Privy Council Appeal No. 18 of 1987

S. Buxoo and Another *Appellant*

v.

The Queen *Respondent*

FROM

THE SUPREME COURT OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH MAY 1988

Present at the Hearing:

LORD KEITH OF KINKEL

LORD BRANDON OF OAKBROOK

LORD GRIFFITHS

~~*[Delivered by* ***Lord Keith of Kinkel****]*~~

On 5th December 1985 the appellants were convicted by the Intermediate Court of Mauritius on a charge of having wilfully and criminally inflicted wounds and blows upon one Fockeena which incapacitated him from personal labour for more than 20 days, contrary to section 228(1) of the Criminal Code. They were each sentenced to 18 months imprisonment with hard labour. An appeal to the Supreme Court of Mauritius was dismissed on 18th August 1986. The appellants now appeal to Her Majesty in Council under section 70A of the Courts Act. That section, which was added to the Act by section 7 of the Courts (Amendment) Act 1980, provides:-

> "(1) Notwithstanding any other enactment an appeal shall lie from decisions of the Supreme Court or the Court of Criminal Appeal to Her Majesty in Council as of right in all criminal cases."

It is to be observed that section 81(1) of the Constitution of Mauritius, dealing with appeals as of right to Her Majesty in Council from decisions of the Court of Appeal or the Supreme Court, specifies in paragraphs (a), (b) and (c) certain categories of cases in which such an appeal is to lie. The final paragraph, (d), adds "in such other cases as may be prescribed by Parliament".

At the outset of his argument counsel for the appellants raised a question as to the scope of the appeal to Her Majesty in Council in criminal cases now available as of right by virtue of section 70A of the Courts Act. Until that enactment no appeal from any court in any jurisdiction lay to Her Majesty in Council as of right in a criminal case. Such an appeal might be presented only with special leave granted by Her Majesty on the advice of the Board, and that is still the position in respect of all the other courts appeals from which Her Majesty in Council has jurisdiction to entertain. (See *Oteri v. The Queen* [1976] 1 W.L.R. 1272 and *Holder v. The Queen* [1980] A.C. 115). Special leave is traditionally granted only in exceptional circumstances, where the Board find room for the view that a really serious miscarriage of justice may have occurred. The question which arises is whether a similar principle is to be applied in the disposal of appeals as of right under section 70A of the Mauritius Courts Act, or whether the Board is to consider on a broad basis whether the conviction appealed against is bad by reason of misdirection or wrongful admission or rejection of evidence, or is unsafe or unsatisfactory in the light of the evidence led.

In the first appeal coming before the Board under section 70A, *Badry v. D.P.P.* [1983] 2 A.C. 297, the traditional principle was held to apply. Lord Hailsham of St. Marylebone L.C. said at p. 302-303:-

> "... since this appeal may be the first to be heard under the legislation (Courts (Amendment) Act 1980, section 7) extending the right of appeal to the Judicial Committee in appeals from Mauritius, their Lordships feel it right to reiterate the general principles on which they will continue to feel bound to tender their advice in criminal matters.
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> The locus classicus in which these principles are stated are the passages in the opinion of the Board given by Lord Sumner in *Ibrahim v. The King* [1914] A.C. 599, 614-615, where he said:
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> 'Their Lordships' practice has been repeatedly defined. Leave to appeal is not granted 'except where some clear departure from the requirements of justice' exists: *Riel v. The Queen* (1885) 10 App.Cas. 675, 677; nor unless 'by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done': *In re Dillet* (1887) 12 App.Cas. 459, 467. It is true that these are cases of applications for special leave to appeal, but the Board has repeatedly

> treated applications for leave to appeal and the hearing of criminal appeals as being upon the same footing: *Riel's* case, 10 App.Cas. 675; *Ex parte Deeming* [1892] A.C. 422. The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself; and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. Misdirection, as such, even irregularity as such, will not suffice: *Ex parte Macrea* [1893] A.C. 346. There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future: *Reg. v. Bertrand* (1867) L.R. 1 P.C. 520.'

