IN THE PRIVY COUNCIL — No. 10 of 1963

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG

B E T W E E N

LI KEUNG PONG alias LI SIU CHEUNG — Appellant

AND

THE ATTORNEY GENERAL OF HONG KONG — Respondent

R E C O R D O F P R O C E E D I N G S

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED LEGAL STUDIES
22 JUN 1965
25 RUSSELL SQUARE
LONDON, W.C.1.
78573

DARLEY CUMBERLAND & CO.
36 John Street,
Bedford Row,
London W.C.1.
Solicitors for the Appellant.

CHARLES RUSSELL & CO.
37 Norfolk Street,
London W.C.2.
Solicitors for the Respondent.

IN THE PRIVY COUNCIL No. 10 of 1963

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG

B E T W E E N

LI KEUNG PONG alias LI SIU CHEUNG — Appellant

and

THE ATTORNEY GENERAL OF HONG KONG — Respondent

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

No.	Description of Document	Date	Page
	IN THE DISTRICT COURT OF VICTORIA		
1.	Case Stated by District Judge (including Charges)	24th September 1962	1
2.	Ruling by District Judge (Appendix to Case Stated)	18th September 1962	6
	IN THE SUPREME COURT OF HONG KONG		
3.	Short Decision of the Supreme Court	3rd October 1962	17
4.	Full Decision of the Supreme Court	13th November 1962	18
	IN THE DISTRICT COURT OF VICTORIA		
5.	Judgment and Reasons for Verdict of District Judge	3rd October 1962	38
	IN THE PRIVY COUNCIL		
6.	Order in Council granting special leave to Appeal	20th February 1963	46

DOCUMENTS NOT TRANSMITTED TO THE PRIVY COUNCIL

Description of Document	Date
Notes of Evidence	
Notes of Argument	

IN THE PRIVY COUNCIL No. 10 of 1963

ON APPEAL
FROM THE SUPREME COURT OF HONG KONG

B E T W E E N :

LI KEUNG PONG alias LI SIU CHEUNG Appellant

and

10 THE ATTORNEY GENERAL OF HONG KONG Respondent

RECORD OF PROCEEDINGS

No. 1.

In the District Court of Victoria

No.1.

Case stated by District Judge

24th September, 1962.

CASE STATED BY DISTRICT JUDGE including CHARGES

CASE NO: V.D.C. No.37 of 1962.

Case stated by a District Judge.

IN THE SUPREME COURT OF HONG KONG
Appellate Jurisdiction

BETWEEN:

20 Regina per Attorney General Appellant

and

LI Keung-Pong alias LI Siu Cheung. Respondent

This is a case stated by the undersigned a District Judge at Hong Kong under section 32A of the District Court Ordinance 1953 (see

In the District Court of Victoria

No.1

Case stated by District Judge.

24th September 1962.

(continued)

Supplement No.1 to the Hong Kong Government Gazette No. 47 dated Friday, September 14th, 1962) for the purpose of appeal to the Full Court on questions of law which arose before me as hereinafter stated.

1. At the Victoria District Court in the said Colony, on the 6th day of September, 1962, the following six charges were preferred by Regina per The Attorney General (hereinafter called the Appellant) against LI Keung-Pong alias LI Siu-Cheung (hereinafter called the Respondent):- 10

1st Charge

Statement of Offence

Obtaining credit by fraud other than false pretences, contrary to section 51(a) of the Larceny Ordinance, Cap.210.

Particulars of Offence 20

LI Keung-Pong alias LI Sui-Cheung, on the 9th day of May, 1962, in this Colony, in incurring a debt or liability to Richard CHENG alias CHENG Tien-shun, obtained credit to the amount of $34,489.75 Hong Kong currency, from the said Richard CHENG alias CHENG Tien-shun by means of fraud other than false pretences.

2nd Charge

Statement of Offence 30

Obtaining credit by fraud other than false pretences, contrary to section 51(a) of the Larceny Ordinance, Cap.210.

Particulars of Offence

LI Keung-pong alias LI Siu-cheung, on the 9th day of May, 1962 in this Colony, in incurring a debt or liability to Richard CHENG alias CHENG Tien-shun, obtained credit to the amount of $34,572.00 Hong Kong currency, from the said Richard CHENG alias CHENG Tien-shun by means of fraud 40

other than false pretences.

In the District Court of Victoria

No.1.

Case stated by District Judge.

24th September 1962.

(continued)

3rd Charge

Statement of Offence

Obtaining credit by fraud other than false pretences, contrary to section 51(a) of the Larceny Ordinance, Cap.210.

Particulars of Offence

LI Keung-pong alias LI Siu-Cheung, on the 10th day of May, 1962 in this Colony, in incurring
10 a debt or liability to Richard CHENG alias CHENG Tien-shun, obtained credit to the amount of $18,126.00 Hong Kong currency, from the said Richard CHENG alias CHENG Tien-shun by means of fraud other than false pretences.

4th Charge

Statement of Offence

Obtaining credit by fraud other than false pretences, contrary to section 51(a) of the
20 Larceny Ordinance, Cap.210.

Particulars of Offence

LI Keung-pong alias LI Siu-cheung, on the 10th day of May, 1962 in this Colony, in incurring a debt or liability to Richard CHENG alias CHENG Tien-shun, obtained credit to the amount of $42,210.00 Hong Kong currency, from the said Richard CHENG alias CHENG Tien-shun by means of fraud other than false pretences.

5th Charge

30 Statement of Offence

Obtaining credit by fraud other than false pretences, contrary to section 51(a) of the Larceny Ordinance, Cap.210.

Particulars of Offence

LI Keung-pong alias LI Siu-cheung, on the 10th day of May, 1962 in this Colony, in

incurring a debt or liability to Richard CHENG alias CHENG Tien-shun, obtained credit to the amount of $69,847.50 Hong Kong currency, from the said Richard CHENG alias CHENG Tien-shun by means of fraud other than false pretences.

6th Charge

Statement of Offence

Obtaining credit by fraud other than false pretences, contrary to section 51(a) of the Larceny Ordinance, Cap.210.

Particulars of Offence

LI Keung-pong alias LI Siu-cheung, on the 10th day of May, 1962 in this Colony, in incurring a debt or liability to Richard CHENG alias CHENG Tien-shun, obtained credit to the amount of $64,320.00 Hong Kong currency, from the said Richard CHENG alias CHENG Tien-shun by means of fraud other than false pretences.

2. I heard and mentally determined the said six charges and wrote a judgment thereon.

3. That judgment remains undelivered since as I was about to deliver it Counsel for the Respondent made a submission that I had no jurisdiction. After hearing Crown Counsel in reply I wrote a second judgment confined to the issue of jurisdiction and reaching the conclusion that I had no jurisdiction. The Respondent being upon bail, I thereupon discharged his recognisances.

4. And whereas the Appellant, being dissatisfied with my determination upon this issue of jurisdiction as being erroneous in point of law has, pursuant to section 32A of the District Court Ordinance 1953, duly applied to me in writing to state and sign a case setting forth the facts and grounds upon which my said determination was made, in order that he may appeal therefrom to the Full Court.

5. Now therefore I, the said District Judge, in compliance with the said Appli-

In the District Court of Victoria

No.1

Case stated by District Judge.

24th September 1962.

(continued)

cation and the provisions of the said Ordinance, do hereby state and sign the following case:

(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(i) 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.

(iv) My reasons for those conclusions are set out in the written judgment a copy of which is attached as an appendix hereto.

(v) The Crown had very little notice of the intention of the Respondent's counsel to submit a plea to the jurisdiction. I understand that subsequently to my determination of this issue argument, fuller than was addressed to me, has been addressed to my brother McMullin by the Crown on precisely the same issue. My colleague has not yet ruled on the issue nor is argument complete. I have thought it proper to refrain from any comment on additional argument which was not addressed to me and the nature of which I am aware only at second-hand.

In the District Court of Victoria

No.1

Case stated by District Judge.

24th September 1962.

(continued)

(vi) The questions of law arising on the above statement for the opinion of the Full Court are:-

(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. 10

Dated the 24th day of September, 1962.

(W.F. Pickering)
District Judge, Victoria.

No. 2.

Ruling by District Judge.

18th September 1962.

No. 2.

RULING BY DISTRICT JUDGE (Appendix to Case Stated)

IN THE DISTRICT COURT OF HONG KONG
HOLDEN AT VICTORIA
CRIMINAL JURISDICTION.
CASE NO. 37 OF 1962 20

THE QUEEN

against

LI KEUNG-PONG alias LI SIU-CHEUNG
(on bail)

Coram: Pickering, D.J.

R U L I N G

I adjourned this case for the purpose of arriving at a verdict. I have written a judgment and was about to de- 30

In the District Court of Victoria

No.2.

Ruling by District Judge.

18th September 1962.

(continued)

liver it when Mr. Leong, at what he owned was a very late stage, made a submission. His submission concerned jurisdiction and went to the very root of the case. It was therefore incumbent upon me to hear that submission and I also had the benefit of hearing learned Crown Counsel in reply.

