

Tubal Uriah Butler - - - - - *Appellant*

v.

The King - - - - - *Respondent*

FROM

THE COURT OF CRIMINAL APPEAL FOR TRINIDAD  
AND TOBAGO

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 12TH MAY, 1939

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*Present at the Hearing :*

LORD RUSSELL OF KILLOWEN  
LORD ROMER  
SIR GEORGE RANKIN

[*Delivered by LORD RUSSELL OF KILLOWEN*]

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The appellant was indicted on a charge of sedition, before Mr. Justice Robinson and a jury, in the Supreme Court of Trinidad and Tobago. He was found guilty and was on the 16th December, 1937, sentenced to two years imprisonment with hard labour. He appealed from the conviction to the Court of Criminal Appeal of that Colony. The appeal was heard and dismissed on the 28th January, 1938.

The appellant then petitioned His Majesty in Council for special leave to appeal *in formâ pauperis* alleging, amongst other grounds, that the Court which had heard and dismissed his appeal was not a duly constituted Court; and by Order in Council dated the 28th July, 1938, leave was granted to him to appeal against the judgment of the 28th January, 1938, "the appeal to be limited to the sole question whether the said Court was duly constituted according to the provisions of the Criminal Appeal Ordinance, 1931 (No. 31 of 1931), of Trinidad and Tobago having regard to the fact that the Court included two acting judges".

Their Lordships are accordingly in no way concerned with the merits of the appellant's appeal from his conviction. They have only to consider whether the appeal was heard by a tribunal capable of adjudicating upon it.

The Court which heard and dismissed the appeal was composed of the Chief Justice of the Colony, acting Justice Hobson, K.C. and acting Justice Boland. The question for determination is whether the two last-named gentlemen were members of or entitled to sit in the Court of Criminal Appeal. The solution of this question depends upon the true construction of certain ordinances.

The Judicature Ordinance, Chapter 35, is dated the 20th March, 1880, and (as amended by some subsequent Ordinances) provides as follows:—

3. There shall be one Supreme Court in the Colony, which shall be a Superior Court of Record, and such Court shall be called the Supreme Court of Trinidad and Tobago.

4.—(1) The Supreme Court shall consist of not more than three and not less than two Judges, of whom one shall be called the Chief Justice of Trinidad and Tobago and shall be the President of the Court, and the other or others shall be called the Puisne Judge or Puisne Judges of Trinidad and Tobago, and shall, if more than one, be called the First and Second Puisne Judges according to the terms of their respective appointments. (*Substituted by 23 of 1914, s. 3.*)

(2) The Court shall be deemed to be duly constituted notwithstanding any vacancy in the office of any Judge.

5. Every Judge of the Court shall be appointed by Letters Patent under the Public Seal of the Colony by the Governor, in accordance with such instructions as he may receive through one of His Majesty's Principal Secretaries of State, and shall hold his office during His Majesty's pleasure, subject to any conditions contained in any regulations made by or under the authority of His Majesty for His Majesty's Colonial Service, and shall receive such salary as the Governor, with the sanction of the Legislative Council, may appoint. The acceptance by any Judge of the Court of any other office or place of profit or emolument not authorized by law shall be and be deemed *de facto* an avoidance of his office of Judge, and his salary as Judge shall cease accordingly from the time of his acceptance of such other office or place.

6. Any act required or authorized to be done by, before, or in the name of the Chief Justice may be done by, before, or in the name of a Puisne Judge of the Court in case of the absence on leave or otherwise, indisposition, or inability to attend of the Chief Justice.

7.—(1) Whenever the office of any Judge of the Court is vacant, or whenever any Judge is absent from the Colony, or is, by reason of illness, interest in any cause or matter, or for any other reason, incapable of acting, or whenever in the opinion of the Governor the due administration of justice so requires, the Governor may, in the name of His Majesty, by Letters Patent under the Public Seal of the Colony, appoint some person, being a barrister-at-law of five years standing at least to act as Judge of the Court.

(2) Every such appointment shall be for such time, or for the trial or hearing of such causes or matters, or otherwise, as may be specified in the instrument of appointment.

(3) Every person so appointed and acting under such appointment shall, so far as may be necessary for the purposes of his appointment, have all the powers of a Judge of the Court, and all acts done within the scope of his appointment by any person so appointed and acting as aforesaid shall be as valid as if done by a Judge, whether in Court or Chambers or otherwise.

By the Judicature (Amendment) Ordinance, 1936, the following sections were substituted for the 4th and 5th sections above set out, viz.:

4.—(1) The Supreme Court shall consist of four Judges, one of whom shall be designated the Chief Justice of Trinidad and Tobago and the others the Puisne Judges of Trinidad and Tobago.