By these words their Lordships, notwithstanding any new legislation in the territories of the Commonwealth from which appeals may be brought in criminal matters, continue to feel themselves bound and, in the instant appeals, their Lordships consider that they have been guided by them. Their Lordships also desire to repeat the practice direction, issued by Viscount Dunedin (1932) 48 T.L.R. 300:

> 'Their Lordships have repeated ad nauseam the statement that they do not sit as a Court of Criminal Appeal. For them to interfere with a criminal sentence there must be something so irregular or so outrageous as to shake the very basis of justice. Such an instance was found in *In re Dillet* ((1887) 12 App.Cas. 459) which has all along been held to be the leading authority in such matters. In the present case '... an Indian petition for special leave to appeal against conviction and sentence of death for murder ...' the only real point is a point for argument on a section of a statute, and all that the petitioner can say is that it was wrongly decided. That is to ask the Board to sit as a Court of Criminal Appeal and nothing else.'

> In all that their Lordships say hereafter in discussing the merits of the instant consolidated appeals, their Lordships believe that they remain bound by, and have stayed within, the confines of these precepts."

Counsel for the appellants pointed out that, in so far as appears from the report of the case, no argument had been directed in *Badry v. D.P.P.* to the scope of the appeal or the principles to be applied

in the disposal of it, and he submitted that the matter should be reconsidered. He drew attention to the terms in which the Attorney-General and Minister of Justice had presented the proposed enactment of section 70A to the Mauritian Parliament as indicative of an intention that the scope of the appeal should be as wide as was the case in civil appeals which lay as of right. (Fourth Legislative Assembly Debates, Fourth Session, 26 June 1980 col. 3298). It appears that in Mauritius, where a large part of the law is derived from that of France, travaux preparatoires are readily resorted to as an aid to the true construction of legislation. That is not a practice which their Lordships would readily say anything to discourage. The reference does not, however, indicate any intention on the part of the legislature to dictate to the Board the principles which are to be applied in the disposal of appeals under the enactment. If the enactment had specifically purported to do this, for example by specifying the grounds upon which an appeal might be allowed, then a serious question would have arisen as to whether the Board were bound to give effect to the enactment, in so far as it purported to bring about a departure from the traditional principles. Section 70A of the Courts Act does not purport to do that, and the statement of the Attorney-General and Minister of Justice cannot reasonably be construed as capable of importing such an intention into the section by implication. In the circumstances the question does not arise for decision, but the Board would not easily be persuaded that their function of tendering advice to Her Majesty was capable of being fettered by the legislature of any of the countries where the jurisdiction of Her Majesty in Council is accepted.

The Board will accordingly continue to hold themselves bound, in relation to criminal appeals from Mauritius, by the principles set out in *Badry v. D.P.P.* It is to be remarked, however, that these principles are not necessarily to be applied with the most extreme rigidity. Where an important point of law of general application is raised by an appeal, and the decision in question is capable, if not reversed, of constituting a precedent not conducive to the public interest in the proper administration of justice, the appeal may be capable of being accommodated within the intendment of the principles. Thus the Board have on occasion granted special leave to appeal to a prosecutor. Recent instances are *Attorney-General of Hong Kong v. Tse Hung-Lit* [1986] A.C. 876, *Attorney-General of Hong Kong v. Sham Chuen* [1986] A.C. 887 and *Attorney-General of Hong Kong v. Wong Muk Ping* [1987] A.C. 501.

In the present case, however, it is plain that the circumstances of the appeal take it far outside any possible application of the principles in question.

No point of law is involved. The only issue before the Intermediate Court and the Supreme Court was whether on the evidence led the appellants had been identified as being among the persons who carried out the serious assault which was undoubtedly perpetrated on the victim Fockeena. The Intermediate Court found that they had been and the finding was upheld by the Supreme Court. The Board could never consider it right to interfere with a concurrent finding of fact of that nature.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed.