Privy Council Appeal No. 10 *of* 1963

Li Keung Pong *alias* **Li Siu Cheung** – – – – – *Appellant*

v.

The Attorney General of Hong Kong – – – – – *Respondent*

FROM

THE SUPREME COURT OF HONG KONG

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH APRIL, 1964

Present at the Hearing:
LORD MORRIS OF BORTH-Y-GEST.
LORD PEARCE.
LORD DONOVAN.
[*Delivered by* LORD MORRIS OF BORTH-Y-GEST]

This is an appeal by special leave 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 such District Court had no jurisdiction to hear certain charges against the appellant of obtaining credit by fraud. At the conclusion of the hearing before their Lordships Board their Lordships intimated that for reasons to be given at a later date their Lordships would humbly advise Her Majesty that the appeal should be dismissed: they also intimated that they would make no order as to costs. Their Lordships now give their reasons.

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. That section, so far as now relevant, is 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."

On the date mentioned (23rd May 1962) the appellant appeared before a Magistrate at the Central Magistracy, Hong Kong, charged with the offences: he was on that date released on bail. Thereafter the respondent made an application to the magistrate that the charges should be transferred to the District Court. Section 87A(1) in Part III A of the Magistrates Ordinance, Cap. 227, provides 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 offence with which the appellant was charged was not included in any of the categories specified in Part III of the Second Schedule. On the 20th July 1962 the magistrate ordered that the charges against the appellant be transferred to the District Court.

By section 25 of the District Court Ordinance 1953 (No. 1 of 1953) it is provided:—

" 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 III A 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."

On the 26th July 1962 the respondent preferred the charges against the appellant in the District Court. On the 6th September 1962 and on subsequent dates the charges were heard before the District Court (Pickering D. J.). The District Court was a new Court which was established with limited civil and criminal jurisdiction by the District Court Ordinance 1953 (No. 1 of 1953). Part IV of the Ordinance relates to Criminal Jurisdiction and section 24 (which is in Part IV) provides as follows:—

" 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."

Having heard the charges the learned Judge came to a conclusion in his own mind in regard to them and prepared a written judgment which he intended to deliver. While it was still undelivered and when the learned Judge was about to deliver it a submission was made to him. It was submitted that he had no jurisdiction. It was said that the offences (laid as being contrary to section 51 (a) of the Larceny Ordinance Cap. 210) were not indictable offences and that therefore the magistrate had had no power to transfer the charges and the District Court had had no right to hear them. Even though the submission was made at a somewhat late stage the learned District Judge was clearly correct in deciding to hear the submission and to give it his consideration and to give effect to it if it was valid. The learned Judge came to the conclusion that the submission should be upheld. He considered that the offence under section 51 (a) of the Larceny Ordinance Cap. 210 is not an indictable offence. The question then arose as to whether he was nevertheless entitled to proceed with the case. That involved consideration of the provisions of section 29 of the District Court Ordinance 1953. Sub-section 1 of section 29 is in the following terms:—

" (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."

The question presented was whether the applicability of the procedure and practice of the Supreme Court in relation to criminal proceedings enabled the learned Judge to invoke section 69 of the Criminal Procedure Ordinance Cap. 221 which 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."

The learned Judge came to the conclusion that section 29 (5) (a) of the District Court Ordinance 1953 rendered him powerless to invoke section 69. Section 29 (5) (a) is as follows:—

" (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; "

In the result the learned Judge, on the 18th September 1962, held that he had no jurisdiction to hear the charges. He gave a fully reasoned ruling upon the submission. He was asked to state a case and did so under section 32A of the District Court Ordinance 1953 (see Supplement No. 1 to the Hong Kong Government Gazette No. 47) for the purpose of appeal to the Full Court on questions of law. He stated the questions of law as follows:—

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?

On the 3rd October 1962 the Supreme Court (Sir Michael Hogan C.J., Scholes and Mills-Owens J.J.) gave their decision allowing the appeal on the second ground only i.e. they held that although the offences charged are not indictable offences the learned District Judge could have applied the provisions of section 69 (1) of the Criminal Procedure Ordinance. They directed that the trial should be resumed and that the learned District Judge should consider that section and the exercise of the discretion it conferred upon him. It is from that decision of the Supreme Court that (pursuant to leave granted on the 5th February 1963) appeal is now brought.

Following upon the direction of the Supreme Court the learned District Judge on the same day (the 3rd October 1962) resumed consideration of the case and, applying the provisions of section 69, he held that the appellant was guilty of the first three charges preferred against him. He did not deal with the remaining three charges on the ground that only three charges could be heard by a magistrate.

On the 13th November 1962 the Supreme Court gave their reasons for allowing the appeal.