The Chief Justice shall be the President of the said Court. The Puisne Judges shall be called the First, Second and Third Puisne Judges according to the terms of their respective appointments.

(2) The Court shall be deemed to be duly constituted notwithstanding any vacancy in the office of any Judge.

5. Every Judge of the Court shall be appointed by Letters Patent under the Public Seal of the Colony by the Governor, in accordance with such instructions as he may receive through one of His Majesty's Principal Secretaries of State, and shall hold his office during His Majesty's pleasure, subject to any conditions contained in any regulations made by or under the authority of His Majesty for His Majesty's Colonial Service, and shall receive such salary as the Governor, with the sanction of the Legislative Council, may appoint. No Judge shall accept or perform any other office or place of profit or emolument not authorized by law without the consent of the Governor: Provided that this restriction shall not apply to a Judge temporarily appointed to act as such under section 7 of this Ordinance.

The Supreme Court of the Colony accordingly now consists of four judges, viz., the Chief Justice and the first, second and third Puisne Judges.

In the year 1931 there was enacted an Ordinance to establish in the Colony a Court of Criminal Appeal, viz., the Criminal Appeal Ordinance, 1931. That Ordinance contained the following provisions:—

3.—(1) There shall be a Court of Criminal Appeal in the Colony, and the Chief Justice of Trinidad and Tobago and the Puisne Judges of Trinidad and Tobago shall be Judges of that Court.

(2) For the purpose of hearing and determining appeals under this Ordinance, and for the purpose of any other proceedings under this Ordinance, the Court of Criminal Appeal shall be summoned in accordance with directions given by the Chief Justice, and the Court shall be duly constituted if it consists of three Judges.

The Court shall sit in Port-of-Spain except in cases where the Chief Justice gives special directions that it shall sit at some other place.

(3) The Chief Justice, if present, and in his absence the senior member of the Court, shall be president of the Court.

(4) A judge of the Court of Criminal Appeal shall not sit as a judge on the hearing of any appeal, or on the hearing of any application for leave to appeal, against a verdict given or sentence passed at a trial at which he presided, or on the consideration of any point reserved by him under the provisions of the Criminal Procedure Ordinance, Cap. 5.

(5) The determination of any question before the Court of Criminal Appeal shall be according to the opinion of the majority of the members of the Court hearing the case.

(6) Unless the Court direct to the contrary in cases where, in the opinion of the Court, the question is a question of law on which it would be convenient that **separate judgments** should be pronounced by the members of the Court, the judgment of the Court shall be pronounced by the **President of the Court** or such other member of the Court hearing the case as the president of the Court directs, and no judgment with respect to the determination of any question shall be separately pronounced by any other member of the Court.

(7) The Court of Criminal Appeal shall be a superior court of record, and shall, for the purposes of and subject to the provisions of this Ordinance, have full power to determine, in accordance with this Ordinance, any questions ~~necessary to~~ be determined for the purpose of doing justice in the case before the Court.

(8) Any direction which may be given by the Chief Justice under this section may in the event of any vacancy in that office or in the event of the incapacity of the Chief Justice to act from any reason, be given by the senior Judge of the Court of Criminal Appeal.

It is to be observed that the Court so established is not established as a branch of the existing Supreme Court; but as a separate Court of Record, the judges of which are stated to be "the Chief Justice of Trinidad and Tobago and the Puisne Judges of Trinidad and Tobago." It is further to be observed that the Criminal Appeal Ordinance contains no power to appoint a person to act as a Judge of the Court of Criminal Appeal.

The critical point now becomes apparent. Is a person who has been appointed under section 7 of the Judicature Ordinance "to act as Judge of the Supreme Court" a member of the Court of Criminal Appeal or capable of acting as such?

The letters patent appointing Mr. Hobson to be acting Justice ran thus:—

WHEREAS by Section 7 of the Judicature Ordinance, Chapter 35, it is among other things provided that whenever in the opinion of the Governor the due administration of justice so requires the Governor may, in the name of His Majesty, by Letters Patent under the Public Seal of the Colony, appoint some person, being a Barrister-at-Law of five years standing at least to act as Judge of the Supreme Court;

AND WHEREAS it is expedient to appoint some person to act as a Judge of the Supreme Court for the purpose of hearing and determining the appeal of Tubal Uriah Buz Butler to the Court of Criminal Appeal in the case of The King vs. Tubal Uriah Buz Butler for Sedition;

KNOW ye therefore by these presents that WE being well satisfied of the loyalty, integrity and ability of JOHN DAVIDSON HOBSON, ESQUIRE, B.A. K.C. do hereby appoint the said John Davidson Hobson to act as Judge of the Supreme Court and of the Court of Criminal Appeal of the said Colony as from the 24th day of January 1938 for the purpose of hearing and determining the said appeal of the said Tubal Uriah Buz Butler, and for that purpose to have, hold, exercise and enjoy the said office and place, together with all rights, privileges and advantages thereunto belonging or appertaining.

The letters patent appointing Mr. Boland were in identical language.

It seems plain to their Lordships that if the acting judges were members of the Court of Criminal Appeal or were capable of sitting therein, that result can have flowed only from their having been appointed to act as Judges of the Supreme Court, for no power existed to appoint them to act simply as Judges of the Court of Criminal Appeal, or to appoint them for the hearing of a specified matter in that Court.

It is said on behalf of the respondent that the result does flow from their appointment to act as Judges of the Supreme Court, because under section 7 (3) of the Judicature Ordinance every person so appointed is given all the powers of a Judge of the Supreme Court, and that one of the powers thus given is the power of a Judge of the Supreme Court to sit and adjudicate in the Court of Criminal Appeal.

Their Lordships are unable to accept this contention. The powers conferred by section 7 (3) are the powers exercisable by a Judge of the Supreme Court when he is acting

in that capacity. Those are the powers which are to be exerciseable by the appointee when he is acting in the same capacity. They are only conferred upon him "so far as may be necessary for the purpose of his appointment", i.e., his appointment to act as a judge of the Supreme Court; and it is the acts done by a person "acting as aforesaid" which are to be as valid as if done by a Judge. Nor is it true to say that one of the powers of a Judge of the Supreme Court is the power to sit and adjudicate in the Court of Criminal Appeal. That power is derived only from the fact that the constituent members of that Court are, by enactment, the individuals who are the Chief Justice and the Puisne Judges of Trinidad and Tobago. A person appointed under section 7 (3) of the Judicature Ordinance is not a Puisne Judge of Trinidad and Tobago, nor is he under that provision invested with any powers beyond such as are necessary to enable him to act effectively as a judge of the Supreme Court.

Two further contentions were advanced on behalf of the respondent, based upon sections 17 and 20 of the Interpretation Ordinance, 1933 (No. 19 of 1933). Those sections provide as follows:—

Section 17. Where by or under any law, any powers are conferred or any duties are imposed upon a public officer, the Governor may direct that if during any period owing to absence or inability to act from illness or any other cause such public officer shall be unable to exercise the powers or perform the duties of his office in any place under his jurisdiction or control, such powers shall be had and may be exercised and such duties shall be performed in such place by the person named by or by the public officer holding the office designated by the Governor; and thereupon such person or public officer, during any period as aforesaid, shall have and may exercise the powers and shall perform the duties aforesaid, subject to such conditions, exceptions, and qualifications as the Governor may direct.

Section 20.—(1) Where any law confers a power or imposes a duty then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.

(2) Where any law confers a power or imposes a duty on the holder of an office, as such, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed by the holder of the office for the time being or by a person duly appointed to act for him.

It was said that the case was covered by one or other of these sections: but quite plainly neither section can apply. Each section deals with the case of one individual being appointed to take the place of another individual, and to act as a substitute for him. In the present case neither Mr. Hobson nor Mr. Boland was appointed to take any one's place or to act as a substitute for any individual.

Nor can the respondent derive any help from the decision of their Lordships' Board which was cited, viz., *Ex parte Marais*, ([1902] A.C. 51) which at most might be an authority to establish that a person appointed to act as a judge of the Supreme Court is a judge of the Supreme Court. But it falls far short of establishing the proposition that a person appointed so to act is a member of or entitled to sit in a Court, the judges of which, it is enacted, shall be the Chief



Justice and the Puisne Judges of the Colony. An acting judge is not a Puisne Judge of the Colony, for the number of Puisne Judges is fixed and cannot be exceeded. Moreover they are appointed in accordance with instructions received through a Secretary of State, which is not the case with acting judges.

For the reasons indicated, their Lordships are of opinion that the Court which purported to adjudicate upon the appellant's appeal from his conviction was not properly constituted as the Court of Criminal Appeal in the Colony. It had no jurisdiction to deal with the matter. The appeal from the conviction has accordingly never been heard. This appeal should therefore be allowed and the judgment of the Chief Justice and the two acting judges of the 28th January, 1938 should be declared to be void and of no effect. Their Lordships will humbly advise His Majesty accordingly.



In the Privy Council

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TUBAL URIAH BUTLER

v.

THE KING

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DELIVERED BY LORD RUSSELL OF  
KILLOWEN

Printed by His Majesty's STATIONERY OFFICE PRESS,  
Pocock Street, S.E.1.

1939