared with the judgment of Marshall C.J., discussed the whole question of exterritoriality of a public ship of war, quoting the authorities from 1740 onwards and referring to cases of Government action. He quotes Casaregis (1740), "Discursus de Commercio", Hubner (1759), "De la Saisie des Batiment Neutres," Lampredi, Pinheiro Ferreira, Azueri, Lord Stowell's advice to the British Government in 1820 in *Brown's* case, Wheaton, Hautefeuille, "Des Droits et des Devoirs des Nations Neutres," Ortolan, "Diplomatie de la Mer," Bluntschli Heffter and Calvo. Of these Hubner, Hautefeuille, Ortolan and Calvo support in his view the high doctrine of exterritoriality, Casaregis and Wheaton are non-committal, the others are against the doctrine. After controverting the views which favour complete exterritoriality and pointing out the difficulties and indeed absurdities to which the doctrine leads, he says:—

> "The rule which reason and good sense would as it strikes me prescribe would be that as regards the discipline of a foreign ship and offences committed on board as between members of her crew towards one another matters should be left entirely to the law of the ship, and that should the offender escape to the shore he should if taken be given up to the commander of the ship on demand and should be tried on shore only if no such demand be made. But if a crime be committed on board the ship upon a local subject or if a crime having been committed on shore the criminal gets on board a foreign ship he should be given up to the local authorities. In which way the rule should be settled so important a principle of international law ought not to be permitted to remain in its present unsettled state."

In this passage which was cited with approval by the Full Court of Hong Kong in the present case, it should be observed that the Lord Chief Justice assumes that even if a crime be committed on board by one member of the crew on another, should the offender escape to shore and no demand be made for his return, the territorial Court would have jurisdiction. Their Lordships doubt whether when he is dealing with the case of a crime committed on board on a local subject he has present to his mind the possibility of the

local subject being a member of the crew. And while he says that in the cases put the offender should be given up to the local authorities, he does not say whether, if surrender were refused, judicial process could be directed to the captain of the foreign vessel to secure the custody of the offender by the local authority. In the memorandum of Sir Alexander Cockburn, Mr. Justice Archibald concurred. Mr. Stephen wrote a memorandum to the same effect in the trenchant Stephen style. Mr. Rothery treated the dogmatic assertion of "Historicus" and his authorities to a merciless dissection to which the conclusions of a Whewell Professor can seldom have been subjected. In addition to the authorities already mentioned, reference should be made to the passages cited in the judgment of the Supreme Court in this case from Hall, 8th Ed., 1924, edited by Professor Pearce Higgins, para. 55. There the author states that a public vessel is exempt from the territorial jurisdiction: but that her crew and persons on board of her cannot ignore the laws of the country in which she is lying as if she were a territorial enclave. Exceptions to their obligation exist in the case of acts beginning and ending on board the ship and taking no effect externally to her in all matters in which the economy of the ship or the relations of persons on board to each other are exclusively concerned. The author appends a note:—

> "The case which however would be extremely rare on board a ship of war of a crime committed by a subject of the state within which the vessel is lying against a fellow subject would no doubt be an exception to this. It would be the duty of the captain to surrender the criminal."

The other passage is from "Oppenheim", 5th Ed., 1937, edited by Professor Lauterpacht, vol. 1, para. 450. The author adopts the full exterritorial view:—

> "The position of men of war in foreign waters is characterised by the fact that they are called 'floating portions of the flag State.' For at the present time there is a customary rule of international law universally recognised that the State owning the waters into which foreign men of war enter must treat them in every point as though they were floating portions of their flag State."

When, however, he is dealing with the analogous immunities of diplomatic envoys, para. 389, he says "exterritoriality in this as in every other case is a fiction only, for diplomatic envoys are in reality not without but within the territories of the receiving States". There is a note that "The modern tendency among writers is towards rejecting the fiction of exterritoriality", a note which is not in the second edition, the last prepared by the author, and appears for the first time in the 4th edition edited by Professor McNair.

Their Lordships have no hesitation in rejecting the doctrine of exterritoriality expressed in the words of Mr. Oppenheim which regards the public ship "as a floating portion of the flag State". However the doctrine of exterritoriality is expressed it is a fiction, and legal fictions have a tendency to pass beyond their appointed bounds and to harden into dangerous facts. The truth is that the enunciators of the floating island theory have failed to face very obvious possibilities that make the doctrine quite impracticable when