Mr. Leong's principal point was that section 51(a) of the Larceny Ordinance (Cap.210) under which these six charges are brought provides that each of these offences is "a misdemeanour triable summarily". The language of that phrase, Mr. Leong urged, could not be clearer and it followed that the case should have been heard before a magistrate and that there was no power in any magistrate to transfer the case to the District Court. He referred me to the case of in re Robb's Contract, (1941) Ch. at p.478 where Lord Greene M.R. referring to the great inconvenience which the court's decision would cause said of a circular issued by the Commissioner of Inland Revenue:

> "The Court cannot allow the existence of that circular to affect its mind in deciding what is the true construction of the section. All the circular does is to emphasize in a very striking way the great inconvenience of the section when it is construed as I consider it should be construed, and the matter may well be one for the attention of the legislature. All we can do is to construe the Act."

A further decision referred to was the Privy Council case of Hoani Te Heuheu Tukino V. Aotea District Maori Land Board, (1941) A.C., p.308 where it was held that:

> "It is not open to the court to go behind what has been enacted by the legislature and to inquire how an enactment has come to be made, whether it arose out of incorrect information or, indeed, actual deception by someone on whome reliance was placed by it. The court must

In the District Court of Victoria

No. 2.

Ruling by District Judge.

18th September 1962.

(continued)

accept the enactment as the law,..."

Other cases quoted by Mr. Leong as authority for the proposition that where the words of a statute are in themselves precise and unambiguous they must be accepted in their natural and ordinary sence, where the Sussex Peerage case, (1844) Clark and Pinnelly's Reports, Vol.11, p.85 (Tindal L.C.J. at p.143) and Vacher v. London Society of Compositors (1913) A.C. at p.107 (particularly the first three paragraphs of Lord Macnaghten's judgment at p.117). 10

Throughout the Larceny Ordinance, Mr. Leong said, various offences were described as"misdemeanours" and others were described as "misdemeanours triable summarily". Thus, section 51(a) - the section with which we are concerned, speaks of a misdemeanour triable summarily; whereas section 50 speaks of a misdemeanour and prescribes a maximum penalty of five years. This maximum penalty, Mr. Leong said, was such as to result in the omission of the words "triable summarily" in section 50. It was not intended that the offence referred to in section 51(a) should be an indictable offence and since section 87A(1) of the Magistrates Ordinance (Cap.227) enables a magistrate to transfer to the District Court only certain indictable offences, the magistrate had no power to transfer this case to the District Court. 20 30

Defence Counsel also referred me to Archbold's Criminal Pleadings 34th Edn., p.2, para.2 where it is said that an indictment is the ordinary common law remedy for all treasons and felonies, for misprisions of treason and felony and for misdemeanours of a public nature. 40

I was referred also to Hawkins' Pleas of the Crown at p.210, Cap. 25, section 4 where it is stated:

"There can be no doubt, but that all capital crimes whatsoever, and also all kinds of inferior crimes of a

In the District Court of Victoria

No. 2

Ruling by District Judge.

18th September 1962.

(continued)

public nature, as misprisions, and all other contempts, all disturbances of the peace, all oppressions, and all other misdemeanours whatsoever of a public evil example against the common law, may be indicted; but no injuries of a private nature, unless they some way concern the King."

The present proceedings, Mr. Leong said, were virtually in the nature of a private prosecution. They concerned alleged fraud in the giving of worthless cheques by the accused to a Mr. Cheng who was also taking civil action in respect of these cheques. It was not a matter which affected the public.

Mr. Leonard, for the Crown, countered with a reference to the same edition of Archbold where at para. 6 on p.3, it is stated that:

"Where a statute declares any act or omission to be treason, felony, misprision of treason or misdemeanour, an indictment lies in respect of such act or omission. Even though a statute does not use express terms describing the nature of the offence, if it prohibits a matter of public grievance to the liberties and securities of the subject, or commands a matter of public convenience (such as the repairing of highways or the like), all acts or omissions contrary to the prohibition or command of the statute are misdemeanours at common law, punishable by indictment, unless such method of procedure manifestly appears to be excluded by the statute."

The words "manifestly appears to be excluded" were, Mr. Leonard suggested, the acid test and he quoted the case of R. v. Hall (1891) 1 Q.B. p.747 where Charles J. at p.753 said, quoting Hawkins' Pleas of the Crown:

"It seems to be a good general ground that wherever a statute prohibits a

In the District Court of Victoria

No. 2.

Ruling by District Judge.

18th September 1962.

(continued)

> matter of public grievance to the liberties and security of a subject, or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable, not only at the suit of the party aggrieved, but also by way of indictment for this contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it." 10

It appears to me, however, that learned Crown Counsel who had very little notice that this submission was to be made, may have missed the continuation of that quotation which detracts from the excerpt which he quoted and which is set out above. The question continues a little down the page: 20

> "Also where a statute makes a new offence which was no way prohibited by the common law, and appoints a peculiar manner of proceeding against the offender as by commitment, or action of debt, or information, etc., without mentioning an indictment, it seems to be settled to this day that it would not maintain an indictment, because the mentioning the other methods of proceeding seems impliedly to exclude that of indictment." 30

The extract quoted immediately above appears also in Archbold 34th Edn. at p.4 para. 7.

As I understand it, the term "indictable offences" embraces all common law offences, whether felonies or misdemeanours, and all statutory offences except those which the statute creating them provides shall be triable summarily or alternatively provides shall be triable either summarily or on indictment. If that be the correct view it would appear that an offence under section 51(a) of the Larceny Ordinance is not an indictable offence, for the offence is, as Mr. 40

In the District Court of Victoria

No. 2.

Ruling by District Judge.

18th September 1962.

(continued)

Leonard conceded, a creature of statute and the section provides for a method of trial which is not trial on indictment.

The proposition that an offence, created by a statute which also prescribes some particular method of proceeding against the offender without mentioning an indictment, is not an indictable offence is one which was accepted by my learned brother Macfee in the case of R. v. Ho Sai Ngau, (1956) D.C.L.R. p.1 in which he considered the meaning of the words "triable summarily" in relation to section 36(c) of the Offences against the Person Ordinance, Cap. 212. In that case he said:

> "As I see it, assisted by the representations of learned Counsel, any misdemeanour is indictable unless it is only made an offence by a statute which also prescribes some particular method of proceeding against the offender, without mentioning an indictment."

The learned Judge in that case went on to consider whether the offence with which he was concerned was created by statute or not and decided that it was not a statutory offence but had been an offence at common law and was accordingly an indictable offence. He went on to apply the "No manifest exclusion test" of R. v. Hall to which I have referred and came to the conclusion that there was no such exclusion and that the District Court had jurisdiction in respect of offences under section 36(c) of the Offences against the Person Ordinance.

I would here digress for a moment to observe that in that case my learned brother considered initially the question as to whether the District Court is a court of summary jurisdiction because, had that been the case, he would undoubtedly have had jurisdiction to try Ho Sai Ngau as I would have jurisdiction to try the present accused. In dealing with this question he said:-

> "I think it may be convenient first of all to consider whether this Court is a court of summary jurisdiction because

In the District Court of Victoria

No. 2.

Ruling by District Judge.

18th September 1962.

(continued)

if it is then of course it would undoubtedly have jurisdiction to try the second charge. This consideration is rather complicated by the absence of any English parallel with the District Courts of Hong Kong. Apart from such rare methods of procedure as impeachment and criminal information, the usual methods of prosecution in England are of course by way of indictment at assizes or quarter sessions - usually, but not invariably, after a committal by magistrates - or by trial in a court of summary jurisdiction pursuant to complaint or information in that court. In Hong Kong the first of these methods is appropriate for a prosecution before the Supreme Court (in the exercise of its criminal jurisdiction) and the second for a prosecution before magistrates.

The District Courts appear to fall between two stools, their criminal jurisdiction only arises in cases "transferred" to them by Magistrates, and yet such "transfer" is not on similar lines to a committal for trial on indictment and indeed it seems clear that District Courts cannot try offences on indictment albeit that they can only try "indictable" offences which latter (with certain specified exceptions) are the only sort of offences which the magistrates can "transfer" to District Courts.

I am of the view that the necessity for the prior bringing before, and transfer by, a magistrate of a charge before it can be tried by the District Courts operates to take the District Courts out of the category of courts of summary jurisdiction in criminal matters. The fact that District Courts exercise, by express statutory provision, the former summary jurisdiction of the Supreme Court in civil matters is not I consider a relevant consideration for present purposes."

I agree and would only add that in the

In the District Court of Victoria

No.2.

Ruling by District Judge.

18th September 1962.

(continued)

Interpretation Ordinance, Cap.1, the term "summary conviction" is defined as summary conviction by a Magistrate in accordance with the procedure prescribed by the Magistrates Ordinance. It seems to me that by analogy summary trial must be trial by a magistrate in accordance with the procedure prescribed by that Ordinance.

