Privy Council Appeal No. 12 *of* 1956

Alfred Granville Ross - - - - - - - - - *Appellant*

v.

The Queen - - - - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

REASONS FOR THE REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH DECEMBER, 1956

Present at the Hearing:

VISCOUNT SIMONDS
LORD OAKSEY
LORD COHEN
LORD KEITH OF AVONHOLM

[*Delivered by* VISCOUNT SIMONDS]

On the 14th July, 1955, the appellant was convicted in the Supreme Court of Kenya of offences against the Income Tax and Excess Profits Tax Ordinances of Kenya. He appealed to the Court of Appeal of Eastern Africa and that Court on the 17th November, 1955, quashed the conviction but ordered him to be retried. From so much of this order as ordered him to be retried the appellant has by special leave appealed to Her Majesty in Council.

Two questions arise for decision, the first one of general importance, whether the Court of Appeal of Eastern Africa has jurisdiction to order a new trial in a criminal case, the second whether, if the Court has such jurisdiction, it was so improperly exercised in this case as to justify their Lordships in advising Her Majesty that the order should be set aside.

Their Lordships will first deal with the question of jurisdiction. They regret that, as the point was not taken until the matter reached their Lordships' Board, they have not the benefit of the opinion of the Court of Appeal for Eastern Africa upon it, but as the jurisdiction has been exercised without challenge for more than 50 years during the whole of the existence of the present Court and its predecessors they are glad to be able to come to the clear conclusion that there is no valid ground for questioning it.

The present Court was established by the East African Court of Appeal Order in Council 1950 which, after reciting (inter alia) that it was desirable that the East African Court of Appeal Orders in Council 1921 to 1947 should be revoked and replaced by a new Order, ordered as follows:—

> Section 3. The Territories to which this Order applies are Aden, Kenya, Seychelles, Somaliland, Tanganyika, Uganda and Zanzibar.
>
> Section 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 is hereby constituted as, a Court of Appeal for the Courts of Seychelles and Somaliland. The Court shall be a Superior Court of Record.

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

(2) The process of the Court shall run throughout the Territories and any judgment of the Court shall be executed and enforced in like manner as if it were an original judgment of the Court from which the appeal is brought.

(3) In the hearing of any appeal the law to be applied shall be the law applicable to the case in the Court from which the appeal is brought.

Section 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 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 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.

Under and by virtue of the authority contained in Section 18 of the Order in Council Rules of Court were duly made by the President and Judges of the Court and approved by the Secretary of State on the 29th June, 1954.

Part III of such Rules is entitled "First Appeals in Criminal Matters" and contains the following Rules:—

Rule 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

Rule 25. In any case not provided for by this part of these Rules the practice and procedure for the time being of the Court of Criminal Appeal in England shall be followed as nearly as may be.

Rule 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.

(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.

It may be noted that the appellate jurisdiction vested in the Court related to both criminal and civil matters and a similar power of ordering a re-trial in civil matters is conferred by Rule 76.

The relevant sections of the Order in Council and the relevant Rules having been stated, it is convenient to refer to the submissions of the appellant. The argument of learned Counsel on his behalf assumed that apart from the power conferred by Rule 41 the Court had no jurisdiction to order a re-trial in criminal matters. He contended that the only power to make Rules of Court under Section 18 of the Order in Council is for the purpose of " regulating the practice and procedure . . . in appeals to the Court ", that the conferring of a power to direct a re-trial in a criminal case is not a matter of practice and procedure, that Rule 41 so far as it purports to confer a power to order a new trial is ultra vires, and that so far as it is ultra vires the provision of Section 18 (2) of the Order in Council must be disregarded.

On behalf of the respondent the primary assumption of the appellant was challenged and it was urged not only that Rule 41 was intra vires and was in any case unimpeachable by virtue of Section 18 (2) of the Order in Council, but also that Section 16 of the Order in Council by itself gave the necessary jurisdiction. This contention was founded in the first place on the bare words " jurisdiction to hear and determine such appeals " which, it was said, empowered the Court to make any order which might appear to it necessary for doing justice in the appeal including in a proper case an order for a re-trial. In the second place the last words of Section 16 (1) were called in aid: the Court was thereby given the power authority and jurisdiction vested in the Court from which the appeal was brought: the Supreme Court of Kenya from which the instant appeal was brought had under Section 354 of the Criminal Procedure Code of Kenya power in an appeal from a conviction 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: a similar power authority and jurisdiction thus vested in the Court of Appeal for Eastern Africa empowers that Court to order a re-trial in an appeal from a conviction.

