Privy Council Appeals Nos. 4 and 5 of 1989

(1) Mohammed Mukhtar Ali and
(2) Shaik Murtuza Ali Haji Gulam Rasool *Appellants*

v.

The Queen *Respondent*

FROM

SUPREME COURT OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH FEBRUARY 1992

Present at the hearing:-

LORD KEITH OF KINKEL
LORD BRANDON OF OAKBROOK
LORD OLIVER OF AYLMERTON
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY

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

By a judgment delivered on 20th February 1991, to which reference should be made for the circumstances of these appeals, the Board remitted the two cases to the Supreme Court of Mauritius in order that it might have the benefit of the views of that court upon a point which had been raised for the first time in the course of the hearing before the Board. The question which the Board asked the Supreme Court to consider and adjudicate upon was as follows:-

> "Whether, by reason of the discretion conferred upon the Director of Public Prosecutions by section 28(8) of the Dangerous Drugs Act 1986 or by section 72(3) of the Constitution of Mauritius or otherwise, the provisions of section 38(4) of the Dangerous Drugs Act 1986 are repugnant to the Constitution of Mauritius inasmuch as the said subsection prescribes, in relation to a person charged with an offence triable before the Supreme Court, an Intermediate Court or a District Court and found to be a trafficker in drugs, a mandatory penalty on conviction only in the Supreme Court."

The Supreme Court (Sir Victor Glover C.J., Lallah S.P.J. and Pillay J.) has now delivered a judgment dated 20th September 1991. The judgment does not find
[6] it necessary or appropriate to answer the question

remitted to the court, because it reaches the conclusion that on a true construction of the relevant enactments the Director of Public Prosecutions has no discretion as to the court before which a person, who is accused of an offence under section 28(1)(c) of the Dangerous Drugs Act 1986 ("the 1986 Act") and who is alleged to be a trafficker, is to be tried. Such a person, so the judgment holds, can be tried only before a judge sitting without a jury.

Their Lordships are unable to accept this conclusion. The relevant provisions of the 1986 Act are these:-

Section 28(1) and (8)

"(1) Subject to section 38, every person who unlawfully -

(a) (i) has in his possession, smokes, consumes or administers to himself or to any other person any drug specified in subsection (2);

(ii) has in his possession any pipe, syringe, utensil, apparatus or other article for use in connection with the smoking, sniffing, consumption or administration of any drug specified in subsection (2);

shall commit an offence and shall on conviction be liable to a fine which shall not exceed 5,000 rupees and to imprisonment for a term which shall not exceed 8 years;

(b) sells, supplies, procures, distributes, transports or offers to buy, sell, supply, distribute or transport any drug specified in subsection (2) shall commit an offence and shall on conviction be liable to a fine which shall not exceed 50,000 rupees and to penal servitude for a term which shall not exceed 12 years;

(c) imports, causes to be imported, aids, abets, counsels or procures the importation of any drug specified in subsection (2) shall commit an offence and shall on conviction be liable to a fine which shall not exceed 200,000 rupees and to penal servitude for a term which shall not exceed 20 years.

(8) Any person who is charged with an offence under subsection (1)(b) or (1)(c) shall be tried before a Judge without a jury, the Intermediate or the District Court at the discretion of the Director of Public Prosecutions."

Section 38

"(1) The court which tries a person for an offence under section 28, 29, 30, 32, 33 or 34 shall make a finding whether the accused person is a trafficker in drugs.

(2) A person shall be a trafficker where having regard to all the circumstances of the case against him it can be reasonably inferred that he was engaged in trafficking in drugs.

(3) Subject to subsection (4), any person who is found to be a trafficker in drugs under subsection (1) shall be liable in the case of -

(a) a first conviction, to a fine which shall not exceed 100,000 rupees together with penal servitude for a term which shall not exceed 20 years;

(b) a second or subsequent conviction to a fine which shall not be less than 100,000 rupees or more than 250,000 rupees together with penal servitude for a term of 30 years.