I have considered the position in
10 England in relation to the similar offences arising under section 13(1) of the Debtors Act 1869. My consideration of the various legislative enactments under which a person charged on indictment may elect to be tried summarily and in certain cases a person charged summarily may elect to go before a jury, has not greatly assisted me and I will say no more than that it is of interest to observe that the offence under section 13(1)
20 of the Debtors Act 1869 is in England on indictable offence, but is one which is included in the First Schedule to the Magistrates Courts Act, 1952, as being an offence in respect of which the accused may elect to be tried summarily. Having come to the conclusion that an offence under section 51(a) of the Larceny Ordinance is not an indictable offence because it is a creation of statute and a method of proceeding against
30 the offender other than that of an indictment is prescribed, I was at first concerned at the realization that in England the similar offence under section 13(1) of the Debtors Act 1869 is indictable. The reason, however, becomes apparent when one compares the wording of the two sections, Section 13 of the Debtors Act 1869 reads in part:

> "Any person shall in each of the cases following be deemed guilty of a mis-
> 40 demeanour, and on conviction thereof shall be liable to be imprisoned for any time not exceeding one year, with or without hard labour; that is to say, (1) If in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud:"

The second and third subsections merely go on to describe further offences.

In the District Court of Victoria

No. 2.

Ruling by District Judge.

18th September 1962.

(continued)

It is to be observed that in that section there is no reference to summary trial and that, it seems to me, is why the offence in England, although born of statute is nonetheless indictable.

The distinction, as I see it, between the case of R. v. Ho Sai Ngau (supra) and the present case is that the offence in the former case was merely a statutory restatement of a common law offence. In the present case it is not. It is an offence created by statute in respect of which a mode of trial other than on indictment has been prescribed, and, as such, on the authority of the later passages from Hawkins' Pleas of the Crown quoted in R. v. Hall and reproduced in Archbold, it is not an indictable offence.

10

Under section 87(A) of the Magistrates Ordinance, Cap. 227, however, a magistrate can only transfer to the District Court certain types of indictable offences and I am of the opinion that the Crown should not have sought the transfer of this case and that from the beginning I have had no jurisdiction.

20

My jurisdiction arises under section 24 of the District Court Ordinance (No. 1 of 1953) and it is a jurisdiction to hear all such charges as the Attorney General may lawfully prefer under the provisions of section 25. Under section 25 the Attorney General is required, unless he enters a nolle prosequi, to deliver to the registrar a charge sheet after 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. In the present case, however, the charge was not transferred in accordance with those provisions since the offence is not an indictable offence.

30

40

I have considered whether or not section 34 of the Interpretation Ordinance Cap. 1, would serve the Crown's position. That section reads:

In the District Court of Victoria

No.2.

Ruling by District Judge.

18th September 1962.

(continued)

> "A provision in an enactment which constitutes or results in the constitution of an offence shall, unless such offence is declared to be treason, felony or misdemeanour or the words 'upon indictment' appear, be deemed to include a provision that such offence shall be punishable upon summary conviction."

That means by inference, as I understand it, that if an offence is described as a misdemeanour and no indication of a mode of trial is given it can be tried upon indictment, but that can hardly apply in the case of a section such as section 51(a) of the Larceny Ordinance which provides explicitly for summary trial.

I have also asked myself whether I could call in aid section 69(1) of the Criminal Procedure Ordinance, Cap.221, which reads:

> "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 case of conviction, impose such punishment upon the person so convicted as might have been imposed by a magistrate and as the court may deem proper."

I do not think that I can utilize this section. In the first place, the word "court" used in that section is defined in the same Ordinance as meaning the Supreme Court acting in the exercise of its criminal jurisdiction. It is possible that with further research that difficulty of definition might be shown to be illusory.

I have not gone further into that matter however because it seems to me that section 29(5) of the District Court Ordinance would in any event effectively preclude me from any action under section 69(1) of the

In the District Court of Victoria

No. 2.

Ruling by District Judge.

18th September 1962.

(continued)

Criminal Procedure Ordinance. It is section 29 of the District Court Ordinance which applies (with considerable modifications) the provisions of the Criminal Procedure Ordinance to the District Court. Sub-section 5(a) of that section, however, provides that nothing in the whole section shall be taken to authorize the institution of any criminal proceedings in the District Court, save in accordance with the express provisions of that Part (i.e. Part IV) of the District Court Ordinance. The present proceedings, however, were not instituted in accordance with section 25(1), since they were not transferred to this Court in accordance with the provisions of Part IIIA of the Magistrates Ordinance and the explicit wording of section 29(5)(a) precludes me from taking any action to preserve the proceedings.

The decision should not be construed as implying that wherever the words "triable summarily" appear in a penal provision the case cannot be transferred to the District Court. That situation only arises where the offence, as in the present case, is not an indictable offence. If the offence is one which was a common law offence the mere use of the words "triable summarily" would not inhibit trial by indictment and such a case can properly be transferred to the District Court for trial, thought not on indictment, as an indictable offence.

I have said that I have no jurisdiction. I must however assume jurisdiction to the extent of discharging the recognisance which earlier I imposed upon Mr. LI Keung Pong.

(sd.) W.F. Pickering
District Judge
18.9.1962.

No. 3.

SHORT DECISION OF THE SUPREME COURT

IN THE SUPREME COURT OF HONG KONG

(Appellate Jurisdiction)

CRIMINAL APPEAL NO.279 of 1962

The Attorney General Appellant

and

10 LI Keung Pong alias LI Siu Cheung Respondent

Coram: Full Court (Hogan C.J., Scholes & Mills-Owens JJ.)

President's notes of the decision of the Full Court on 3rd October, 1962.

Decision: Appeal allowed on 2nd ground only. For reasons to be given later, we are satisfied that the first ground of appeal fails as the offences now not triable on indictment but that 20 the District Judge could have applied the provisions of Section 69(1) of the Criminal Procedure Ordinance and we direct that the trial be resumed and the District Judge consider that Section and the exercise of the discretion it confers upon him; that for that purpose the Appellant appear now before the District Court and his bail be extended accordingly and thereupon the bail be transferred to the District Court.

30 Basto applies for leave to appeal to the

In the Supreme Court of Hong Kong.

No. 3.

Short Decision of the Supreme Court.

3rd October, 1962.

(continued)

Judicial Committee of the Privy Council and for bail pending the appeal.

Court refuses to make any order granting leave to appeal to Privy Council.

Basto applies for bail on undertaking to file as soon as possible an application for leave to appeal to the Judicial Committee of the Privy Council.

Court refuses application.

(Sd.) M.J. Hogan
(President).

10

No. 4.
Full decision of the Supreme Court.

13th November, 1962.

No. 4.

FULL DECISION OF THE SUPREME COURT

IN THE SUPREME COURT OF HONG KONG
(Appellate Jurisdiction)
CRIMINAL APPEAL No. 279 of 1962

The Attorney General — Appellant

and

LI Keung Pong alias LI Siu Cheung — Respondent

20

D E C I S I O N

This is an appeal by way of case stated from a ruling by a District Judge, given when he had completed the hearing of the evidence on charges laid against the respondent under Section 51(a) of the Larceny Ordinance, Cap. 210, that he had no jurisdiction to try these

In the Supreme Court of Hong Kong

No. 4.

Full decision of the Supreme Court.

13th November, 1962.

(continued)

charges. The relevant part of the section as at present in force 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; or
> ....
> shall be guilty of a misdemeanor triable summarily and on conviction thereof liable to imprisonment for one year."

10

On the respondent appearing before the Magistrate the case was transferred to the District Court for trial in purported exercise of the provisions contained in Part IIIA of the Magistrates Ordinance (Cap.227). The trial proceeded in the District Court over a number of days and the point was reached where the District Judge was about to deliver his judgment. Before he could do so, Counsel for the respondent rose to make a submission that the District Court had no jurisdiction to try the offence. The basis of his submission was that the jurisdiction of the District Court is limited to the trial of indictable offences, such offences only being transferrable under Part IIIA of the Magistrates Ordinance.

20

Admittedly it is the case that Part IIIA authorizes the transfer to the District Court of indictable offences only. The case stated, and the argument both before the District Judge and before this Court, raise two broad points:- first, is the offence in question a summary offence simpliciter or is it one of that type of offences, which might be called hybrid offences, which may be prosecuted alternatively either on indictment or summarily; secondly if it be purely a summary offence, did Section 69(1) of the Criminal Procedure Ordinance (Cap.221) empower the District Judge to assume jurisdiction either to proceed with the trial, delivering his judgment or to remit the case to a magistrate.

30

40

The District Judge held that the offence was a summary offence and that Section 69(1) did not serve to overcome the limitation of the jurisdiction of the District Court to the

In the Supreme Court of Hong Kong

No. 4.

Full decision of the Supreme Court.

13th November, 1962.

(continued)

trial of indictable offences.