The appellant now submits that the Supreme Court were wrong in holding that the learned District Judge could apply the provisions of section 69. The respondent submits that the appeal should be dismissed because even if the learned District Judge did not initially have jurisdiction to deal with the case he had jurisdiction to deal with it pursuant to section 69 but he submits that it should have been held that the learned District Judge had jurisdiction without any resort to section 69 for the reason that the appellant was charged with indictable offences and that the charges against him were quite properly transferred to the District Court. The respondent submits therefore that while the Supreme Court was correct in directing that the trial of the appellant should be resumed they should have so directed on the basis and for the primary reason that the District Court had jurisdiction for the reason that the offences were indictable.

Under section 51 (a) of the Larceny Ordinance Cap. 210 a person who, in incurring any debt or liability, obtains credit under false pretences or by means of any other fraud is guilty of a " misdemeanour triable summarily ". What then is a misdemeanour triable summarily? Their Lordships consider that the words need present no difficulty in construction. Though in popular

parlance and in some contexts the word misdemeanour may simply describe some misdeed or wrong behaviour when found in an ordinance or statute concerning crime it ordinarily denotes an indictable offence which is not a felony. A misdemeanour triable summarily, as it seems to their Lordships, is a misdemeanour which can be tried or in other words which it is permissible to try summarily. Their Lordships do not share the view that the expression is an equivocal or ambiguous one. Nor is there in the context of the words in the section or in the Act any reason to ascribe to the expression any meaning other than that which it would seem naturally to bear.

It is to be noted that in section 7 of the Larceny Ordinance (Cap. 210) it is provided by sub-section 1 that a person guilty of one of certain offences " shall on summary conviction " be liable *inter alia* to a fine of a thousand dollars or to imprisonment for six months and by sub-section 2 it is provided, *inter alia*, that one who commits one of such offences, after having been convicted of any such offence, " shall be guilty of a misdemeanour triable summarily, and on conviction thereof liable to imprisonment for eighteen months ". Their Lordships do not think that the words " a misdemeanour triable summarily " and the words " on summary conviction " refer to the same kind of offence. In section 8 of the same Ordinance there is also a contrast between a " summary conviction " under sub-section 1 and the more serious guilt under sub-section 2 " of a misdemeanour triable summarily ".

Their Lordships take the view therefore that the language of the Ordinance is clear and that no occasion arises to examine the legislative heredity of section 51 (a). If such examination is made their Lordships conclusion would be no different. In the Larceny Ordinance as it was in 1935 (No. 32 of 1935) the offence of obtaining credit by fraud other than false pretences was a " misdemeanour " (see section 50). On conviction an accused was liable to be imprisoned for not more than one year. It can not be questioned that in the period immediately after 1935 the offence was indictable. In 1950 the Law Revision (Penalties Amendments) Ordinance was enacted (No. 22 of 1950). Section 3 of that Ordinance 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 misdemeanour triable summarily.
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> (2) Whenever in any enactment coming into operation before the commencment 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 misdemeanour 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.
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> (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."

As a result of sub-section (3) of the section just quoted and as a result of the exercise by the Law Revision Commissioners of their powers under the Revised Edition of the Laws Ordinance (No. 20 of 1948) the former section 50 of the Larceny Ordinance (as it was in 1935) now appears as section 51 (a) and a person who in incurring any debt or liability obtains credit under false pretences or by means of any other fraud is guilty of " a misdemeanour triable summarily " and on conviction is liable to imprisonment for one year. Prior to the change of language from " misdemeanour " to " misdemeanour triable summarily " i.e. prior to 1950 the vast majority of indictable offences were already triable summarily by virtue of what is now section 89 of the Magistrates Ordinance, that provision having been introduced in the Magistrates Ordinance of 1932 (No. 41 of 1932). Section 89 is as follows:—

> " 89. Whenever any person is accused before a permanent magistrate of any indictable offence except an offence specified in the first part of the Schedule, the magistrate, instead of committing the accused for trial before the court, may deal with the case and convict the accused summarily, and on conviction may sentence the accused to imprisonment for two years or to a fine of two thousand dollars: Provided that nothing in this section shall affect any greater punishment specifically provided for in any other Ordinance."