(4) Any person who is charged with an offence under section 28(1)(c) before a Judge without a jury and who is found to be a trafficker in drugs shall be sentenced to death."

Section 41

"Notwithstanding any other enactment, the Intermediate Court shall have -

(a) jurisdiction to inflict the penalties provided in this Act, other than section 38(4);

(b) power to order sentences imposed under this Act to be served consecutively, provided that the terms of such sentences shall not in the aggregate exceed 30 years."

The Supreme Court, at the beginning of its judgment, made reference to *Heerah v. R* (1988) M.R. 249. In that case the accused had been charged before the Intermediate Court with possession of heroin contrary to section 28(1)(a) of the 1986 Act. The court found the charge proved and proceeded to make a finding under section 38(1) that the accused was a trafficker and sentenced him to a higher penalty as provided for under section 38(3). The information had not contained any averment that the accused was a trafficker. The Supreme Court held on appeal that, in the absence of such an averment, it was not open to the Intermediate Court to make the finding it did about trafficking and to impose the higher penalty. The accused had been given no notice that he was at risk

of such a finding. The Supreme Court accordingly quashed the sentence and substituted a sentence within the limit prescribed by section 28(1)(a). In its judgment in the present case the Supreme Court interpreted the decision in *Heerah* as being to the effect that "the correct approach was to treat section 38 as one which introduced an aggravating circumstance that had to form part of the charge and to be averred in the information". It followed that the instant appellants were charged with an offence committed, not against section 28 simpliciter, but against section 28(1)(c) and 38, namely the offence of importing heroin while being a drug trafficker.

Their Lordships cannot accept this reasoning as being altogether correct. Section 38 does not create any separate offence. What it does is to prescribe more severe penalties, if a certain state of affairs is found to exist, for offences found proved under any of the enactments mentioned in subsection (1). It is true in a sense to say that the fact of the accused being a trafficker constitutes an aggravating circumstance, but the effect of the aggravation is that the accused is liable to a more severe penalty, not that he has committed a separate and different offence from that created by any of the enactments referred to in subsection (1) of section 38. *Heerah* is, of course, undoubtedly correct in holding that it is not open to the court to make a finding of trafficking if that has not been alleged in the information.

The Supreme Court then went on to consider the question as to which court had jurisdiction to try what it described as "the offence of importing-cum-trafficking derived from the combined effect of sections 28(1)(c) and section 38". After setting out the legislative provisions concerning the District Court the judgment reads:-

> "If our reasoning regarding the charge with which the appellants were faced is correct, it follows that, even if section 28(8) of the Dangerous Drugs Act is interpreted literally, we fail to see how its meaning could be stretched to say that it also enables the Director of Public Prosecutions to direct that a person charged under section 28(1)(b) or (c) coupled with section 38 may, at his discretion, be charged before a District Court. We shall, however, go further and say there is an added reason for which section 28(8) should not be taken at its face value but considered, in relation to the Intermediate Court and the District Courts, to have been inserted through error."

The added reason appears to be that the Bill which became the 1986 Act was prepared in haste and that certain provisions in it were much amended at the committee stage in the Assembly.

It is apparent that the principal, if not the only, purpose of section 28(8) was to make it possible for offences under section 28(1)(b) or (c) to be tried before a judge sitting without a jury. Under section 72(3) of the Constitution of Mauritius the Director of Public Prosecutions already had power to institute criminal proceedings before any court of law, other than a disciplinary court. So if section 28(8) had not been enacted he could have instituted proceedings for any offence under the 1986 Act for which a penalty was provided before the District Court, the Intermediate Court or a judge of the Supreme Court sitting with a jury. The effect of section 28(8) was to do away with the last option as regards section 28(1)(b) and (c) offences and substitute a judge sitting without a jury. In that situation it was reasonable and appropriate to mention the Intermediate and the District Courts in the subsection as continuing to be courts available to the Director of Public Prosecutions in the exercise of his discretion. The legislature did not intend to make a judge without a jury the only forum before which charges under section 28(1)(b) and (c) might be tried. It could well be entirely appropriate that, say, a person who sold a small quantity of gandia to a friend or who imported a small quantity of it on returning from holiday should be tried before the District Court which, as appears from section 114(2) of the Courts Act, would have power to award imprisonment with hard labour for up to two years and a fine not exceeding 2,000 rupees. The disapplication by section 37 of the 1986 Act of section 150 of the Criminal Procedure Act would seem to have the effect that, in respect of those offences under the 1986 Act for which imprisonment with hard labour is prescribed, the requirement that the sentence must be for at least three years is removed.

The Supreme Court concluded that the District Court had jurisdiction to try any offence under the 1986 Act provided that it was not excluded penalty-wise and that it had power only to inflict a fine not exceeding 2,000 rupees in those cases where the prescribed penalty is imprisonment with hard labour and to impose imprisonment up to two years in those cases where the prescribed penalty is imprisonment without hard labour, and no power to try offences under section 38(3) or (4). The Supreme Court thought that this followed from the disapplication of section 150 of the Criminal Procedure Act. The true result of that disapplication would seem, on the contrary, to be the bringing of all the offences under the 1986 Act for which penal servitude is prescribed within the jurisdiction of the District Court.

As regards the Intermediate Court, the Supreme Court relied on section 41 of the 1986 Act as requiring it to reach this conclusion, saying of it:-

> "There can be no clearer indication that Parliament's intention was that the Intermediate Court is competent to hear any case involving an offence

> under the Act, except one of importing-cum-trafficking, which alone carries a mandatory death penalty and which consequently can be tried only by a Judge sitting without a jury."

The Supreme Court has thus held that on a true construction of the relevant provisions of the 1986 Act the intention of Parliament is that a person charged under section 28(1)(c) upon an information containing an allegation that he is a trafficker in drugs must be tried before a judge without a jury and before no other court. Their Lordships cannot agree. The purpose of section 41 is clearly to increase the powers of the Intermediate Court so as to enable it to pass sentences up to the maximum provided for by section 38(3). If Parliament had intended that a person charged under section 28(1)(c) and alleged to be a trafficker should be tried only before a judge without a jury, it would have been very simple for it to have said so expressly, but it has not done so. Nor can such an intention be implied. The amplitude of section 38(3) is such that it must apply to any person convicted of any of the offences mentioned in subsection (1), including that under section 28(1)(c). That involves that the person in question may have been tried before the Intermediate Court, if not indeed the District Court. Further, it is apparent that cases of importing dangerous drugs in the course of trafficking may vary widely in their seriousness. It is hardly likely that Parliament would have chosen to subject to the mandatory death penalty a person who imported into Mauritius a few grams of gandia or Indian hemp with a view to selling it to his friends. The plain intention of Parliament, in their Lordships' opinion, is that the Director of Public Prosecutions should have a discretion to be exercised according to his view of the seriousness of the case, as to which of the three tribunals mentioned in section 28(8) was appropriate to try it, and that this discretion was to be available for section 28(1)(c) cases which involved trafficking no less than for other cases.

It is now necessary to turn to the question upon which their Lordships sought the benefit of the views of the Supreme Court, which they have unfortunately not received, namely the question whether anything in section 38(4), having regard to the discretion available to the Director of Public Prosecutions, offends against the Constitution of Mauritius. The principle which is said to have been breached is that of the separation of the powers of the legislature, the executive and the judicial branches of government. The Director of Public Prosecutions is an officer of the executive branch. The argument for the appellants is that the discretion available to him to select the court before whom a person is to be tried for an offence under section 28(1)(c), that person being alleged to be a trafficker in drugs, in effect enables the Director to select the

penalty to be inflicted on that particular person. If he chooses trial before a judge without a jury, and conviction follows plus a finding of trafficking the sentence must be that of death. In *Hinds and Ors v. The Queen* [1977] A.C. 195 the question arose as to the constitutionality of certain provisions of the Jamaican Gun Court Act 1974. One of these provisions was section 8, which prescribed a mandatory sentence of detention at hard labour for specified offences, determinable only by the Governor-General on the advice of the Review Board. The Review Board established by section 22 of the 1974 Act consisted of five members of whom only the chairman was a member of the judiciary. The Judicial Committee of the Privy Council advised Her Majesty that sections 8 and 22 were contrary to the Constitution and void. Lord Diplock, after referring to the doctrine of the separation of powers, said at p.226:-

