Judgment 7 of 1972

IN THE PRIVY COUNCIL No. 18 of 1971

ON APPEAL

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

BETWEEN :

SAMSOONDAR RAMCHARAN Appellant

- and -

THE QUEEN Respondent

CASE FOR THE APPELLANT

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1. This is an Appeal from the Judgment of the Court of Appeal of Trinidad and Tobago (Sir Arthur McShine, C.J. Phillips, J.A., and Fraser, J.A.) dated the 19th day of November 1970, which, upon a Case Stated, set aside the Order of the Supreme Court (Achong, J.) wherein the Appellant was fined $1,500 and ordered to enter into a personal bond in the sum of $1,000 to be of good behaviour for 12 months upon his conviction on a charge of receiving stolen goods, and substituted a sentence of five years imprisonment with hard labour.

pp.21-26

pp.9-11
p.6, l.35 - p.7, l.11

2. The Appellant was charged before a Judge (Achong, J.) and Jury on an indictment which contained two counts. The first was that he sometime between the 14th and 16th days of October 1967, at Port of Spain broke and entered the store of City and Loan Association and stole therefrom a quantity of jewelry valued at $128,000 and $2,000 in cash the property of the said City and Loan Association. The second count in that indictment related to the offence of receiving stolen goods and was stated therein to be contrary to the Larceny Ordinance Ch.4 No.11 Sec. 34, and it complained that the said Samsoondar Ramcharan did receive on the days mentioned therein and quoted above, a quantity of jewelry the property of City and Loan Association knowing the same to have been stolen.

pp.1-2

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pp.5-7 3. The trial took place on the 12th, 13th and 14th October, when the Appellant was acquitted on the 1st Count of larceny but convicted on the 2nd count of receiving. The learned Judge remanded the Appellant for sentence to the 30th October 1970, and asked that a Probation Officer's report should be obtained.

4. On the 30th October 1970, the Appellant again came before the Court when the following documents were considered by the learned Judge:-

p.11, l.25-p.15 (a) A Probation Officer's Report;

p.16, l.15-p.20 (b) A number of testimonials which spoke of the Appellant's good character;

p.16, ls.1-14 (c) A medical certificate to the effect that the Appellant was suffering from diabetis and hypertension.

There was also evidence that the Appellant was 51 and had 2 previous convictions, one for indecent assault in 1934 when he was a boy of 15, for which he was whipped, and the other for unlawful possession which, in the words of the learned judge "arose out of and followed from a search carried out by the Police at his premises which resulted in the charges on which he appeared before me. It may be pertinent to point out that this last conviction was recorded after the commission of the offences resulting in his present conviction."

p.10, ls. 26-27 5. The learned trial Judge, having considered these documents, and after hearing a plea of mitigation and having considered "all the circumstances and in particular the antecedents and health of the prisoner" decided that a custodial sentence should not be imposed. Instead, he fined the Appellant in the sum of $1,500 (or 18 months with hard labour in default) and ordered him to enter into a personal bond in the sum of $1,000 to keep the peace and be of good behaviour for 12 months, (or 6 months with hard labour in default).

p.6, l.35 - p.7, l.11

p.10,ls.37-38 6. In imposing a fine, the learned Judge considered that there was an inherent power at common law to impose a fine in cases of felony. However, it was later pointed out to the learned Judge (presumably

p.10,l.44-p.11,l.2

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privately and not in Court) that there is no such power in the High Court of Trinidad and Tobago. In those circumstances, he decided to refer the matter by way of case stated for the consideration of the Court of Appeal in accordance with the provisions of the Supreme Court of Judicature Act, No. 12 of 1962, S.60. The case stated is dated the 10th November 1970. p.11,ls.17-21

7. The Judgment of the Court of Appeal was delivered by the learned Chief Justice, who said that it was common ground that receiving in the circumstances of this case was a felony. This was a statutory offence in Trinidad by virtue of Section 34 of the Larceny Ordinance (Chapter 4 No. 11) which provides:- pp.21-26

> "34(1) Every person who receives any property knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour, shall be guilty of an offence of the like degree (whether felony or misdemeanour) and liable -
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> (a) in the case of felony, to imprisonment for ten years;
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> (b) in the case of misdemeanour, to imprisonment for five years."

The learned Chief Justice went on to say that that section "should have . . . . . guided the learned judge to a right approach to sentencing in this matter, when he could not possibly have imposed a fine even though he may have thought a fine possible in case of felony at common law." The learned Chief Justice went on to hold, that even apart from this, "for a long time in England itself there had been no power to fine for felony". He said:- p.22,ls.42-p.23, l.2

> "long before 1948 the power to impose a fine for felony had been taken off the Statute Books and it had been replaced by forfeiture and attainder which of themselves were abolished by Act No.33 Victoria. So therefore even if he thought at Common Law p.23,ls.20-39

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he had the power, long ago the Courts had been deprived of such power in England, since 1870. And again 1848; it is fair to mention that because of the general application of Acts before 1848 it became part of the law. But here we have the Larceny Ordinance which came into force in this country in 1919. Besides that, larceny with its ancillary offence of receiving by the Larceny Act in England of 1861 became a statutory offence and there was no power to impose a fine for any such statutory offence as the felony of larceny. But this was remedied in 1948 by the Criminal Justice Act 1948 and there for the first time the courts' power so to speak was restored, of course that is in England, to fine for felony."

