

Privy Council Appeal No. 52 of 1985

(1) Pierre Simon Andre Sip Heng Wong
Ng "Alias" Wong
(2) Louis Charles Mario Ng Ping Man

Appellants

v.

The Queen

Respondent

(Consolidated Appeals)

FROM

THE SUPREME COURT OF MAURITIUS

REASONS FOR REPORT OF THE LORDS OF THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE
18TH JUNE 1987, DELIVERED THE 20TH JULY 1987

Present at the Hearing:

LORD KEITH OF KINKEL
LORD BRANDON OF OAKBROOK
LORD GRIFFITHS
SIR ROBERT MEGARRY
SIR DUNCAN McMULLIN

[Delivered by Lord Griffiths]

The appellants appeal with the leave of the Supreme Court of Mauritius from the judgment of the Supreme Court (Appellate Division) dated 24th June 1985 dismissing their appeals against their convictions by the magistrates in the Intermediate Court on 15th October 1984. At the conclusion of the hearing their Lordships indicated that they would humbly advise Her Majesty that the appeals ought to be allowed and the convictions quashed, and that they would give their reasons later. This they now do.

The appellants were tried with two co-accused. The first appellant was charged with stealing a large quantity of clothing from his employers. The second appellant and the co-accused were charged with being in possession of this stolen property. The prosecution case was that the first appellant arranged for the clothing to be stolen from the custody of his employers who were holding the clothing to the order of the owner. An accomplice

called by the prosecution (Quirin) transported the goods and stored them in his garage. The appellants and one of the co-accused there counted and sorted the clothing. They then took a sample of the stolen clothing to the second of the co-accused who was a shopkeeper. He agreed to buy all the goods. All the accused were convicted. The first appellant was sentenced to two years' imprisonment with hard labour and the second appellant and the two co-accused to one year's imprisonment with hard labour.

The case was first referred to the Intermediate Court on 18th December 1981, but it was not until a year later that the court began to hear the evidence of the prosecution on 8th December 1982. On that date the two magistrates were S. Moosun and A. Prasad. The same two magistrates continued to hear the prosecution evidence on 26th April, 17th June, 4th August and 27th September 1983, when the prosecution closed their case.

On 12th and 17th October 1983 the same magistrates heard submissions of no case to answer made on behalf of the appellants and the two co-accused. The magistrates reserved judgment on the submissions.

On 13th March 1984, a short interlocutory judgment rejecting the submissions of no case to answer was delivered by a differently constituted court consisting of Mrs. V. Narayen and A. Prasad. Mrs. V. Narayen had of course heard none of the evidence.

The next effective hearing was on 17th April 1984. On this occasion the magistrates were again Mrs. V. Narayen and A. Prasad. Evidence was called on behalf of one of the co-accused, and closing speeches were made on behalf of the appellants and the co-accused.

On 15th October 1984 the magistrates gave judgment and convicted the appellants and their co-accused. The magistrates sitting on this occasion were Mrs. P. Balgobin and A. Prasad. The judgment was read by Mrs. P. Balgobin. Thus it will be seen that of the two magistrates who convicted the appellants one who had heard none of the evidence and none of the submissions. Furthermore, one of the magistrates who was party to the interlocutory judgment holding that there was a case to answer had likewise heard none of the evidence nor any of the submissions on that issue.

The appellants, having been convicted by a magistrate who had heard none of the evidence in the case nor any of the submissions made on their behalf, complained that they had been denied the fair hearing of their cases guaranteed to them by section 10(1) of the Mauritius Constitution. This provides:-

"Where any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial Court established by law."