> "In the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted upon all offenders found guilty of the defined offence - as, for example, capital punishment for the crime of murder. Or it may prescribe a range of punishments up to a maximum in severity, either with or, as is more common, without a minimum, leaving it to the court by which the individual is tried to determine what punishment falling within the range prescribed by Parliament is appropriate in the particular circumstances of his case.
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> Thus Parliament, in the exercise of its legislative power, may make a law imposing limits upon the discretion of the judges who preside over the courts by whom offences against that law are tried to inflict on an individual offender a custodial sentence the length of which reflects the judge's own assessment of the gravity of the offender's conduct in the particular circumstance of his case. What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed under Chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders."

Lord Diplock later referred with approval to the case in the Supreme Court of Ireland of *Deaton v. The Attorney General and The Revenue Commissioners* [1963] I.R. 170. An Act of 1876, as applied to Ireland, prohibited the importation into that country of certain goods. One of the provisions of the Act provided that any person contravening "shall for each ... offence forfeit either treble the value of the goods ... or one hundred pounds, at the election of the [Revenue] Commissioners ...". The plaintiff was prosecuted by the Commissioners for importing butter without a licence,

and they elected to proceed for treble the value of the goods. The Supreme Court held that the provision in question was repugnant to the Constitution and accordingly void. Ó'Dálaigh C.J. said at p. 182-183:-

> "There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case. ... The legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the courts ... the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the executive ..."

Lord Diplock observed that this statement, uttered in relation to the Constitution of the Irish Republic, applied with even greater force to Constitutions on the Westminster model, and he added, under reference to *Liyanage v. The Queen* [1967] 1 A.C. 259, that the legislature under such constitutions not only does not, but it can not prescribe the penalty to be imposed in an individual citizen's case.

The legislature here has not, by any provision of the 1986 Act, prescribed the penalty to be imposed in any individual citizen's case. What it has purported to do, however, is to authorise the Director of Public Prosecutions, an officer of the executive branch of government, to select the punishment to be inflicted upon an individual accused convicted under section 28(1)(c) and found to be a trafficker. If the Director chooses to prosecute before a judge without a jury, the judge has no discretion as to punishment but must impose the death penalty. That means that it is the Director, by his decision about the court of trial, who has selected the death penalty. In the course of his argument to the Board, the Director sought to controvert this view of the matter by reference to *Teh Cheng Poh v. Public Prosecutor* [1980] A.C. 458. One of the points in that case was whether the decision to prosecute the appellant for unlawful possession of a firearm under the Malaysian Internal Security Act 1960 contravened article 8(1) of the Malaysian Constitution, which provided: "All persons are equal before the law and entitled to the equal protection of the law". The penalty under the Internal Security Act, which applied only to possession in a security area, was a mandatory death penalty, while that under the Arms Act 1960, which applied throughout Malaysia, was only a fine or imprisonment or both. The accused's possession of a firearm was in a security area. Lord Diplock, in rejecting the constitutional argument for the appellant on this point, said at p. 475:-

"There are many factors which a prosecuting authority may properly take into account in exercising its discretion as to whether to charge a person at all, or, where the information available to it discloses the ingredients of a greater as well as a lesser offence, as to whether to charge the accused with the greater or the lesser. The existence of those factors to which the prosecuting authority may properly have regard and the relative weight to be attached to each of them, may vary enormously between one case and another. All that equality before the law requires, is that the cases of all potential defendants to criminal charges shall be given unbiased consideration by the prosecuting authority and that decisions whether or not to prosecute in a particular case for a particular offence should not be dictated by some irrelevant consideration.