tested by the actualities of life on board ship and ashore. Immunities may well be given in respect of the conduct of members of the crew to one another on board ship. If one member of the crew assault another on board, it would be universally agreed that the local courts would not seek to exercise jurisdiction, and would decline it unless indeed they were invited to exercise it by competent authority of the flag nation. But if a resident in the receiving State visited the public ship and committed theft and returned to shore, is it conceivable that when he was arrested on shore and shore witnesses were necessary to prove dealings with the stolen goods and identify the offender, the local courts would have no jurisdiction? What is the captain of the public ship to do? Can he claim to have the local national surrendered to him? He would have no claim to the witnesses or to compel their testimony in advance or otherwise. He naturally would leave the case to the local courts. But on this hypothesis the crime has been committed on a portion of foreign territory. The local court then has no jurisdiction, and this fiction dismisses the offender untried and untriable. For it is a commonplace that a foreign country cannot give territorial jurisdiction by consent. Similarly in the analogous case of an embassy. Is it possible that the doctrines of international law are so rigid that a local burglar who has broken and entered a foreign embassy and having completed his crime is arrested in his own country cannot be tried in the courts of the country? It is only necessary to test the proposition to assume that the foreign country has assented to the jurisdiction of the local courts. Even so objective exterritoriality would for the reason given above deprive our courts at any rate of any jurisdiction in such a case. The result of any such doctrine would be not to promote the power and dignity of the foreign sovereign but to lower them by allowing injuries committed in his public ships or embassies to go unpunished.

On this topic, their Lordships agree with the remarks made by Professor Brierly in " The Law of Nations," (1928), p. 110.

> " The term ' exterritoriality ' is commonly used to describe the status of a person or thing physically present in a State's territory, but wholly or partly withdrawn from that State's jurisdiction by a rule of international law, but for many reasons it is an objectionable term. It introduces a fiction, for the person or thing is in fact within, and not outside, the territory: it implies that jurisdiction and territory always coincide, whereas they do so only generally; and it is misleading because we are tempted to forget that it is only a metaphor and to deduce untrue legal consequences from it as though it were a literal truth. At most it means nothing more than that a person or thing has some immunity from the local jurisdiction; it does not help us to determine the only important question, namely, how far this immunity extends."

The true view is that in accordance with the conventions of international law, the territorial sovereign grants to foreign sovereigns and their envoys and public ships and the naval forces carried by such ships certain immunities. Some are well settled: others are uncertain. When the local court is faced with a case where such immunities come into question

it has to decide whether in the particular case the immunity exists or not. If it is clear that it does, the Court will of its own initiative give effect to it. The sovereign himself, his envoy, and his property including his public armed ships are not to be subjected to legal process. These immunities are well settled. In relation to the particular subject of the present dispute, the crew of a warship, it is evident that the immunities extend to internal disputes between the crew. Over offences committed on board ship by one member of the crew upon another, the local courts would not exercise jurisdiction. The foreign sovereign could not be supposed to send his vessel abroad if its internal affairs were to be interfered with, and members of the crew withdrawn from its service by local jurisdiction. What are the precise limits of the immunities it is not necessary to consider. Questions have arisen as to the exercise of jurisdiction over members of a foreign crew who commit offences on land. It is not necessary for their Lordships to consider these. In the present case the question arises as to the murder of one officer and the attempted murder of another by a member of the crew. If nothing more arose the Chinese Government could clearly have had jurisdiction over the offence: and though the offender had for reasons of humanity been taken to a local hospital, a diplomatic request for his surrender would appear to have been in order. It is difficult to see why the fact that either the victim or the offender or both are local nationals should make a difference if both are members of the crew. But this request was never made. The only request was for extradition, which is based upon treaty and statutory rights, and in the circumstances inevitably failed. But if the principles which their Lordships have been discussing are accepted, the immunities which the local courts recognise flow from a waiver by the local sovereign of his full territorial jurisdiction and can themselves be waived. The strongest instances of such waiver are the not infrequent cases where a sovereign has as it is said submitted to the jurisdiction of a foreign court over his rights of property. Here is no question of saying you may treat an offence committed on my territory as committed on yours. Such a statement by a foreign sovereign would count for nothing in our jurisprudence. But a sovereign may say you have waived your jurisdiction in certain cases: but I prefer in this case that you should exercise it. The original jurisdiction in such a case flows afresh.

Applying these considerations to the present case, it appears to their Lordships as plain as possible that the Chinese Government, once the extradition proceedings were out of the way, consented to the British Court exercising jurisdiction. It is not only that with full knowledge of the proceedings they made no further claim, but at two different dates they permitted four members of their service to give evidence before the British Court in aid of the prosecution. That they had originally called in the police might not be material if on consideration they decided to claim jurisdiction themselves. But the circumstances stated together with the fact that the material instruments of conviction, the

revolver bullets, etc., were left without demur in the hands of the Hong Kong police make it plain that the British Court acted with the full consent of the Chinese Government. It therefore follows that there was no valid objection to the jurisdiction and the appeal fails. There was a further point raised by the Crown as to the possible effect of the Treaty of Tientsin in 1858, in renouncing jurisdiction by Chinese over British subjects who committed crimes in China. The Supreme Court was prepared to decide in favour of the Crown on this point also, but in view of the opinion already expressed on the main point it is unnecessary to decide this and no opinion is expressed upon it. For the above reasons their Lordships will humbly advise His Majesty that this appeal be dismissed.

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In the Privy Council

CHUNG CHI CHEUNG

v.

THE KING

DELIVERED BY LORD ATKIN

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