On the hearing of this appeal brought at the instance of the Crown under Section 32A of the District Court Ordinance, 1953, we came to the conclusion that, for reasons to be delivered later, the appeal should be allowed. We then indicated that whilst we were of the opinion that the offence is a purely summary offence, the provisions of Section 69(1) of Cap. 221 are applicable to the District Court so that the District Judge was thereby empowered, and indeed required, either to proceed with the trial by delivering his judgment or to remit the case to a magistrate, as he in his discretion thought fit. Upon allowing the appeal on the second point, therefore, we ordered that the trial be resumed by the judge with a view to such discretion being exercised. We now give our reasons for holding, first, that the offence is a summary offence, but secondly that Section 69(1) applies to meet the situation where a charge for such an offence has, wrongly in the first instance, been transferred to the District Court.

Before doing so, we should perhaps state that it appears to be accepted that if the offence were to be what we have termed a hybrid offence, it could properly have been transferred under Part IIIA of Cap.227. Whether that is so or not depends upon the definition of "indictable offence" appearing in Section 2 of Cap.227, and prima facie the definition appears to include hybrid offences. But in the circumstances of our conclusion that the offence is a summary offence simpliciter, it is not necessary to refer further to this aspect of the matter.

The Larceny Ordinance, Cap. 210, is compounded of the Larceny Ordinance 1935 with subsequent amendments, in particular the amendment effected by Section 3 of the Ordinance No. 22 of 1950 (the Law Revision (Penalties Amendment) Ordinance, 1950). In the 1935 Ordinance the relevant section was Section 50 and it expressed the offence of obtaining credit by fraud to be a "mis-

demeanour" punishable "on conviction" by imprisonment for not more than one year. Section 3 of the Ordinance No.22 of 1950 provided as follows:-

"3. (1) Whenever in any enactment coming into operation before the commencement of this Ordinance an offence is made punishable upon indictment by imprisonment for a term not exceeding two years or punishable upon indictment by a fine not exceeding two thousand dollars, or punishable upon indictment by such imprisonment or such fine in the alternative, such offence shall be a misdemeanor triable summarily.

(2) Whenever in any enactment coming into operation before the commencement of this Ordinance an offence is made punishable in manner specified in the previous subsection, and also upon summary conviction, such offence shall be a misdemeanor triable summarily, and the provisions in such enactment relating to summary conviction shall be deemed to have been repealed hereby if the punishment upon summary conviction is less than that which could be imposed upon indictment.

(3) The enactments affected by this section shall be deemed to have been amended by this section whether or not such enactments are also affected by amendments enacted by section 2 of this Ordinance."

The offence is now expressed in Chapter 210 to be a "misdemeanour triable summarily". No doubt that is the result of the exercise by the Law Revision Commissioners of their powers of incorporating amendments into the body of a statute (vide the Revised Edition of the Laws Ordinance (No. 20 of 1948, as under subsection (3) of Section 3 of the Ordinance) No. 22 of 1950 the amendments effected by the section are to be deemed to be incorporated in the enactments thereby amended. As a result of this latter subsection therefore, and of the exercise by the Commissioners of their powers under the Ordinance of 1948, the

In the Supreme Court of Hong Kong.

No. 4.

Full decision of the Supreme Court.

13th November, 1962.

(continued)

Larceny Ordinance of 1935 now appears, in the form of Chapter 210, with the words "triable summarily" appearing immediately after the word "misdemeanour".

Counsel for the respondent contended that as the Revised Edition of the Laws is now the "sole and only proper Statute Book of the Colony" (vide Section 7(2) of the Ordinance of 1948) it is not permissible to have regard to the history of the enactment of the offence unless the provisions of the Section as it now appears in Chapter 210 are ambiguous. 10

He contended that the provisions of Section 51(a) of the Larceny Ordinance as now in force are, on the face of them, quite plain and unambiguous, that they must be given their plain grammatical meaning and that there is no justification for seeking to interpret them by reference to judicial authorities or the history of the Statute, and no justification for assuming that the Legislature made any error or mistake in enacting them in their present form. In support of this argument he referred to Craies on Statute Law (5th Edn.) p.488, and the cases of Barrell v. Fordree *(1)* and Richards v. McBride *(2)*. 20

We would say immediately that in our view the expression "misdemeanour triable summarily" is an equivocal expression. The word "misdemeanour" might be regarded as a term of art clearly implying an offence triable on indictment in which case it might be said the additional words "triable summarily" are to be regarded as providing for an alternative, additional mode of trial; per contra, the whole expression "misdemeanour triable summarily" might be regarded as meaning an offence triable summarily, a summary offence simpliciter. On the meaning to be attributed to the word "misdemeanour" we have derived valuable assistance from the Australian Case of Reynolds v. Stacy *(3)*, where the history of the use of the expression 30 40

(1) (1932) A.C. 676 at 682
(2) 8 Q.B.D. 119 at 122
(3) (1957) 96 C.L.R. 454

is carefully examined and the conclusion arrived at that in its primary meaning "misdemeanour" connotes that the offence is indictable, although a wider secondary meaning is recognized in which the word is sometimes employed covering all offences below the degree of felony whether indictable or not (at p.462). Where, therefore, 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. It would be otherwise, for example, where the enactment in question is not concerned to create an offence but to refer to a person's misdemeanours.

We therefore conclude that we may and should, have regard to the history of the enactment now in question. Here the main standpoint of the Crown is that the original existence of the offence as an indictable offence under the Ordinance of 1935, coupled with the retention of the term of art, the word "misdemeanour", in the Ordinance No.22 of 1950, must lead to the view that the addition of the words "triable summarily" was intended to have a cumulative, not a restrictive effect. Henceforward, the offence was to be triable either on indictment or summarily.

In support of this argument reference is made to Halsbury's Laws of England (3rd Edn.) Vol.10 p.271 where it is stated:

> "If a statute prohibits or commands an act, disobedience to the statute is criminal and punishable by indictment, unless proceedings by indictment manifestly appear to be excluded by the Statute."

The authority quoted for this statement is 2 Hawk. P.C. c.25, s.4 Paragraphs 2 and 6 of Archbold's Criminal Pleading Evidence & Practice (34th Edition) were also mentioned; but the authority quoted in this testbook is again that of Hawkins.

Crown Counsel then turned to Sec. 34 of the Interpretation Ordinance, which reads as follows:-

In the Supreme Court of Hong Kong

No. 4.

Full decision of the Supreme Court.

13th November, 1962.

(continued)

"34. A provision in an enactment which constitutes or results in the constitution of an offence shall unless such offence is declared to be treason, felony or misdemeanour or the words "upon indictment" appear, be deemed to include a provision that such offence shall be punishable upon summary conviction."

This section, it is urged, clearly implies that a misdemeanour is triable on indictment and since the word "misdemeanour" appears in Sec. 51(a) the offence must be triable on indictment, and consequently the reference to "triable summarily" merely implies an additional remedy.

Crown Counsel went on to argue that the words "triable summarily" should be distinguished from words such as "liable on summary conviction" or "punishable on summary conviction" which, he maintained, would clearly limit the punishment to trials of a summary nature; where, on the other hand, the words "triable summarily" are introduced in respect of an offence already triable on indictment, they should be regarded, he said, as providing an additional and not an exclusive remedy.

In support of these contentions, he referred to a number of English cases, including the Queen v. Hall *(4)* where Charles J. (at p.753) quoted the passage from Hawkins' Pleas of the Crown, Bk.2, c.25, s.4. to which reference has already been made and which reads as follows:-

"It seems to be a good general ground that wherever a statute prohibits a matter of public grievance to the liberties and security of a subject, or commands a matter of public convenience, ... an offender against such statute is punishable, not only at the suit of the party aggrieved, but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it. ..... Also, where a statute makes a new offence which was

(4) (1891) 1 Q.B. 747

In the Supreme Court of Hong Kong.

No. 4.

Full decision of the Supreme Court.

13th November, 1962.

(continued)

no way prohibited by the common law, and appoints a peculiar manner of proceeding against the offender as by commitment, or action of debt, or information, &c, without mentioning an indictment, it seems to be settled to this day that it would not maintain an indictment, because the mentioning the other methods of proceeding seems 10 impliedly to exclude that of indictment. Yet it hath been adjudged that, if such a statute give a recovery by action of debt, bill, plaint, or information, or otherwise, it authorizes a proceeding by way of indictment. Also where a statute adds a further penalty to an offence prohibited by the common law, there can be no doubt but that the offender may still be indicted, 20 if the prosecutor think fit, at the common law. And if the indictment for such offence conclude contra formam statuti, and cannot be made good as an indictment upon the statute, it seems to be now settled that it may be maintained as an indictment at common law."

Other authorities mentioned were:-

R. v. Kakelo, (17 C.A.R. 150)

R. v. Barnett, (35 C.A.R. 37)

30 R. v. Ho Sai Ngau, (1956 H.K.D.C.L.R. 1)

R. v. Robinson, (97 E.R. 568)

R. v. Harris, (100 E.R. 973) and

Pickup v. Dental Board of United Kingdom, (1928 2 K.B. 459).