If indeed the Attorney-General was possessed of a discretion to choose between prosecuting the defendant for an offence against section 57(1) of the Internal Security Act 1960 or for an offence under the Arms Act 1960 and the Firearms (Increased Penalties) Act 1971, there is no material on which to found an argument that in the instant case he exercised it unlawfully. But, in their Lordships' view, although he had a choice whether to charge the defendant with an offence of unlawful possession of a firearm and ammunition at all instead of proceeding with a charge of armed robbery (which was also brought against the defendant but not proceeded with), once he decided to charge the defendant with unlawful possession of a firearm and ammunition he had no option but to frame the charge under the Internal Security Act 1960."

That case does not, in their Lordships' opinion, assist the Director. The discretion available to him under section 28(8) of the 1986 Act is not concerned with whether a person should be charged with one offence rather than with another. It is concerned with the court before which a person is to be tried. In general, there is no objection of a constitutional or other nature to a prosecuting authority having a discretion of that nature. Under most, if not all, systems of criminal procedure the prosecuting authority has a discretion whether to prosecute a wide range of offences either summarily or under solemn procedure, and the choice depends upon the view taken about the seriousness of the case. If the choice is for prosecution before a court of summary jurisdiction, or other court having limited sentencing powers, that court can usually, if it considers that these powers do not match the seriousness of the offence, take steps to secure that the offence is dealt with by a court whose powers are not so limited. In Mauritius section 115 of the Courts Act deals with this situation as regards District

Magistrates. If prosecution is initiated before a higher court whose sentencing power is not limited otherwise than by the enactment creating the offence in question, the matter of the particular penalty to be imposed lies entirely within the discretion of that court. In Mauritius, even if the enactment creating an offence prescribes a minimum sentence of imprisonment, section 152 of the Criminal Procedure Act provides that the court may inflict imprisonment for a period less than the minimum term fixed by the enactments. In *Teh Cheng Poh* all persons convicted under the Security Act of possession of a firearm in a security area were subject to the mandatory death penalty. That offence was a more serious one than mere possession of a firearm under the Arms Act 1960. As Lord Diplock observed, a discretion in the prosecuting authority to prosecute for a more serious offence rather than for a less serious one is not open to any constitutional objection. If in Mauritius importation of dangerous drugs by one found to be trafficking carried in all cases the mandatory death penalty and importation on its own a lesser penalty, the Director of Public Prosecution's discretion to charge importation either with or without an allegation of trafficking would be entirely valid. The vice of the present case is that the Director's discretion to prosecute importation with an allegation of trafficking either in a court which must impose the death penalty on conviction with the requisite finding or in a court which can only impose a fine and imprisonment enables him in substance to select the penalty to be imposed in a particular case.

As their Lordships have observed, a discretion vested in a prosecuting authority to choose the court before which to bring an individual charged with a particular offence is not objectionable if the selection of the punishment to be inflicted on conviction remains at the discretion of the sentencing court. Here one of the courts before which the Director might choose to prosecute the offence, namely a judge without a jury, was given no such discretion. It follows that the constitutional vice which their Lordships have found to exist stems from section 38(4) of the 1986 Act, which must accordingly be held to be invalid. The result is that the judge sitting without a jury, before whom the two appellants were tried and convicted with a finding of trafficking, had no power to impose a penalty other than that prescribed by section 38(3). The appeals are against conviction, but the convictions are not vulnerable to any attack on constitutional or other grounds. The sentences of death, however, having been imposed under an invalid enactment, must be set aside, and the cases remitted to the Supreme Court to substitute such sentences, within the limits of section 38(3), as it considers appropriate. Their Lordships will humbly advise Her Majesty to that effect. The respondent must pay the appellants' costs before their Lordships' Board and of the proceedings in the Supreme Court which led to the judgment of 20th September 1991.