Their Lordships consider the appellants' complaint to be unanswerable. It should be said at once that the Solicitor-General very properly did not seek to uphold their convictions. The Courts Act 1945 (Cap. 168), as amended, provides that proceedings before the Intermediate Court shall be heard and determined by not less than two nor more than three magistrates and that where the court is composed of two magistrates the decision must be unanimous (see section 85). In a criminal trial, whether before a jury or before magistrates, it is a fundamental requirement of justice that those called upon to deliver the verdict must have heard all the evidence. The evaluation of oral evidence depends not only upon what is said but how it is said. Evidence that may ultimately read well in a transcript may have carried no conviction at all when it was being given. Those charged with returning a verdict in a criminal case have the duty cast upon them to assess and determine the reliability and veracity of the witnesses who give oral evidence, and it is upon this assessment that their verdict will ultimately depend. If they have not had the opportunity to carry out this vital part of their function as judges of the facts, they are disqualified from returning a verdict, and any verdict they purport to return must be quashed. There are many authorities to this effect: see *Lewis v. Lewis* (1928) 92 J.P. 88; *Samuels v. Smithson* (1939) 3 Jamaica L.R. 151; *Fulker v. Fulker* [1936] 3 All E.R. 636; *Joseph v. Joseph* [1948] L.J.R. 513 (which, said Lord Merriman P. at p. 514, was "a case for plain speaking"); and see *R. v. Manchester Justices, ex parte Burke* (1961) 125 J.P. 387, a case of mere suspicion, and justice not being seen to be done. As was said by Sir John Coleridge in delivering the judgment of this Board in *R. v. Bertrand* (1867) L.R. 1 P.C. 520 at 535 (a jury case), a note of this evidence is, or may be, "the dead body of the evidence, without its spirit; which is supplied when given openly or orally, by the ear and eye of those who receive it"; and this was subsequently applied to a magistrate's case by Wills J. in *Re Guerin* (1888) 58 L.J.M.C. 42 at 45.

The Court of Appeal dealt with the appellants' submissions shortly. They said:-

"This case started in February 1982 and ended over two years later in October, 1984, during which time certain changes took place in the composition of the Intermediate Court. Although it is a matter of regret that the two Magistrates who heard most of the evidence could not deliver

the final judgment, yet at least one was present throughout. Mrs. Balgobin who stepped in at the last minute was in presence of the whole of the evidence and of counsel's submissions and could properly pass judgment, taking into account and making necessary allowances for the fact that she had not seen or heard the witnesses."

Their Lordships understand that the reference to Mrs. Balgobin being "in presence of the whole of the evidence and of counsel's submissions" to be a reference to the fact that she would have had access to another magistrate's note of the evidence and submissions.

Although the Court of Appeal did not refer to it in their judgment, their Lordships assume that they were following the previous decision of the Supreme Court of Mauritius in *Syea and Others v. The Queen*, [1968] Mauritius Reports 100. In that case the appellants were prosecuted, some for making use of forged commercial writings, and one for unlawful possession of articles obtained by means of crime. Of the three magistrates who finally gave judgment in the case, only one had actually heard and seen the witnesses. The court nevertheless held that the power of magistrates "to take, follow up and determine" a case begun before other magistrates enabled those magistrates who had not actually heard and seen the witnesses to return a verdict. In the Intermediate Court this power is contained in section 124 of the Courts Act 1945 which provides:-

- "(1) Where any Magistrate is by reason of illness or challenge or for any other reason incapable of acting, the Chief Justice may direct another Magistrate to replace him.
- (2) Any Magistrate so directed may take, follow up, and determine any case, cause or proceeding begun before the Intermediate Court."

This section cannot bear the construction placed upon it by the Court of Appeal, for to do so would conflict with the right to a fair trial provided by section 10(1) of the Constitution. If, after part of the evidence has been heard in a trial in which the accused pleads not guilty, it becomes necessary to replace a magistrate, there is no alternative but to recommence the trial and recall the evidence so that all the magistrates hear all the evidence and the submissions made on behalf of the accused. *Syea and Others v. The Queen* was wrongly decided and should not be followed.

Whether or not justice was done in the present case it was certainly not seen to be done.

Both appellants are entitled to their costs of their appeal before their Lordships' Board.