It is submitted that inasmuch as most indictable offences were already in 1950 (and had been for some eighteen years) triable summarily the phrase " misdemeanour triable summarily " as introduced for the first time by section 3 of the Ordinance quoted above (No. 22 of 1950) must be interpreted as meaning an offence only to be tried summarily. Though a consideration of the language of section 3 of the Ordinance (No. 22) of 1950 leads to some enquiry and some doubt as to the full reasons for its enactment, their Lordships cannot accept that the submission now referred to has such weight that it makes it permissible to give to the words " misdemeanour triable summarily " a meaning quite contrary to what their Lordships consider to be their plain meaning. One part of the Magistrates Ordinance deals with " Summary Offences ". If it had been intended to convert the offence denoted by section 50 of the Larceny Ordinance as it was in 1935 from a " misdemeanour " to a summary offence or to an offence punishable " upon summary conviction " it would have been easy to say so expressly. In sub-section 2 of section 3 of Ordinance No. 22 of 1950 the words " upon summary conviction " appear: it would be strange if in the very same section the phrase " misdemeanour triable summarily " was coined to describe an offence only punishable " upon summary conviction ".

In the Supreme Court the test was applied of considering whether the legislation enacted in 1950 had so altered the procedure and punishment as " manifestly to exclude proceeding by indictment ". Applying the same test their Lordships conclude that proceeding by indictment has not been excluded and has certainly not manifestly been excluded.

It is further to be noted that though the " misdemeanour " described by section 50 of the Larceny Ordinance No. 32 of 1935 might as a result of section 89 of the Magistrates Ordinance 1932 (No. 41 of 1932) be " triable summarily " an accused person might wish to have it tried before a jury on indictment and might hope that a magistrate would order that it would be so tried. It would be natural to expect that legislation which removed any hope or chance that an accused person might have of being tried on indictment (for an offence such as that described by section 50 of the Larceny Ordinance (No. 32 of 1935)) would be enacted in clear and definite terms.

For the reasons which have been stated their Lordships consider that the first question of law which was raised by the learned District Judge should have been answered by saying that he was wrong in holding that he lacked jurisdiction to try the case. The second question as raised in the Case Stated does not therefore, strictly speaking, arise. As however argument was heard on the question whether if the appellant had been erroneously committed for trial to the District Court the provisions of section 69 of the Criminal Procedure Ordinance (cited above) could have been applied their Lordships consider that it is appropriate for them to express their concurrence with the reasoning on this point of the Supreme Court.

The provisions of section 29 (1) of the District Court Ordinance 1953 (No. 1 of 1953) have been set out above. It would seem natural to suppose that in considering what was " the procedure and practice for the time being in force in the Supreme Court in relation to criminal proceedings therein " recourse would be had and reference made to the provisions of the Criminal Procedure Ordinance. So much would seem to be indicated by section 29 (2) of the District Court Ordinance 1953 which is in the following terms:—

> " (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."

Section 69 of the Criminal Procedure Ordinance is not one of the provisions particularised in Part I of the Third Schedule.

In agreement with the Supreme Court their Lordships do not find anything in the provisions of section 29 (5) (cited above) of the District Court Ordinance which prevents the application in a District Court of the procedure prescribed by section 69 of the Criminal Procedure Ordinance in circumstances where it appears that a person on trial in a District Court has been guilty of an offence punishable only on summary conviction. The jurisdiction of the District Court in criminal matters is to hear a charge or complaint which has been transferred to it in accordance with the provisions of Part III A of the Magistrates Ordinance (see sections 24 and 25 of the District Court Ordinance). Nor do the provisions of section 27 (5) of the District Court Ordinance prevent the application of the procedure. That section relates to the signing and form of charge sheets. Sub-section 5 seems designed to make it clear that any provisions concerning procedure and practice are not to affect " the law or practice relating to the jurisdiction of the District Court ". The jurisdiction of the District Court is not to be enlarged by reason of any such provisions. Their Lordships do not consider however that the procedure made possible by section 69 of the Criminal Procedure Ordinance is to be regarded as extending the jurisdiction of a court. If in a criminal trial in the Supreme Court or in a criminal trial in a District Court (and cases only go to the District Court as a result of being " transferred " to it in accordance with the provisions of Part III A of the Magistrates Ordinance) it appears to the Court that the accused " has been guilty of an offence punishable only on summary conviction " then the convenient and beneficial course made possible by section 69 may be followed.

Their Lordships do not forget that in the Third Schedule of the District Court Ordinance it is provided that no objection to a charge is to be taken by way of demurrer but that if a charge does not state in substance an offence or states an offence not triable by the Court the accused may move the court to quash it or in arrest of judgment. That provision does not in terms prevent the adoption of the course denoted by section 69. Their Lordships consider that that section (section 69) prescribes a course that is comprehended in and forms a part of the " procedure and practice for the time being in force in the Supreme Court in relation to criminal proceedings therein " and accordingly that the course is one which, where appropriate, can be adopted in a District Court.

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In the Privy Council

LI KEUNG PONG *alias*
LI SIU CHEUNG

v.

THE ATTORNEY GENERAL OF
HONG KONG

DELIVERED BY
LORD MORRIS OF BORTH-Y-GEST

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