Counsel for the respondent, on the other hand, argued that the cases quoted by Counsel for the Crown and the additional case of R. v. Carlile *(5)* to which he referred, show that unless the offence in question had previously been prohibited under the common law 40 then the enactment of a statute appointing a particular remedy, such as the remedy of

(5) 106 E.R. 621

In the Supreme Court of Hong Kong

No. 4.

Full decision of the Supreme Court.

13th November, 1962.

(continued)

summary trial in this instance, impliedly excludes a remedy by way of indictment.

This view seems to find a measure of support in the passage from Hawkins, but the passage is more limited in scope than may appear at first sight. When the author talks of "a new offence which was in no way prohibited by the common law" he seems to imply that an offence must fall into one or other of these two categories. This ignores a third category of offences; those which were not new offences, inasmuch as they had previously been prohibited by statute. 10

A similar limitation in the question to which the Court was addressing itself emerges from R. v. Carlile, 106 E.R. where Abbott C.J. (at p.622) said:-

> "Now I take it to be a general rule, that where there is a misdemeanour at common law, a statute providing a particular punishment for it does not repeal the common law." 20

On the other hand, a perusal of the cases indicates that the expression of the rule in a form which appears to restrict it to offences previously punishable at common law may well have been due to the fortuitous circumstances that the particular offence with which the Court was concerned at the time was, in fact, a common law offence. This, 30 of course, would not apply to the statement in Hawkins, but the rule has been frequently stated by Judges in terms wide enough to include offences previously created by statute. Castle's case, Cro. Jac.643, to which reference is so frequently made in the earlier decisions, was decided about a century before Hawkins wrote his book and in it the rule is expressed as follows:-

(see quotation in R. v. Robinson *(6)* 40

> "... where a statute creates a new offence, by prohibiting and making unlawful anything which was lawful before; and appoints a specific

(6) 97 E.R. at 570

remedy against such new offence (not antecedently unlawful) by a particular sanction and a particular method of proceeding, that particular method of proceeding must be pursued, and no other."

The rule as so stated makes it immaterial whether the prior prohibition depended on the common law or on a statute.

10 In R. v. Kakelo *(7)*, at p.153, the Court having referred to the quotation from Hawkins by Charles, J. in The Queen v. Hall *(4)* went on to state the law in the following terms:-

"We think that the law is that where a statute renders acts punishable for the first time, if the statute contains no general prohibition, such acts cannot be prosecuted by indictment unless 20 that mode of trial is prescribed, but can only be prosecuted in the manner which the statute directs."

This is a corollary of the opening statement in the passage from Hawkins and, strictly, does not necessarily preclude the possibility that only a prior prohibition at common law would save the remedy by indictment, but the implication appears to be that if the act was punishable at all on indict- 30 ment before the new statute, the remedy by indictment would remain.

In the case of R. v. Barnett *(8)* at p.42, the Court quoted and endorsed the principles expressed in the judgment of Williams J. in Eastern Archipelago *(9)* where he said at page 879:-

"It is a familiar doctrine that, though, where a statute makes unlawful that which was lawful before and appoints a 40 specific remedy, that remedy must be pursued and no other, yet, where an offence was antecedently punishable by

(4) (1891) 1 Q.B. 747
(7) 17 C.A.R. 150
(8) 35 C.A.R. 37
(9) 2 E. & B. 856

In the Supreme Court of Hong Kong

No. 4.

Full decision of the Supreme Court.

13th November, 1962.

(continued)

a common law proceeding as by indictment, and a statute prescribes a particular remedy in case of disobedience, that such particular remedy is cumulative, and proceedings may be had either at common law or under the statute."

That statement in terms, limits the common law requirement to the method of procedure and not to the creation of the crime itself. 10

Moreover, in a number of the older cases where the judges accepted the argument that the remedies were cumulative, the offences in question had previously become such by virtue of a statute and not at common law.

According to the account of the case of R. v. Davis *(10)* which is given by Lord Mansfield in the case of R. v. Robinson *(6)* at p.570, objection was taken to a charge for failing to obey the order of two Justices under 20 a statute of Charles II, on the ground that this was not an indictable offence because another statute had been enacted in the reign of William and Mary providing a new and specific remedy. The Court rejected this objection:-

"for they held the offence to have been indictable after the Act of 13, 14 C.2, c.12, and consequently not a new offence originally created by the 3, 4 W. & M. 30 c.11."

The same view appears to have been taken in the case of R. v. Boyall *(11)*. There the Court held that the offence in question which had been created under an earlier statute remained indictable even after the appointment of a summary remedy by a subsequent statute of 22 C.2; reliance being placed on the earlier decision of R. v. Davis *(10)*:

In the course of the argument in R. v. Boyall *(11)*, reference was made to Stephens

(6) 97 E.R. at 570
(10) M.28 G.2, Bur.803
(11) 97 E.R. 586

v. Watson, which is reported at 1 Salk. p.44. A footnote to that case, entered, no doubt, by the author in 1795, states:-

> "It should be observed, 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 in the same manner as if it was an offence at common law. Such are cases of Regina v. Gould, post.381; Rex. v. Davis, cited 2 Bur. 803; Rex. v. Jackson, Cowp.297."

The cases cited in support - one of which, R. v. Davis *(10)*, we have just mentioned - appear to support this conclusion.

None of this line of authorities, however, refers to an instance where the change was brought about by providing a summary remedy through amendment of the section creating the original offence, as distinct from the introduction of a new remedy by a separate statute which does not purport directly to amend or repeal the original provision.

The present case seems to come closer to the circumstances considered in Michell v. Brown *(12)* at p.912 where Lord Campbell, delivering the judgment on appeal said:-

> "...., if a later statute again describes an offence created by a former statute, and affixes a different punishment to it, varying the procedure, &c., giving an appeal where there was no appeal before, we think that the prosecutor must proceed for the offence under the later statute. If the later statute expressly altered the quality of the offence, as by making it a misdemeanour instead of a felony or a felony instead of a misdemeanour, the offence could not be proceeded for under the earlier statute: and the same consequence

(10) M.28 G.2, Bur.803
(12) 120 E.R. 909

In the Supreme Court of Hong Kong

No. 4.

Full decision of the Supreme Court.

13th November, 1962.

(continued)

> seems to follow from altering the procedure and the punishment. The later enactment operates by way of substitution, and not cumulatively giving an option to the prosecutor or the magistrate."

Has the legislation enacted in 1950 so altered the procedure and punishment as - to use the phrase of Hawkins - manifestly to exclude proceeding by indictment? 10

Prima facie, since prior to the amendment of what is now Section 51 of the Larceny Ordinance, Cap.210 by the addition of the words "triable summarily", this particular offence was, under the provisions of Section 89 of the Magistrates Ordinance, triable summarily as well as by indictment, there would seem to have been little or no reason for adding these words to the section unless it was for the purpose of prescribing that 20 the offence should in future be triable only in a summary manner. We think, however, that it is necessary, in view of the way in which this amendment came about, to examine the matter somewhat more fully for the purpose of ascertaining whether this first impression is sustained by a closer analysis of the legislation which produced this change.

The question really turns on the proper construction of Section 3 of the Ordin- 30 ance No. 22 of 1950. Sub-section (1) of the Section provided in effect that statutory indictable offences punishable with not more than two years imprisonment or $2,000 fine should thenceforth be misdemeanours triable summarily, the punishment remaining unaltered. The offence of obtaining credit by fraud fell into that category. Thus far, the meaning of the expression "misdemeanour triable summarily" remains obscure. But Sub-section (2) goes on 40 to provide that statutory offences which were punishable in the manner specified in Sub-section (1), that is to say on indictment with punishment not exceeding that specified in Sub-section (1) and also upon summary conviction should, likewise, thenceforth be misdemeanours triable summarily. Obviously,

In the Supreme Court of Hong Kong

No. 4.

Full decision of the Supreme Court.

13th November, 1962.

(continued)

Sub-section (2) was dealing with the hybrid type of offence and if the expression "misdemeanour triable summarily" was intended to mean triable either on indictment or summarily it was unnecessary to make the foregoing provision. Sub-section (2) provided further, however, that if the punishment on summary conviction should be less than that imposable on indictment the provisions relating to summary conviction should cease to have effect. It might therefore be contended that the Sub-section was perhaps intended to serve as an indirect method of increasing the punishment on a summary conviction of a hybrid offence, allowing it to remain a hybrid offence. But if that were so it would not be in keeping with Sub-section (1) which made no such provision; a position would have been reached whereby the more serious offences, the former purely indictable misdemeanours, would in some cases now carry on summary conviction a lesser penalty than the less serious offences, the hybrid offences, would carry on summary conviction. Such a result would, for example, occur where one had, as the subject of Sub-section (1), a former indictable offence carrying a maximum of one year's imprisonment, and , as the subject of Sub-section (2), a hybrid offence punishable on indictment with two year's imprisonment.