So far as the present appeal is concerned the argument last stated appears to their Lordships to be conclusive. Section 354 of the Criminal Procedure Code of Kenya has been referred to. Section 378 of the same Code provides for an appeal to the Court of Appeal in Eastern Africa of a person convicted on a trial held by the Supreme Court of Kenya. It appears to be a logical and consistent scheme that the same power of ordering a re-trial should be given to the ultimate Court of Appeal as to the Court from which the appeal is brought. That is what the last words of Section 16 (1) of the Order in Council provide.

It does not however seem to their Lordships that it would be satisfactory to base their decision solely on this ground The jurisdiction of the Court to order a re-trial has been generally challenged and it may be that the laws of other territories from whose Courts an appeal may be brought to the Court of Appeal for Eastern Africa are not strictly comparable with those of Kenya. Upon this matter their Lordships have no sufficient information. It is desirable therefore to examine the validity of the plea that Rule 41 is ultra vires in that it is not a Rule for regulating "practice and procedure" to which the rule-making power is confined. Upon this point their Lordships are able to reach a decision without discussing the effect of Section 18 (2) of the Order in Council.

The meaning of the words "practice and procedure" in Section 18 of the Order in Council is not to be ascertained either by treating them as if the Order in Council of 1950 was the first Order in Council for these Territories in which they appeared or by reference to those words in the Imperial Statute which set up the Court of Criminal Appeal in England. On the contrary they have behind them a history of half a century. In 1902 by the Eastern African Protectorates (Court of Appeal) Order in Council 1902 a Court was constituted, which was the first predecessor of the Court whose order is now under appeal. It was called His Britannic Majesty's Court of Appeal for Eastern Africa and it was by Section 8 (1) empowered to make Rules of Court with respect to all matters of procedure relating to the exercise of its jurisdiction. Such rules were made and approved by the Secretary of State. They included Rule 22 which was in these terms "If upon the hearing of an appeal it shall appear to the Court of Appeal that a new trial ought to be had, it shall be lawful for the Court of Appeal to order that the verdict and judgment shall be set aside and that a new trial shall be had". Two things deserve notice, first, that these rules were made by the Court itself, a matter regarded as having considerable importance in *Poyser* v. *Minors* 7 Q.B.D. 329, and, second, that already before the establishment of the Court of Criminal Appeal in England the power to order a re-trial in criminal cases upon an appeal by a convicted person was in the Protectorate or Colony regarded as a matter of procedure. Nor was there in this view a departure from any universal principle. For, though it might be regarded as fundamental that a man should not be put in peril twice on the same charge, yet a substantial inroad had been made upon this doctrine by the fact that it had long been the law of England that in cases of misdemeanour the Court of King's Bench had in certain circumstances jurisdiction upon motion by the convicted person to quash the verdict and order a new trial. Some further inroad was also made by procedure under writ of error, venire de novo or case stated to the Court of Crown Cases Reserved. Therefore, though there is high authority for saying that a right of appeal is itself to be regarded not as a matter of practice or procedure but as a substantive right (see e.g. *Colonial Sugar Refining Co.* v. *Irving* [1905] A.C. 369 at p. 372, *Newman* v. *Klausner* [1922] 1 K.B. 228 at p. 231), yet when the right of appeal has been granted there seems little or no difficulty in regarding the power to order a new trial as part of the practice and procedure of the Court. It was clearly so regarded by the rule-making authority under the Order in Council of 1902. But the matter does not rest there. The Order in Council of 1902 was superseded by the Eastern African Protectorates (Court of Appeal) Order