In support of the above proposition, the learned Chief Justice referred to the case of R. v. Markwick (1953) 37 C.A.R. 125.

p.26,ls. 22-34

8. On the question of sentence, the Court of Appeal took the view that in the circumstances of the case the only appropriate sentence was one of five years imprisonment with hard labour.

9. The Appellant respectfully submits that the Judgment of the Court of Appeal is wrong and ought to be reversed for the following reasons:-

(a) The Court of Appeal were wrong in holding that there was no power to impose a fine for felony under the law of Trinidad;

(b) in the alternative, even if there was no power to impose a fine for felony, the Court of Appeal had no power, on a case stated, to substitute a sentence of imprisonment for a fine;

(c) in the further alternative, even if they had such power, the Court exercised such power wrongly by substituting the excessive sentence of five years' imprisonment with hard labour for a fine of $1,500.

(d) in any event, the trial Judge had no

power to state a case of his own motion in the circumstances of this case.

10. With regard to (a) it is submitted that the Court of Appeal wrongly took the view that because receiving is a statutory offence for which a sentence of imprisonment is provided under S.34 of the Larceny Ordinance, then the power to impose a fine, if any, at common law, cannot be used. The laws of Trinidad provide for the application of the common law in the absence of statutory provision to the contrary and if there was power to impose a fine at common law in 1848 (the relevant reception date in Trinidad), then it is submitted that a fine could be imposed for felony notwithstanding the provisions of the Larceny Ordinance.

It is submitted further that the Court of Appeal wrongly held that there was no power to impose a fine for felony at common law in 1848. The Appellant respectfully submits that the true position is that the imposition of a fine for felony at common law had always been in the discretion of a Court and that power had not been removed by statute in 1827 as the Court of Appeal held.

11. With regard to (b), the powers of the Court of Appeal on a case stated are contained in Sections 60 and 61 of the Supreme Court of Judicature Act, No. 12 of 1962 which provide:-

> "S.60(1) Where any person is convicted on indictment, the trial judge may state a case or reserve a question of law for the consideration of the Court of Appeal and the Court of Appeal shall consider and determine such case stated or question of law reserved and may either -
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> (a) confirm the judgment given upon the indictment;
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> (b) order that such judgment be set aside and quash the conviction and direct a judgment and verdict of acquittal to be entered;

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(c) order that such judgment be set aside, and give instead thereof the judgment which ought to have been given at the trial;

(d) require the judge by whom such case has been stated or question has been reserved to amend such statement or question when specially entered on the record; or

(e) make such other order as justice requires.

(2) The Court of Appeal, when a case is stated or a question of law reserved for their opinion, shall have power, if they think fit, to cause the case or certificate to be sent back for amendment and thereupon the same shall be amended accordingly.

S.61 Where a case is stated or a question of law reserved for the consideration of the Court of Appeal, the provisions of sections 48, 49, 51, 53, 54, 55, and 56, sub-sections (1), (3) and (5) of section 57 and section 59 shall apply to such proceedings in like manner as to an appeal."

It is respectfully submitted that unlike the case of appeals (Sections 44 and 45) where the Court has specific power to alter or vary or substitute another sentence, there is no such similar power on a case stated. The Appellant respectfully submits that even if his arguments in para. 10 herein are wrong, the proper order in this case would have been to remit the case to the trial judge for sentence.

12. With regard to (c), the Appellant submits that the Court of Appeal applied wrong principles in their approach to sentence. The learned trial judge had fully considered all the circumstances and had given full reasons why a custodial sentence was not appropriate in this case. It is submitted that even if the Court of Appeal thought otherwise, their sentence of Five years imprisonment with hard labour was out of all proportion with the gravity of the offence and was highly excessive. It is significant that in R. v. Markwick (supra) upon which the Court of Appeal relied, the fine of £500 imposed by the trial judge was replaced by a 2 month imprisonment.

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It is also significant that the default sentence passed by the learned Trial Judge in lieu of the $1,500 fine was one of 18 months imprisonment with hard labour.

13. With regard to (d), it is respectfully submitted that the terms of S.60(1) do not allow a Trial Judge to state a case of his own motion, without application from the prosecution or defence. In this case, the learned Trial Judge on the 30th October 1970, came to the conclusion that he had power to impose a fine. There is no evidence that there was complaint from either prosecution or defence to the taking of this course. Nor is there evidence that a complaint was lodged subsequently to the Trial Judge in the proper form. The events suggest that the error (if indeed there was any error) was drawn to the attention of the Trial Judge privately, whereupon he decided to state a case.

14. On the 28th August 1971, an Order was made granting the Appellant Special Leave to Appeal to Her Majesty in Council. pp.27-28

15. The Appellant respectfully submits that this appeal should be allowed with costs and that the Order of the Court of Appeal wherein the Appellant was imprisoned for five years should be quashed and the Order of the Trial Judge restored for the following amongst other

R E A S O N S

1. BECAUSE the Trial Judge had no power to state a case of his own motion in the circumstances of this case.

2. BECAUSE the Court of Appeal erred in holding that there was no power to impose a fine for felony under the Law of Trinidad.

3. BECAUSE the Court of Appeal had no power, on a case stated, to substitute a sentence of imprisonment for a fine.

4. BECAUSE, even if they had such a power, it was wongly exercised in the circumstances of this case.

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5. BECAUSE the sentence of five years imprisonment was, in the circumstances, highly excessive.

6. BECAUSE the judgment of the Court of Appeal is wrong.

EUGENE COTRAN.

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