Privy Council Appeal No. 1 of 1990

Marday Curpen *Appellant*

v.

The Queen *Respondent*

FROM

THE SUPREME COURT OF MAURITIUS

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 8TH OCTOBER 1991, DELIVERED THE 11TH NOVEMBER 1991

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD TEMPLEMAN
LORD GOFF OF CHIEVELEY
LORD BROWNE-WILKINSON
SIR MAURICE CASEY

*[Delivered by **Lord Goff of Chieveley**]*

On 24th February 1987 in the Intermediate Court of Mauritius (Magistrates Mr. P. Lam Shang Leen and Mrs. P. Balgobin), the appellant, Marday Curpen, was convicted of offences of counterfeiting bank notes contrary to section 100(2)(a)(1) and (4) of the Criminal Code of Mauritius, and of knowingly having in his possession moulds for producing counterfeited bank notes contrary to section 100(3)(b) and (4) of the Code. He was sentenced to three years' penal servitude. He appealed against his conviction and sentence to the Supreme Court of Mauritius; on 28th October 1987 that court (A.G. Pillay and R. Proag JJ.) dismissed his appeal. It is against that decision on his appeal against conviction that the appellant appealed to Her Majesty in Council. At the conclusion of the hearing their Lordships agreed humbly to advise Her Majesty that the appeal ought to be allowed, the convictions quashed and the orders for costs in the lower courts set aside. The appellant is entitled to his costs before the Board. Their Lordships now give their reasons.

In his grounds of appeal before the Supreme Court, dated 25th March 1987, the appellant based his appeal against conviction on the ground that the case against him had not been proved beyond reasonable doubt. However, on 20th July 1987 the advice of the Judicial

Committee in *Wong v. R.* (now reported in [1987] 1 W.L.R. 1356) was delivered. That case was concerned with an appeal from the Supreme Court of Mauritius and arose from the fact that one of the two magistrates who convicted the appellant had not heard any of the evidence in the case. The Privy Council, allowing the appeal, held that it was a fundamental principle of justice in a criminal case for those who return the verdict to see and hear all the witnesses, and that that principle had been broken.

In the present case, the trial of the appellant and his co-accused had begun before two magistrates, Mr. Basset and Mrs. Balgobin, who heard part of the evidence; it then continued before Mr. P. Lam Shang Leen and Mrs. Balgobin, who convicted the appellant and one of his co-accused. Accordingly, the appellant submitted to the Supreme Court that the fundamental principle stated in *Wong* had also been broken in his case; but the Supreme Court dismissed his appeal, distinguishing *Wong*. Before their Lordships, Mr. Ollivry Q.C., for the appellant, submitted that the Supreme Court had erred in distinguishing *Wong*, and that on the principle in that case the appeal should be allowed and the appellant's conviction quashed.

Their Lordships turn first to the course of the proceedings before the Intermediate Court. The information was laid against the appellant on 10th December 1984. On 14th January 1985 the appellant, and two others who were charged with him, pleaded not guilty to the offences with which they were charged. After four adjournments, the case came on for trial on 28th November 1985. The court consisted of Mr. Basset and Mrs. Balgobin. Evidence was given by a number of witnesses. Two witnesses gave evidence of statements said to have been made by the first two accused, Jacques Lafolle and Panden Curpen. P.S. Rampersad of Flacq C.I.D. then put in two statements said by him to have been made by the appellant, who was the third accused. He was cross-examined by counsel for the appellant. In the course of cross-examination, he gave an account of the events which occurred at the time of the raid which led to the prosecution, with particular reference to the activities of the appellant on that occasion. It is plain from the notes of the evidence of Mr. Rampersad that the statements which he had put in as having been given by the appellant were being challenged by his counsel. The relevant part of the note of Mr. Rampersad's evidence reads as follows:-

> "I have given a statement. It is not true that what I have read does not emanate from Accused No. 3. I cautioned Accused No. 3 and recorded what he said. Accused No. 3 is Marday."

After the evidence of Mr. Rampersad, further evidence was given to prove photographs, measurements and the provenance of four sealed boxes.

Next, Mr. Parianen, the manager of a bank at St. Pierre, began to give evidence concerning the verification of foreign currency notes; but his credentials as an expert were then challenged by the defence. Finally, Chief Inspector Soobadar of Moka C.I.D. gave evidence of a search of the premises raided by the police on 23rd March 1984, identifying the contents of the four sealed boxes as being what was found on that occasion, and spoke to certain other matters. He was cross-examined by counsel for the first accused, and then re-examined. The question of the expertise of Mr. Parianen was adjourned to the next hearing. After two more adjournments, the hearing was resumed on 20th June 1986, the court then consisting of Mr. P. Lam Shang Leen and Mrs. Balgobin. They ruled that, on the evidence given on 28th November 1985, Mr. Parianen could not give evidence as an expert. After four more adjournments, the hearing was resumed before the same two magistrates on 16th January 1987; and at the next hearing, on 24th February 1987, they delivered their judgment convicting the appellant together with the first accused, and imposed sentence.

From this brief account, it is evident that the appellant's complaint relates to the hearing which took place on 28th November 1985, when evidence was given before a court which did not include Mr. P. Lam Shang Leen, though he was one of the two magistrates who, on 24th February 1987, convicted the appellant.