It is true that if the purpose of both Sub-section (1) and Sub-section (2) was, as we conceive it to be, to convert certain indictable offences and hybrid offences into summary offences, the anomaly in regard to punishment brought about by the latter part of Sub-section (2) would remain. Nevertheless, this anomaly is a factor to be considered in determining the (hypothetical) question whether Sub-section (2) was concerned solely to alter the extent of punishment on summary conviction of a hybrid offence. If that had been the sole object of Sub-section (2), the anomaly would have been all the more inexplicable, because it would have occured in legislation which, ex hypothesis, was directly aimed at the matter of punishment; on the other hand, if Sub-section (2) had the object of altering the procedure as well as the punishment it would not have been so gross an anomaly, being more likely to have occurred

In the Supreme Court of Hong Kong

No. 4.

Full decision of the Supreme Court.

13th November, 1962.

(continued)

incidentally.

Further, if the intention of Sub-section (1) was to convert indictable offences into hybrid offences it would have been most unusual to leave the punishment the same for conviction on indictment as on summary conviction; indeed, what object would have been served. In the case of Sub-section (2) it would have been still more pointless. These anomalies would not, of course, occur if the Sub-section were to be construed as we think they should be. Moreover, if the expression "misdemeanour triable summarily" was intended to mean an offence triable either on indictment or summarily it is strange that Sub-section (2) should, in defining the same subject matter, use a different expression, namely offences "punishable in manner specified in the previous sub-section, and also upon summary conviction." If Sub-section (2) had been intended only to provide that the maximum punishment upon summary conviction of a hybrid offence should thenceforth be the same as upon conviction on indictment, its purpose would, we think, have been achieved by more direct and explicit language. It would have been simple so to provide. But that would have been a departure from the usual provision made for this type of offence where the choice of proceeding on indictment, being one for the Prosecution, is exercised on a consideration of the circumstances of the offence and where the dual procedure is naturally aimed at the provision of different maxima of punishment according to the gravity of the offence.. Similarly, in the case of Sub-section (1), we think that more direct and explicit language would have been employed if the purpose had been to provide that indictable offences punishable with not more than two year's imprisonment should thenceforth also be punishable on summary conviction to the same extent.

In the year 1950, as today, the vast majority of indictable offences were already triable summarily by virtue of what is now Section 89 of the Magistrates Ordinance, this provision having been introduced in the Magistrates Ordinance of 1932. It may also be observed - a matter which Crown Counsel

In the Supreme Court of Hong Kong

No. 4.

Full decision of the Supreme Court.

13th November, 1962.

(continued)

touched upon - that it was by a later Ordinance of the year 1950 (namely the Law Revision (Misc. Amendments)(No.3) Ordinance, No. 37 of 1950) that a new section had been introduced into the Interpretation Ordinance, the effect of which was to make certain statutory offences punishable on summary conviction, namely those offences created in terms which did not declare them to be treason, felony or misdemeanour or in which the words "upon indictment" did not appear. The inference is that the legislature was endeavouring in that year to divert the lesser offences to the magistracy. The case for the appellant on the first point raised by the case stated rests in effect on the presumption that indictable offences remain indictable until it manifestly appears otherwise, a rule which may rest partly on the presumption that the jurisdiction of the superior court is not to be ousted except by express words or necessary implication. In our view, the proper construction of the legislation of 1950 leaves no room for the application of these doctrines. Section 3 of the Ordinance No. 22 of 1950 appears to us to be sufficiently clear in its terms and intent, and it would be wrong to attribute to the Legislature such a gross oversight, in the year 1950, as a failure to bear in mind that most indictable offences were already triable summarily under provisions which had been on the statute book for some 18 years previously and which must have been the subject of almost daily exercise. For these reasons we concluded that the offence in question is now a purely summary offence.

We turn to the question whether, assuming the offence under Section 51(a) of the Larceny Ordinance (Cap. 210) to be a purely summary offence, Section 69(1) of the Criminal Procedure Ordinance (Cap.221) applied to confer on the District Judge power to exercise a discretion either to conclude the trial or remit the case to a Magistrate. That sub-section reads as follows:-

> "69. (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

In the Supreme Court of Hong Kong

No. 4.

Full decision of the Supreme Court.

13th November, 1962.

(continued)

shall be remitted to a magistrate with such directions as it may think proper or allow the case to proceed, and in case of conviction, impose such punishment upon the person so convicted as might have been imposed by a magistrate and as the court may deem proper."

The District Judge in determining that he had no such power to apply this provision relied upon Section 29(5)(a) of the District Court Ordinance which states:- 10

"(5) Nothing in this section shall be taken to authorize:-
(a) the institution of any criminal proceeding in the District Court save in accordance with the express provisions of this Part;"

It is, however, clear that the operative words in this paragraph are the words "institution of any criminal proceeding" which is not what is in question. 20

Counsel for the respondent placed little reliance on Section 29(5) and concentrated the main weight of his argument on Section 27(5) of the District Court Ordinance, and to us it certainly appears that the difficulty in applying Section 69(1) of Cap.221 to the District Court lies in the provisions of Section 27(5) which provides:-

"(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." 30 40

Having regard to the main purpose of Section 27, it is a strange place in which to find such a provision, and the expression "law or practice relating to the jurisdiction"

is an unusual one.

Sub-section (1) of Section 29 applies the procedure and practice of the Supreme Court to the District Court and Sub-section (2) provides that, notwithstanding the provisions of Sub-section (1), none of the provisions of the Criminal Procedure Ordinance particularized in Part I of the Third Schedule to the Ordinance shall be applied to proceedings in the District Court. The implication is that all those sections of the Criminal Procedure Ordinance which were not so particularized were to be applicable to the District Court. This conclusion is reinforced by reference to the provisions of Sections 32, 33 and 34 of the District Court Ordinance, which modify certain sections of the Criminal Procedure Ordinance in their application to the District Court, those latter sections being sections not rendered inapplicable by Section 29(2).

The question is whether Section 29 is, but for Section 27(5) apt to apply Section 69(1) of the Criminal Procedure Ordinance. We think that regard must be had to the context in which Section 27(5) appears. The section as a whole is concerned with the form and presentment of charges and it may well have been considered desirable to emphasize that the jurisdiction of the District Court was a limited jurisdiction. It certainly appears to have been desired to emphasize that due process should be had. Having provided these two matters of emphasis in a not altogether appropriate place it may well have been considered that the object of precluding from trial in the District Court charges for indictable offences intended to be triable only in the Supreme Court would not, as a matter of drafting, be satisfactorily achieved without reference also to Section 29. Section 27(5) then goes so far as to make reference to Section 36, which is a section devoted entirely to rule-making powers, and to any rules made thereunder. The implication is that the legislature was concerned to leave no possible loophole with respect to the safeguard in mind. What was that safeguard? If it was the prevention of the institution of proceedings over which the

In the Supreme Court of Hong Kong

No. 4.

Full decision of the Supreme Court.

13th November, 1962.

(continued)

District Court had no jurisdiction that may not have been adequately provided for by Section 29(5)(a) which in terms deals with the institution of proceedings in accordance with the procedure laid down by the District Court Ordinance, not the institution of proceedings under Part IIIA of the Magistrates Ordinance where the jurisdictional limits of the Court are properly to be found.

Section 69(1) appears to be a very salutary provision. If it was considered necessary in relation to proceedings in the Supreme Court it was equally desirable of application to the District Court. It is not a case of conferring wider jurisdiction on the District Court, in the sence of jurisdiction over indictable offences triable only by a superior court, the Supreme Court, but of meeting the situation where a case triable in a lower court, the magistrates court, has been wrongly transferred.

Again, if Section 27(5) were to be given the meaning contended for by the respondent, it would follow that a large number of provisions of the Criminal Procedure Ordinance would be rendered inapplicable although they also appear in sections omitted from Part I of the Third Schedule. Thus, for example, Sections 61 to 65 inclusive of the Criminal Procedure Ordinance would be rendered inapplicable. Surely, if it had been intended to exclude the application of those sections, and of Section 69(1), to the District Court they would have been included in Part I of the Third Schedule.

Moreover, Section 29(2) is a particular, specific, provision whereas Section 27(5) is general in its terms, ambiguous, and limited by its context: a context which would appear to indicate that it was intended, not to exclude the whole of specific sections, but merely to preclude any incidental consequences affecting jurisdiction from sections which were otherwise applicable.

By "practice relating to the jurisdiction of the District Court" is meant, it is considered, the procedure established by Sections 24-27 inclusive, that is to say the mode of

presentation and form of charges. Section 29 was not to be construed to override the practice so established. In referring to the "law" relating to the jurisdiction of the District Court, Section 27(5) was referring to the jurisdiction of the Court conferred independently of the Ordinance, that is to say to the basic jurisdiction conferred by Part IIIA of the Magistrates Ordinance, with the
10 object, we consider, of ensuring that such basic jurisdiction should not be taken to be enlarged by reason of the application of portions of the Criminal Procedure Ordinance. If the effect of Section 69(1) in its application to the District Court were to be to enhance the basic jurisdiction of the Court, we would find difficulty in holding that it is so applicable, notwithstanding its non-appearance in Part I of the Third Schedule.
20 But that, in our view, is not the purpose of Section 69(1). Although it is, in a sense, a jurisdictional provision, in substance it is a provision intended to cure errors so as to avoid a multiplicity of proceedings, always a desirable object, and it affords the safeguard that no greater punishment can be imposed than a Magistrate would impose. It can hardly have been the object of Section 27(5) to exclude such a manifestly convenient and
30 beneficial provision.