in Council 1909, which established a new Court of Appeal for Eastern Africa. Its jurisdiction was substantially that of its predecessor and it was provided by Section 9 (1) of the Order that three members of the Court one of whom should be the senior member might make Rules of Court with respect to all matters of procedure relating to the exercise of its jurisdiction. In pursuance of this power Rules of Court were once more made which provided by Rule 29 that in a criminal appeal the Court should have power (inter alia) in an appeal from a conviction to reverse the finding and sentence and acquit or discharge the accused or order the accused to be re-tried. It may be mentioned for a reason that will later appear that Rule 28 provided that in a civil appeal the Court should have power (inter alia) to order that a decree should be set aside and a new trial be had. Thus matters stood for a number of years during which, as their Lordships were informed, the power to order a new trial upon an appeal by an accused person was exercised by the Court without challenge. In 1921 by the Eastern African Court of Appeal Order in Council of that year the Court was again reconstituted and its jurisdiction was conferred in language which, since it differed from that of the earlier orders, may be quoted verbatim. By the latter part of Section 2 of the Order it was provided that "the said Court in the exercise of its appellate jurisdiction shall have power to determine any question and to pass any decree judgment or order the determining or passing of which may appear necessary to the said Court for the purpose of doing justice in the cause or matter before it". The width of these words explains what follows. The same rule-making power was conferred by the Order and Rules of Court were duly made, but they contained no such express power to order a new trial as had been provided in civil appeals by the former Rule 28 and in criminal appeals by the former Rule 29. In their Lordships' opinion there can be no doubt that they were omitted because they were unnecessary in view of the wide words of the Order. It is certain that both in civil and criminal appeals the power to order re-trial continued to be exercised without challenge.

The Order in Council of 1921 was in its turn superseded by that of 1950, the relevant provisions of which have already been cited. As will have been seen there are material changes in the language of the section conferring jurisdiction. The wide words "decree judgment or order the determining or passing of which may appear necessary to the said Court for the purpose of doing justice in the cause or matter before it" have gone: their place is in some measure taken by the final words in the new Section 16 (1) to which attention has already been called. The rule-making power in substantially the same terms is conferred upon the same body. It has been set out in full in an earlier part of this judgment and it has already been noted that Rule 41 renews the power to order a retrial which had been contained in the earlier Rules but omitted from those made under the Order in Council of 1921.

The history of the jurisdiction of the Court, the enactments establishing it and the Rules regulating its procedure, have been set out at some length. This has been done in order that it may become abundantly clear that, whatever interpretation might be put on the words "practice and procedure" in isolation, it has been the consistent policy of the Legislative Authority, whether by the force of the enacting provisions alone or by their force aided by Rules of Court made by the Judges, to give to the Court power to order a re-trial both in civil and criminal cases. Their Lordships entertain no doubt that in appeals from the Courts of those territories to which the Order in Council applies there are very good reasons why such a power should be given, and it appears to them that it is not only open to them but incumbent on them to give to the words in their context the wider meaning which would bring Rule 41 within their scope. For this reason therefore as well as that upon which the respondent relied under the last words of Section 16 (1) of the Order in Council their Lordships are of opinion that the Court had

jurisdiction to make the order from which this appeal is brought. It is unnecessary to refer to that part of the argument for the respondent which rested solely on the words " hear and determine ".

The only other question can be briefly dealt with. The order for a new trial having been competently made will not be set aside upon an appeal to Her Majesty in Council unless the case can be brought within the principles which have been too often stated to need repetition.

Their Lordships have given careful consideration to the arguments of learned counsel who urged that the power to order a new trial, admittedly a discretionary jurisdiction, had been exercised on wrong principles. The gravamen of his plea was that the purpose or at least the result of a re-trial was or would be to enable the prosecution to fill a gap in the evidence which had been due to its own default. He was far from satisfying their Lordships on this point and, as in their opinion the appeal ought to be dismissed and they have humbly so advised Her Majesty so that the appellant will in due course be retried, they think it undesirable to say anything which may in any way prejudice his trial. As already stated their Lordships have accordingly advised Her Majesty that this appeal should be dismissed.

(39925) Wt. 8069—3 90 2/57 D.L.

In the Privy Council

ALFRED GRANVILLE ROSS

v.

THE QUEEN

DELIVERED BY VISCOUNT SIMONDS

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