P.C. — 3/46 — G — 2

Judgment 17/1964

No. 10 of 1963

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE SUPREME COURT OF HONG KONG

BETWEEN

LI KEUNG PONG alias
LI SIU CHEUNG — Appellant

78575

and

ATTORNEY-GENERAL OF HONG KONG — Respondent

CASE FOR THE RESPONDENT

Record

1. This is an appeal by special leave of the Judicial Committee granted on the 5th February, 1963, from a Judgment of the Supreme Court of Hong Kong pronounced on the 3rd October, 1962, which reversed a ruling of the District Court of Hong Kong dated the 18th September, 1962, that the said District Court had no jurisdiction to hear certain charges against the Appellant of obtaining credit by fraud other than false pretences contrary to Section 51(a) of the Larceny Ordinance, Cap. 210. p.17. p.6.

2. Two main questions of law arise in this appeal, namely :-

(a) Is the said offence of obtaining credit by fraud other than false pretences an indictable offence?

(b) If the said offence is not indictable, did Section 69(1) of the Criminal Procedure Ordinance, Cap. 221, apply to the proceedings before the District Court so as to confer power upon the District Court to proceed with and conclude the trial notwithstanding the fact that the charges had not been lawfully transferred by the Magistrate to the District Court?

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3. The facts giving rise to this appeal are as follows :-

(a) On the 23rd May, 1962, the Appellant was charged with six offences of obtaining credit by fraud other than false pretences, contrary to Section 51(a) of the Larceny Ordinance, Cap. 210. The relevant part of the section reads, as follows :-

> "51. Any person who -
>
> (a) in incurring any debt or liability obtains credit under false pretences or by means of any other fraud ..... shall be guilty of a misdemeanour triable summarily and on conviction thereof liable to imprisonment for one year. "

(b) On the same date, 23rd May, 1962, the Appellant was brought before a Magistrate (Derek Cons, Esq.) at the Central Magistracy, Hong Kong, charged with the said offences, and was released on bail in the sum of Dollars 30,000/00.

(c) On the 20th July, 1962, upon an application in writing by the Respondent, the Magistrate ordered that the said charges against the Appellant be transferred to the District Court. In so doing he purported to act (and in the Respondent's submission in fact acted) in accordance with Section 87A(1) in Part IIIA of the Magistrates Ordinance, Cap. 227.

(d) Section 87A(1) of the Magistrates Ordinance reads, as follows :-

> "Notwithstanding anything contained in any other provision of this Ordinance, whenever any person is accused before a magistrate of any indictable offence not included in any of the categories specified in Part III of the Second Schedule, the magistrate shall, upon application made by or on behalf of the Attorney-General, make an order transferring the charge or complaint to the District Court. "

(The said offence was not included in any of the categories specified in Part III of the Second Schedule.)

(e) On the 26th July, 1962, the Respondent preferred the said charges against the Appellant in the District Court. In so doing the Respondent purported to act (and in the Respondent's submission in fact acted) under the provisions of Section 25(2) of the District Court Ordinance, 1953.

(f) The District Court is a Court of limited jurisdiction. Its criminal jurisdiction is conferred on it by the Section 24 read with Section 25 of the District Court Ordinance, 1953, and with Section 87A aforesaid of the Magistrates Ordinance.

Section 24 of the District Court Ordinance at the material time read, as follows :-

> "The District Court shall have jurisdiction to hear and determine in accordance with the provisions of this Ordinance all such charges as the Attorney General may lawfully prefer under the provisions of Section 25. "

The relevant parts of Section 25 of the District Court Ordinance then read, as follows :-

> "(1) Where a charge or complaint has been transferred to the District Court by a magistrate in accordance with the provisions of Part IIIA of the Magistrates Ordinance, the District Court shall have jurisdiction and powers over all proceedings in relation to the offence therein alleged similar to the jurisdiction and powers the Supreme Court would have had if the accused person had been committed to that court for trial on indictment for a similar offence, save that nothing in this Section shall be deemed to give jurisdiction to hear and determine such charge or complaint. "

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"(2) Where a charge or complaint has been transferred as aforesaid, the Attorney General shall ..... deliver to the Registrar a charge sheet setting forth the charge or charges preferred ..... "

(g) The said charges were heard before the District Court (Pickering D.J.) on the 6th September 1962, and subsequent dates.

(h) On the 18th September, 1962, after the conclusion of the evidence and before any judgment was delivered, a submission was made on behalf of the Appellant that the District Court had no jurisdiction to hear the said charges.

(i) On the 18th September, 1962, the
p.6. Learned District Judge gave a Ruling upon the said submission and held that he had no jurisdiction to hear the said charges.

(j) On the 24th September 1962, the Learned District Judge, on the application of the Respondent, stated a case for the
p.1. opinion of the Supreme Court. He annexed
p.6. his said Ruling as an appendix to the case stated.

The case stated included the following passages:

p.5.11.4-25. "(i) The issue is that of jurisdiction. There are no facts which can here be set out.

(ii) The conclusion to which I came was that the offence of obtaining credit by Fraud other than false pretences contrary to Section 51(a) of the Larceny Ordinance, Cap. 210, is not an indictable offence and therefore cannot properly be transferred to the District Court by a Magistrate under S.87A(1) of the Magistrates Ordinance, Cap. 227.

(iii) I was further of the opinion that S. 29(5)(a) of the District Court Ordinance 1953, rendered me powerless to invoke Section 69 of the Criminal

Procedure Ordinance, Cap. 221, and so either proceed with the case or remit it to a Magistrate.

.....

(vi) The questions of law arising on the above statement for the opinion of the Full Court are - p.6.11.1-11.

(i) Was I right or wrong in holding that I lacked jurisdiction to try the case.

(ii) Having so held was I right or wrong in failing to apply the provisions of section 69 of the Criminal Procedure Ordinance ..... "

(k) Section 69 of the Criminal Procedure Ordinance reads, as follows :-

"(1) If, either before or during the trial of an accused person, it appears to the Court that such person has been guilty of an offence punishable only on summary conviction, the Court may either order that the case shall be remitted to a magistrate with such directions as it may think proper or allow the case to proceed, and, in the case of conviction, impose such punishment on the person so convicted as might have been imposed by a magistrate and as the Court may deem proper.

(2) It shall be the duty of the magistrate to whom any such directions are addressed to obey the same. "

(l) Section 29(1) of the District Court Ordinance then read, as follows :-

"Subject to the provisions of this Ordinance and to the District Court Criminal Procedure Rules, the procedure and practice for the time being in force in the Supreme Court in relation to criminal proceedings therein shall, so far as the same may be applicable, be followed as nearly as may be in criminal proceedings in the District Court;

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and where it is necessary for the purpose of rendering such procedure and practice conveniently applicable, the expressions 'indictment' and 'count' shall be understood to refer to 'charge sheet' and 'charge' respectively. "

Section 29(5) of the District Court Ordinance then read, as follows :-

"Nothing in this section shall be taken to authorise -

(a) the institution of any criminal proceedings in the District Court save in accordance with the express provisions of this Part; or

(b) trial by jury in any criminal proceeding instituted under the provisions of this Part."

The relevant provisions of the District Court Ordinance 1953, are set out in full in the annexure to the Respondent's case.

(m) On the 3rd October. 1962, the Supreme Court (Sir Michael Hogan C.J., Scholes and Mills-Owens A.JJ.) gave their
p.17. decision reversing the said Ruling of the Learned District Court Judge. The Supreme Court's decision was that the said offence of obtaining credit by fraud other than false pretences was not an indictable offence, but that the Learned District Court Judge could have applied the provisions of Section 69(1) of the Criminal Procedure Ordinance. The Supreme Court directed that the Learned District Court Judge consider that Section and the exercise of the discretion it confers upon him.

(n) On the 3rd October, 1962, the
p.38. Learned District Court Judge gave Judgment and held that the Appellant was guilty of the first three charges. He did not deal
p.46.11.5-9. with the remaining three charges on the ground that only three charges could have been heard by a magistrate.

(o) On the 13th November, 1962, the Supreme Court gave their reasons for
p.18. allowing the appeal from the Ruling of the Learned District Judge.

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(p) The Supreme Court held that the said offence was not indictable. The Supreme Court stated that the expression "misdemeanour triable summarily" is an equivocal expression; that in its primary meaning "misdemeanour" connotes that the offence is indictable; and that where a statute creates an offence and terms it to be a "misdemeanour" it would ordinarily follow that the expression is used in its primary meaning of an indictable offence. The Supreme Court then considered the history of the offence and concluded that the question really turned on the proper construction of Section 3 of the Law Reform (Penalties Amendment) Ordinance 1950 (Ordinance No. 22 of 1950.) The Supreme Court appeared to accept the Respondent's submission that if a statute creates an offence without a summary remedy, which is therefore indictable, and a summary remedy is given by a subsequent statute, it remains indictable; and that there is a presumption that indictable offences remain indictable until it manifestly appears otherwise. But the Supreme Court held that the proper construction of Section 3 of Ordinance No. 22 of 1950 left no room for the application of this doctrine. Accordingly the Supreme Court held that the offence of obtaining credit by fraud other than false pretences was now a purely summary offence.

p.22.l.29.
p.23.l.2.
p.23.11.7-11.
p.30.l.29.
p.23.l.13.
p.33.l.21.

(q) The Supreme Court disagreed with the Learned District Court Judge's view that Section 29(5) of the District Court Ordinance, 1953, prevented the application of Section 69(1) of the Criminal Procedure Ordinance. The Supreme Court also rejected the Appellant's argument that Section 27(5) of the District Court Ordinance prevented the application of Section 69(1) of the Criminal Procedure Ordinance. The Supreme Court held that Section 29(1) of the District Court Ordinance applied the practice and procedure of the Supreme Court to the District Court except for such of the provisions of the Criminal Procedure Ordinance as were excluded by

p.34.l.8.

sub-section (2) of Section 29. Section 69(1) of the Criminal Procedure Ordinance was not one of the provisions so excluded. Accordingly the Supreme Court held that Section 69(1) of the Criminal Procedure Ordinance applied to confer on the District Court power to exercise a discretion either to conclude the trial or remit the case to a magistrate.

(r) The Appellant appealed against the Judgment of the Learned District Court Judge, mentioned in sub-paragraph (n) hereof. On the 20th November 1962, the Supreme Court granted an application to adjourn the hearing of the said appeal so that it should not be heard before the hearing of this present appeal to Her Majesty in Council.

4. The Respondent respectfully submits that the offence of obtaining credit by fraud other than false pretences contrary to Section 51(a) of the Larceny Ordinance, Cap. 210, is an indictable offence. It is submitted that an essential characteristic of a misdemeanour is that it is indictable, and that, where an offence is declared in terms to be a misdemeanour, clear words are required to deprive the offence of this characteristic and to render it a purely summary offence. No such words are used. The Supreme Court stated that the expression "misdemeanour triable summarily" is equivocal. The Respondent submits that in this expression the words "triable summarily" provide an additional remedy and not an exclusive remedy.

5. The words used elsewhere by the legislature in Hong Kong to connote a purely summary offence are words such as "liable on summary conviction" or "punishable on summary conviction". It would have been simple for the legislature to use such words, if it had intended that this offence was to be a purely summary offence. Instead the expression "misdemeanour triable summarily" is used. The Respondent respectfully submits that the Supreme Court paid too little attention to the use of a different

expression from that used elsewhere in Hong Kong legislation and paid too little attention to the use of the word "misdemeanour".

6. The Respondent respectfully submits that the Supreme Court should not have made speculations or assumptions as to the intention of the legislature when enacting Ordinance No. 22 of 1950. The Supreme Court should have concentrated on the real question namely the construction of the expression "misdemeanour triable summarily" in Section 51(a) of the Larceny Ordinance. It is submitted that the true test to apply in construing the said expression is whether the words used clearly remove the remedy by indictment. The Respondent submits that they do not.

7. The Respondent respectfully submits that the Supreme Court was right in holding that Section 69(1) of the Criminal Procedure Ordinance applied to confer on the Learned District Court Judge power to exercise a discretion either to conclude the trial or to remit the case to a magistrate.

8. The Respondent respectfully submits that the reference in Section 29(1) of the District Court Ordinance, 1953, to the procedure and practice for the time being in force in the Supreme Court in relation to criminal proceedings should be construed as applying the provisions of the Criminal Procedure Ordinance and that the Ordinance as a whole is applied including provisions which have a jurisdictional as well as a procedural element. Further Section 69(1) of the Criminal Procedure Ordinance, although it has a jurisdictional element, is not in substance a jurisdictional provision, being primarily a procedural provision intended to cure errors so as to avoid a multiplicity of proceedings. Any jurisdictional element is merely ancillary to the procedural provisions. It is significant that the marginal note to the said Section reads: "Procedure where person is committed for trial through error".

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9. The Respondent submits that for the reasons given by the Supreme Court Section 27(5) of the District Court Ordinance, 1953, does not prevent the application of Section 69(1) of the Criminal Procedure Ordinance. The Respondent further submits that the concern of the legislature in enacting the said Section 27(5) was to preclude any provision relating to the preferment of charges incidentally offending the Jurisdiction provided by Section 24.

10. The Respondent further submits that in any event there was no substantial miscarriage of justice. The Appellant was not deprived of any safeguard such as a right to trial by jury or assessors. The Appellant was not exposed to any more severe penalty. He suffered no injustice by being tried by the Learned District Judge.

11. The Respondent respectfully submits that the Judgment of the Supreme Court of Hong Kong was correct and ought to be affirmed and that this appeal ought to be dismissed with costs for the following (among other)

REASONS

1. BECAUSE the offence of obtaining credit by fraud other than false pretences is an indictable offence.

2. BECAUSE the said offence was stated in terms to be a misdemeanour.

3. BECAUSE no clear words were used to deprive the said offence of an essential characteristic of a misdemeanour, namely, that it is indictable.

4. BECAUSE a different form of words is used elsewhere in Hong Kong legislation to connote a purely summary offence.

5. BECAUSE the Supreme Court erred in making speculations and assumptions as to the purpose of the legislature in enacting Section 3 of Ordinance 22 of 1950.

6. BECAUSE on the true construction of the expression "misdemeanour triable summarily" the words "triable summarily" provide an additional and not an exclusive remedy.

7. BECAUSE (for the reasons given by the Supreme Court) Section 69(1) of the Criminal Procedure Ordinance applied so as to confer on the Learned District Judge power to exercise a discretion either to conclude the trial or to remit the case to a magistrate.

8. BECAUSE Section 29(1) of the District Court Ordinance, 1953, applied to the District Court all the provisions contained in Section 69(1) of the Criminal Procedure Ordinance.

9. BECAUSE neither Section 27(5) nor Section 29(1) of the District Court Ordinance, 1953, precluded the application of Section 69(1) of the Criminal Procedure Ordinance to the District Court.

10. BECAUSE there was in any event no substantial miscarriage of justice.

ARTHUR HOOTON

DAVID KEMP

(ANNEXURE)

A N N E X U R E

DISTRICT COURT ORDINANCE, 1953.

An Ordinance to establish a new Court, having limited civil and criminal jurisdiction, to be known as the District Court of Hong Kong, and to make provision for the jurisdiction, procedure and practice thereof and for purposes connected with the matters aforesaid.

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PART I

PRELIMINARY

(1. Short title and commencement.)

(2. Interpretation.)

PART II

THE DISTRICT COURT

3. Establishment of the District Court of Hong Kong, and the general jurisdiction thereof. (1) A Court, to be known as the District Court of Hong Kong, is hereby established.

(2) The Court shall be a court of record and shall have such civil and criminal jurisdiction as is conferred upon it by this Ordinance.

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PART III

CIVIL JURISDICTION

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PART IV

CRIMINAL JURISDICTION

24. Criminal jurisdiction. The District Court shall have jurisdiction to hear and determine in accordance with the provisions of this Ordinance all such charges as the Attorney General may lawfully prefer under the provisions of Section 25.

25. Procedure upon transfer of charge or complaint (Cap. 227).

(1) Where a charge or complaint has been transferred to the District Court by a magistrate in accordance with the provisions of Part IIIA of the Magistrates Ordinance, the District Court shall have jurisdiction and powers over all proceedings in relation to the offence therein alleged similar to the jurisdiction and powers the Supreme Court would have had if the accused person had been committed to that Court for trial on indictment for a similar offence, save that nothing in this section shall be deemed to give jurisdiction to hear and determine such charge or complaint.

(2) Where a charge or complaint has been transferred as aforesaid, the Attorney General shall, unless he enters a nolle prosequi, deliver to the Registrar a charge sheet setting forth the charge or charges preferred in the name of Her Majesty against the accused person, and any such charge may allege the commission of any indictable offence not included in any of the categories specified in Part III of the Schedule to the Magistrates Ordinance.

(3) Such charge sheet shall be delivered within fourteen days after the date of the order of transfer or such longer period as the District Court may, in any particular case, allow on any application made by or on behalf of the Attorney General.

26. (Nolle prosequi.)

27. Signing and form of charge sheet. Second Schedule.

(1) Every charge sheet shall be signed by a senior crown counsel or a crown counsel, and shall bear date of the day on which it is so signed.

(2) A charge sheet shall be in the form in the Second Schedule with such additions and modifications as may be necessary to adapt it to the circumstances of the particular case.

(3) Subject to the provisions of this Ordinance, a charge sheet shall not be open to objection in respect to its form of contents, if it is framed in accordance with the District Court Criminal Procedure Rules; Provided that the court may direct that further and better particulars of any charge shall be delivered.

(4) Every charge sheet, when so signed and dated as aforesaid, shall be delivered to the registrar and shall be filed by him in the court, and a copy thereof shall be served on the accused person in the manner hereinafter provided.

(5) Nothing in this section or in section 29 or 36 or in the District Court Criminal Procedure Rules shall affect the law or practice relating to the jurisdiction of the District Court nor prejudice or diminish in any respect the obligation to establish by evidence according to law any act, omission or intention which is legally necessary to constitute the offence with which the person accused is charged, nor otherwise affect the law of evidence in criminal cases.

(28. Limitation on prosecutions.)

29. Procedure and practice of the Court in its Criminal jurisdiction.

(1) Subject to the provisions of this Ordinance and to the District Court Criminal Procedure Rules, the procedure and practice for the time being in force in the Supreme Court in relation to criminal proceedings therein shall, so far as the same may be applicable, be followed as nearly as may be in criminal proceedings in the District Court; and where it is necessary for the purpose of rendering such procedure and practice conveniently applicable, the expressions "indictment" and "count" shall be understood to refer to "charge sheet" and "charge" respectively.

(2) (Cap. 221). Third Schedule. Notwithstanding the provisions of subsection (1), none of the provisions of the Criminal Procedure Ordinance in Part I of the Third Schedule particularised shall be applied to proceedings in the District Court.

(3) Third Schedule. The special provisions contained in Part II of the Third Schedule touching the procedure and practice of the Distruct Court in the exercise of its criminal jurisdiction shall be applied to criminal proceedings in the court where the circumstances of such proceedings require their application.

(4) Where any provision of the Criminal Procedure Ordinance is applicable to criminal proceedings in the District Court, such provision shall be read with such verbal alterations and modifications not affecting its substance as are necessary to render it conveniently applicable; and in particular, and without prejudice to the generality of the aforesaid, -

(a) any such provision relating to a "jury or a "verdict of a jury" shall be understood to refer to a District Judge and the functions of a District Judge as a judge of fact; and

(b) where there occurs any reference to anything to be done before, at, at the termination of, or after, any session of the Supreme Court, such thing shall be done in the District Court from time to time and as often as that court may require.

(5) Nothing in this section shall be taken to authorise -

(a) the institution of any criminal proceedings in the District Court save in accordance with the express provisions of this Part; or

(b) trial by jury in any criminal proceeding instituted under the provisions of this Part.

(36. Criminal procedure Rules. (Power to make rules.)

THIRD SCHEDULE

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PART II

Special provisions touching the procedure

and practice of the District Court in its Criminal Jurisdiction.

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3. (1) No objection to a charge shall be taken by way of demurrer, but if a charge does not state, in substance, an offence or states an offence not triable by the court, the accused person may move the court to quash it or in arrest of judgment.

(2) If such motion is made before the accused person pleads, the court may dismiss the charge or amend it.

(3) If a defect in a charge appears to the court during the trial, and the court does not then think fit to amend the charge it may either quash the charge or leave the objection to be taken thereafter in arrest of judgment.

(4) If a charge is quashed under the provisions of this paragraph, the court may direct the accused person to be detained in custody or to be released on bail for a period not exceeding fourteen days thereafter, and may order him to plead to another charge if called on to do so within that same period.

No. 10 of 1963

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O N A P P E A L
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B E T W E E N

LI KEUNG PONG alias
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and

ATTORNEY-GENERAL OF
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