We think that the application of Section 69 would not in itself alter the jurisdiction of the District Court which is defined by the earlier sections, Sections 24 and 25, read in conjunction with Section 87(A) of the Magistrates Ordinance. Section 69 which appears in an Ordinance dealing substantially with procedure leaves that jurisdiction intact but in the circumstances detailed in it
40 enables the District Judge temporarily to assume or take on the role of an officer exercising an inferior jurisdiction, i.e. a Magistrate, and to deal, within the limits of that lesser jurisdiction, with a case which has wrongly come before him.

The questions of law put to us by the case stated are whether:-

(1) the Judge was correct in holding that he lacked jurisdiction to try the case;

In the Supreme Court of Hong Kong

No. 4.

Full decision of the Supreme Court.

13th November, 1962.

(continued)

(2) having so held he was right in holding that the provisions of Section 69 of the Criminal Procedure Ordinance were not applicable.

We think the Judge was, for the reasons we have indicated correct in holding that, apart from Section 69 of the Criminal Procedure Ordinance, he could not try the charge, but wrong in failing to apply the provisions of that Section. 10

(signed) (Michael Hogan)
President

(signed) (A.D. Scholes)
Appeal Judge

(signed) (R.H. Mills-Owens)
Appeal Judge

In the District Court of Victoria

No. 5.

Judgment and Reasons for Verdict of District Judge

3rd October, 1962.

No. 5.

JUDGMENT AND REASONS FOR VERDICT OF DISTRICT JUDGE 20

IN THE DISTRICT COURT OF HONG KONG
HOLDEN AT VICTORIA
CRIMINAL JURISDICTION
CASE NO. 37 OF 1962

The Queen

against

LI Keung-pong alias LI Siu-cheung
(on bail)

Coram: Pickering, D.J.

JUDGMENT AND REASONS FOR VERDICT 30

In this case I held that the charges were

In the District Court of Victoria

No. 5.

Judgment and Reasons for Verdict of District Judge.

3rd October, 1962.

(continued)

not charges which could properly be transferred to the District Court from a Magistracy and further that I had no jurisdiction to try the charges.

I also considered that I was prevented from preserving the proceedings in this Court by applying S.69(1) of the Criminal Procedure Ordinance Cap. 221.

10 The Full Court has now ruled that the charges are not charges which were properly transferable to the District Court but that it was open to me to exercise my discretion under S.69(1) of the Criminal Procedure Ordinance and either remit the case to a magistrate with directions or allow the case to proceed in this Court.

20 Since all the evidence is complete and I had arrived at a verdict before the issue of jurisdiction was raised, it would be a manifest waste of judicial time to remit the case to a magistrate and I therefore propose to deliver judgment in this Court.

30 40 The evidence of the Prosecution witnesses shows and I so find that the accused, who was a client of the complainant stock broker, gave instructions on the 8th May, 1962, for the purchase of 100 shares in the Hongkong & Shanghai Bank, 1,000 shares in the Hong Kong Electric Company and 1,500 shares in the China Light & Power Company and that on the 9th of May he instructed the purchase of 2,000 further shares in the Hongkong Electric Company, 1,000 shares in the Green Island Cement Company and 500 shares in the Dairy Farm Ice & Cold Storage Company. On the 9th of May the complainant handed to the defendant scrip for 1,000 Hongkong Electric shares and 100 Hongkong & Shanghai Bank shares. In return the accused handed to the complainant two cheques - one for $34,489.75 and one for $34,572. These cheques were dated the 9th of May and when they were handed over the accused asked the complainant not to present them until the 10th. On the 10th of May the complainant handed to the accused scrip for 2,000 Hongkong Electric Shares, 1,000 Green Island Cement shares, 500 Dairy Farm shares and 1,500 shares in the China Light & Power Company and in exchange the

In the District Court of Victoria

No. 5.

Judgment and Reasons for Verdict of District Judge.

3rd October, 1962.

(continued)

accused handed over 4 cheques in the respective amounts of $69,847.50, $42,200.10, $64,320 and $18,926 and again requested one day's grace in the presentation of the cheques.

The complainant presented all these cheques for payment and all were dishonoured. As a result, the complainant and the accused met in a restaurant on the 11th of May and during the course of that meeting the accused caused the balance of his account with the Hang Seng Bank to be withdrawn and paid the resultant $31,000 in cash to the complainant. 10

The evidence further showed that the accused sold the shares which he had purchased - in each case on the date of purchase and in each case at a loss on the net market purchase price, i.e. he made a loss on the actual cost of the shares and also had to pay brokerage on each purchase and again on each sale. 20

These six dishonoured cheques form the basis of the six charges against the accused, all of which are of obtaining credit by fraud other than false pretenses, contrary to section 51(a) of the Larceny Ordinance Cap. 210. It is the Crown's contention that in ordering and accepting the shares and giving a cheque with a request for time in which to meet it, the accused was incurring a debt to the complainant obtaining a credit and doing that by a fraud other than false pretenses. 30

I did not have the benefit of any evidence from the accused or by any witness on his behalf. Nor did the accused volunteer any statement.

At the conclusion of the prosecution's case Mr. Leong for the accused submitted that his client had no case to answer. In support of this submission Mr. Leong pointed out that the wording of S.51 (a) of the Larceny Ordinance is identical with than of S.13 (1) of the English Act known as the Debtors Act 1869. He urged however that because in Hong Kong this particular offence has been incorporated into the Larceny Ordinance something more is required to prove the offence than the mere three ingredients (incurring of a debt or 40

In the District Court of Victoria

No. 5.

Judgment and Reasons for Verdict of District Judge.

3rd October, 1962.

(continued)

liability: the obtaining of credit and fraud) requisite to prove an offence against S.13 (1) of the Debtors Act. In addition to fraudulent intent, counsel argued, you must prove the ingredients of larceny, i.e. that the accused, without the consent of the complainant, fraudulently and without a claim of right made in good faith took and carried away money or valuable securities of the complainant's with
10 the intent at the time of permanently depriving him thereof.

In reply to this particular point Mr. Leonard, for the Crown, said that it was not possible to import the requirements of S. 2 of the Larceny Ordinance, relating to stealing, into those other sections of the Ordinance which created other offences. Thus S.45, he pointed out, related to being found by night armed or in possession of house-breaking
20 implements, S.55 to advertising a reward for the return of lost or stolen property, S.11 to taking or destroying fish in private waters and the requirements of S.2 could not be applied to these offences and should not be applied to S.51(a). The test, he suggested was the same as in England, i.e. the incurring of a debt, the obtaining of credit and fraud.

On this matter I found myself in agreement with counsel for the prosecution.

30 Mr. Leong's next submission in support of the proposition that his client had no case to answer was that there was no evidence of fraudulent intent. The shares which the accused bought and for which he gave the six cheques the subject-matter of these charges, Mr. Leong said, had been re-sold by him on the respective dates of purchase and the proceeds of sale had in each case been paid into the accused's bank as evidenced by the pay-in
40 slips. The object of these payments in, counsel said, was to be able to meet the six cheques which he had given to the complainant for the shares. I have not of course, had the benefit of any evidence from the accused, but I have asked myself if that was indeed the object of the payments in then why were the cheques given to the complainant dishonoured. Why have they still not been honoured (except to the extent of $31,000) to this very day?

In the District Court of Victoria

No. 5.

Judgment and Reasons for Verdict of District Judge.

3rd October, 1962.

(continued)

Mr. Leonard suggested that there was evidence of fraud in the closing of the accused's loan account with the Hang Seng Bank a few days before the transactions with which we are concerned; in the production to the complainant on the day that most of the shares were ordered, of a bank statement showing a credit of $383,353.83 - a far higher daily balance than had previously appeared in his account and one which was largely dissipated by the issue of cheques on the following day; in the request for a day's grace in the presentation of the cheques; in the re-sale of the shares at a loss on the very date of purchase; in the fact that one parcel of the shares was bought in the name of Ching Chi Wai who said in evidence that he had not given anybody authority to buy shares in his name and finally in the fact that the accused repaid $31,000 to the complainant on 11th May.

The re-sale at a loss of shares purchased only that very day is hardly a usual transaction. Counsel suggested that the purchase and re-sale of shares on the same day is commonplace on the Stock Exchange and is the way in which people make money - a suggestion which may well be true when the market is rising but which loses any force in a falling market. The immediate re-sale of these 6 parcels of shares did not appear to me to be explicable by ordinary commercial or investment standards. The undoubted incurring of a debt and obtaining of credit coupled with the accused's behaviour in regard to the shares and with the dishonour of all six cheques did suggest to me that there was sufficient evidence of fraudulent intent to go to a jury.