Their Lordships turn next to the case of *Wong* [1987] 1 W.L.R. 1356. In that case, the evidence for the prosecution was heard by two magistrates, Mr. S. Moosun and Mr. A. Prasad, on four separate dates, after which the prosecution closed their case. On two further dates, the same two magistrates heard submissions of no case to answer, and reserved judgment on those submissions. About five months later a differently constituted court, consisting of Mrs. V. Narayen and Mr. A. Prasad, gave a short judgment rejecting the submissions, Mrs. Narayen having heard none of the evidence nor indeed the submissions themselves. About a month later, the same two magistrates heard evidence called on behalf of the defendants and closing speeches. Six months later, another differently constituted court, consisting of Mrs. P. Balgobin and Mr. A. Prasad, gave judgment convicting the defendants, Mrs. Balgobin having heard none of the evidence or the submissions. The defendants complained that they had been denied the fair hearing guaranteed to them by section 10(1) of the Constitution of Mauritius, which provides as follows:-

> "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."

The advice of the Privy Council was delivered by Lord Griffiths. He said (at pp.1358-59):-

> "Their Lordships consider the defendants' 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, 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."

In the present case, the Supreme Court of Mauritius sought to distinguish the case of *Wong*. The court referred to the statement of Lord Griffiths that "it was a fundamental requirement of justice that those called upon to deliver the verdict must have heard all the evidence". They next described certain practical difficulties which occur in Mauritius, and asserted that literal application of the passage from *Wong* quoted above would cause innumerable administrative problems and inordinate delays. They said:-

> "... a situation has already been reached in our Courts where the completion in a single day of a contested case involving Counsel is the exception rather than the rule.
>
> If every single case, in which a magistrate who has sat alone in a district like Port Louis for say, 18 months, has heard some evidence, whether the evidence has been contested or not, and is subsequently transferred to another distant district like Flacq before the completion of all those cases, must be governed by the fundamental principle of justice relating to the requirement of hearing all the evidence as laid down by the Judicial Committee of the Privy Council, this is what will happen. Either the magistrate who follows in the former's footsteps will have to start all those cases all over

> again or the magistrates who has now moved to Flacq (when, in any event, either magistrate is hard-pressed for time) would have to literally 'make' time to go back to Port Louis every now and then to complete all his cases. Either way the result will be unsatisfactory."

Against that background, they turned to consider the case of *Wong*, and sought to draw the following distinction:-

> "It seems to us that a useful distinction could be drawn between, first, formal and material witnesses and, secondly, between formal witnesses whose evidence is contested on the one hand and formal witnesses whose evidence is uncontested on the other.
>
> At a criminal trial in which an accused party pleads not guilty, the evidence of material witnesses is always contested whereas the evidence of formal witnesses may or may not be contested. We are of opinion that it is only in the case of material witnesses and that of formal witnesses whose evidence is in effect contested that a district magistrate or the two magistrates constituting the Intermediate Court must invariably hear all their evidence."

They then expressed the opinion that, where formal witnesses are not cross-examined at all or are not seriously cross-examined, a mere reading of the transcript of their evidence will, more often than not, be sufficient; into that category they placed the evidence of Mr. Rampersad and Mr. Soobadar. They continued:-

> "It would have made no difference, in our opinion, whether that testimony had been considered by the substituted or substitute Magistrate. Its effect would have been the same since the reliability and veracity of those witnesses was not seriously questioned or questioned at all by the appellant. Likewise, with regard to the statements given by the appellant to the Police, the substitute magistrate was in as good a position as the substituted magistrate to consider those statements."

Before their Lordships, Mr. Ollivry Q.C. submitted that the reasoning of the Supreme Court was open to serious criticism. He referred to the conclusion of the Supreme Court that it is only in the case of material witnesses and of formal witnesses whose evidence is in effect contested that the magistrates who decide the case must hear all the evidence, and he submitted that this conclusion could not be derived from the principle stated in *Wong*. In this connection, he directed particular criticism to the treatment by the Supreme

Court of the evidence given on 28th November 1985, which they dismissed as evidence of formal witnesses who were not cross-examined at all or who were not seriously cross-examined; Mr. Ollivry referred especially to the evidence of Mr. Rampersad, which had plainly been challenged by counsel for the appellant. Finally, Mr. Ollivry informed their Lordships that the practical difficulties which had troubled the Supreme Court had now been overcome as a result of new arrangements made in Mauritius; this was confirmed by Mr. Leung Shing Q.C. for the respondent.

Their Lordships are of the opinion that Mr. Ollivry's criticisms are well-founded. The difficulties inherent in the approach of the Supreme Court are amply illustrated by the fact that their category of formal witnesses, whose evidence is uncontested, proved to be difficult to control since it was allowed to expand to include formal witnesses who were not seriously cross-examined, a category of witnesses which is amorphous and not easily defined. Furthermore the court placed within this category the evidence of Mr. Rampersad which their Lordships consider should plainly have been heard, together with the other evidence, by all the magistrates who had to decide the case. The true answer, in their Lordships' opinion, is that section 10(1) of the Constitution requires that the principle in *Wong* should be complied with. There was a significant breach of that principle in the present case.

Their Lordships wish to conclude with the following observation. In the course of argument, Mr. Leung Shing Q.C. informed their Lordships that some anxiety was being felt in Mauritius about the breadth of the statement of principle in *Wong*, in that it requires that those called upon to deliver the verdict must have heard all the evidence; it is apparently feared that this precludes any provision that certain evidence might be given otherwise than orally before those who decide the case. Their Lordships are concerned to dispel this fear. It would, in their opinion, be possible for such provision to be made, in an appropriate case, consistently with section 10(1) of the Constitution of Mauritius. Examples of provisions of this kind are to be found in section 9 of the Criminal Justice Act 1967 applicable in England, concerned with the admissibility of written statements in evidence, and section 10 of the same Act, concerned with formal admissions; though attention should be directed to the conditions specified in the Act under which such evidence is admissible. In circumstances such as these, the tribunal will hear the evidence in the form authorised by the statute; and that would be in accordance with the statement of principle in *Wong*.