Mr. Leong's final point in his submission was that the transactions between the accused and the complainant were gambling transactions and that therefore on the authority of R. vs. Leon (1945) 1 A.E.R. 14, the debts incurred by the accused were irrecoverable.

There is evidence that some gambling transactions took place between the two men in regard to the future price of shares but the transactions with which we are concerned were straightforward purchases of shares and the relationship between the two so far as

concerns these transactions was that of broker and client. I was of the opinion that R. vs. Leon had no application.

Accordingly I ruled that the accused had a case to answer on all six charges. As I have already said no evidence was given for the defence and the accused made no statement.

In his final speech Mr. Leong raised only one point in addition to the matters he had raised in submitting no case to answer. He suggested that the evidence of the complainant was unreliable and referred in particular to a transaction involving the sum of $178,190. It appears that on May 1st in the course of the ordinary dealings between them the accused gave the complainant a cheque for that amount. The cheque was dishonoured upon presentation and on May 3rd the accused gave the complainant another cheque for the same amount. This second cheque was honoured upon presentation but almost simultaneously the original cheque was also honoured upon a second presentation. It transpired therefore that the accused had paid this sum of $178,190 to the complainant twice.

The complainant said that he repaid one sum of $178,190 to the accused by returning to him and crediting him with the value of two cheques for $100,000 and $36,755.50 respectively and by paying the balance of $41,434.50 in cash into the accused's bank account. The two cheques were cheques which had formerly been given to the complainant by the accused but which had been dishonoured.

In cross-examination it was put to the complainant that his version of the repayment of $178,190 to the accused was untrue; that the two cheques for $100,000 and $36,755.50 had eventually been honoured by the accused and formed part of a payment by him to the complainant of $210,000 on May 4th; that the complainant had in fact swindled the accused of $178,190 and that had this not been so there would have been nearly enough money in the accused's bank account to meet the 6 cheques the subject of these charges.

In the District Court of Victoria

No. 5.

Judgment and Reasons for Verdict of District Judge.

3rd October, 1962.

(continued)

This was strenuously denied by the complainant whose version of his repayment of the $178,190 I have set out above.

It is true that when asked to do so, the complainant was unable to show just how the May 4th payment of $210,000 was made up. That is to say that he was unable to point to any one transaction or one day's dealings with the accused which left the latter owing him exactly $210,000. He explained that the payment appeared to be in part satisfaction of the purchase price of a variety of shares which had been ordered by the accused on May 2nd and the price of which inclusive of brokerage and stamp duty was $255,722.50. I do not find this explanation unconvincing though no doubt it would have been neat and tidy had he been able to point to a transaction resulting in an indebtedness of the accused of exactly $210,000.

Wholly convincing, in my view, is the complainant's explanation of how he repaid the excess sum of $178,190 to the accused. Were that explanation untrue, it would be altogether too much of a coincidence for him to be able to point to three payments, two of them involving odd cents, which totalled exactly $178,190. Defence Counsel has suggested that repayment by means of the return of the dishonoured cheques and by payment of the balance in cash into the accused's bank, was a peculiar method and that the more straightforward way would have been to give the accused a cheque for $178,190. It seems to me that the method which the complainant adopted was a prudent means of ensuring that he would finally obtain value for the cheques in his possession which had previously been dishonoured. I can see nothing sinister in his version of the way in which repayment was effected.

Reviewing the whole of the evidence it appears to me indisputable that there was an incurring of a debt and an obtaining of credit. The nub of the case lies in the question whether the Crown have proved beyond reasonable doubt that there was fraud on the part of the accused.

The complainant gave evidence that owing

to previous cheques which had been dishonoured he had decided to do no further business with the accused and had instructed Mrs. Chu of his own staff to that effect. But, he said, his apprehensions were removed by the production by the accused of a statement from his bank showing a credit balance of more than $383,000. That amount, as is apparent from the accused's bank statements, was far in excess of his daily balance at any other time covered by the bank statements before the Court and within 24 hours of the production of this Credit Certificate, cheques had fallen like leaves and almost $300,000 had vanished from the account. Had the sum of $383,000 remained in the account it would of course have been more than sufficient to meet the six cheques with which we are concerned.

It is significant also that the accused asked for a day's grace in the presentation of each of these cheques and that he sold the shares which he was purchasing by means of the cheques on the very date of his acquisition of them. i.e. the day before his cheques were due to be cashed - and in each case sold at a loss. I do not think that I can draw any inference one way or the other from the fact that the accused had one parcel of shares put into the name of Ching Chi Wai. Nobody has been able to put forward any suggestion as to why this was done.

The fact that on the 11th of May the accused caused his balance at the Hang Seng Bank, amounting to $31,000, to be withdrawn and paid the money over to the complainant certainly does not suggest that he was then of the opinion that he had been swindled by the complainant.

These various matters leave no room, in my view, for reasonable doubt. There was fraud and a planned and carefully executed fraud.

I have balked at the inherent improbability of the offences for the accused is a man who had access to large amounts of money as is evident from his bank statement, and I have asked myself why such a man should perpetrate a fraud of this type which was bound

In the District Court of Victoria

No. 5.

Judgment and Reasons for Verdict of District Judge.

3rd October, 1962.

(continued)

to come to light very quickly and then merely sit back and wait for exposition. I cannot blink the evidence, however. The evidence is there and as it seems to me, it is clear evidence. All the ingredients of the offences are present and I find the accused guilty but of the first three charges only. Since only three charges could have been heard by a Magistrate.

Dated this 3rd October, 1962. 10

(sd) (W.F. Pickering)
District Judge.

No. 6.

In the Privy Council

No. 6.

Order in Council Granting Special Leave to Appeal

20th February, 1963.

ORDER IN COUNCIL GRANTING SPECIAL LEAVE TO APPEAL

AT THE COURT OF SAINT JAMES

The 20th day of February, 1963

Present

HER MAJESTY QUEEN ELIZABETH THE QUEEN MOTHER
HER ROYAL HIGHNESS THE PRINCESS MARGARET, COUNTESS OF SNOWDEN 20

LORD PRESIDENT MR. WOOD
MR. HARE MR. AMERY

WHEREAS Her Majesty, in pursuance of the Regency Acts, 1937 to 1953, was pleased, by Letters Patent dated the twenty-second day of January, 1963, to delegate to the following Counsellors of State (subject to the exceptions hereinafter mentioned) or any two or more of them, that is to say, His Royal Highness The 30 Prince Philip, Duke of Edinburgh, Her Majesty Queen Elizabeth The Queen Mother, Her Royal Highness The Princess Margaret, Countess of

Snowdon, His Royal Highness The Duke of Gloucester, His Royal Highness Prince William of Gloucester and His Royal Highness The Duke of Kent, full power and authority during the period of Her Majesty's absence from the United Kingdom to summon and hold of Her Majesty's behalf Her Privy Council and to signify thereat Her Majesty's approval for anything for which Her Majesty's approval in Council is required:

AND WHEREAS Her Majesty was further pleased to except from the number of the said Counsellors of State His Royal Highness The Prince Philip, Duke of Edinburgh, Her Royal Highness The Princess Margaret, Countess of Snowdon, His Royal Highness The Duke of Gloucester, His Royal Highness Prince William of Gloucester and His Royal Highness The Duke of Kent while absent from the United Kingdom.

AND WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 5th day of February 1963 in the words following viz.:-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Li Keung Pong alias Li Siu Cheung in the matter of an Appeal from the Supreme Court of Hong Kong between the Petitioner and the Attorney-General of Hong Kong Respondent setting forth: that the Petitioner prays for special leave to appeal 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 Petitioner of obtaining credit by fraud: And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal against the Judgment of the Supreme Court of Hong Kong dated the 3rd October 1962 reversing

In the Privy Council

No. 6.

Order in Council Granting Special Leave to Appeal

20th February, 1963.

(continued)

the Ruling of the District Court of Hong Kong dated the 18th September 1962 and for further and other relief:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the Supreme Court of Hong Kong dated the 3rd day of October 1962: 10

"AND Their Lordships do further report to Your Majesty that the proper officer of the said Supreme Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same". 20

NOW THEREFORE Her Majesty Queen Elizabeth The Queen Mother and Her Royal Highness The Princess Margaret, Countess of Snowdon being authorized thereto by the said Letters Patent have taken the said Report into consideration and do hereby by and with the advice of Her Majesty's Privy Council on Her Majesty's behalf approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution. 30

Whereof the Governor-General or Officer administering the Government of Hong Kong and its Dependencies for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly. 40

E.N. LANDALE.

IN THE PRIVY COUNCIL | No. 10 of 1963

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG

B E T W E E N

LI KEUNG PONG alias LI SIU CHEUNG — Appellant

AND

THE ATTORNEY GENERAL OF HONG KONG — Respondent

R E C O R D O F P R O C E E D I N G S

DARLEY CUMBERLAND & CO.
36 John Street,
Bedford Row,
London W.C.1.
Solicitors for the Appellant.

CHARLES RUSSELL & CO.
37 Norfolk Street,
London W.C.2.
Solicitors for the Respondent.