Privy Council Appeal No. 17 of 1991

(1) Goinsamy Chinien
(2) Goolam Ahmad Jaman and
(3) Ahmad Yousouf Joghee *Appellants*

v.

The State *Respondent*

FROM

THE SUPREME COURT OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH DECEMBER 1992

Present at the hearing:-

LORD TEMPLEMAN
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY
LORD MUSTILL
LORD SLYNN OF HADLEY

*[Delivered by **Lord Jauncey of Tullichettle**]*

By information dated 2nd November 1987, seven men were charged with a number of offences involving foreign currency which had been committed during 1985. This appeal is by three of those men and concerns two charges which are in the following terms:-

" COUNT I

That in [or about] the month of March in the year one thousand nine hundred and eighty five at Bernardin de St. Pierre Street in the district of Port-Louis one SATTAR BACSOO, aged 32, fish merchant, residing at No. 1, Bernardin de St. Pierre, Port-Louis, (2) one HASSENALLY MOORBANOO ALSO CALLED HASSEN, 29 years, fish merchant, residing at 7, Arab Lane, Cite Camp Yoloff, and one (3) AHMAD YOUSOUF JOGHEE ALSO CALLED RASHID, aged 30, lorry helper, residing at 4, Pont Rouge, together with an unknown person did wilfully and unlawfully agree with one another to commit an unlawful act, to wit:-
illegally exporting foreign currency.

COUNT VI

Complainant further avers that in or about the month of May 1985 at Port-Louis in the said district the said SATTAR BACSOO, the said AHMAD YOUSOUF JOGHEE ALSO CALLED RASHID, one GOOLAM AHMAD JAMAN ALSO CALLED GOOLAM MANN, aged 35, taxi driver, residing at 9, Maharatta Street, Port-Louis, and one GOINSAMY CHINIEN ALSO CALLED AMBA, aged 35, Barrister-at-Law, residing at 42, Reverend Lebrun Street, Beau-Bassin, did wilfully and unlawfully agree with one another to commit an unlawful act, to wit:- illegally exporting foreign currency."

It was stated at the top of the information that the conspiracy counts involved a breach of section 109 of the Criminal Code (Supplementary) Act ("the Criminal Code"), which section is the following terms:-

"109 Conspiracy

(1) Any person who agrees with one or more other persons to do an act which is unlawful, wrongful or harmful to another person, or to use unlawful means in the carrying out of an object not otherwise unlawful, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 5 years and to a fine not exceeding 1,000 rupees.

(2) Where the agreement is to commit murder or manslaughter, the person charged shall, on conviction, be liable to the same penalty as would have been applicable to an accomplice."

Until the enactment of this section there had been no general offence of conspiracy in the law of Mauritius. The appellants were convicted of the respective charges against them and were each sentenced to five years penal servitude being the maximum penalty under the section. Their appeals against conviction were dismissed by the Supreme Court by a majority.

All three appellants raised a question of time bar in their cases and at their Lordships' invitation, Sir Hamid Moollan Q.C. who appeared for the first appellant dealt with this matter at the beginning of his speech. However in order to understand his forceful and lucid submissions upon the matter it is necessary first to look at the statutory background against which these submissions were made. The Exchange Control Act 1952 which is an almost exact reproduction of the United Kingdom Exchange Control Act 1947 is divided into six parts namely Part I headed "Gold and Foreign Currency", Part II headed "Payments", Part III headed "Securities", Part IV headed "Import and Export", Part V headed "Miscellaneous" and Part VI headed "Supplemental". Part IV contains three sections dealing respectively with restrictions on import, restrictions on export and payments for exports, of which section 22(1) provides *inter alia*:-

"(1) The exportation from Mauritius of -

(a) any notes or coins of a class which are or have at any time been legal tender in Mauritius or any part of Mauritius or in any other territory;

...

(c) any gold;

...

is prohibited except with the permission of the Financial Secretary."

Section 21, which deals with importation, uses identical words of prohibition.

Schedule 4 to the Act contains three parts of which Part II is headed "General provisions as to offences" and Part III "Import and Export". Paragraphs 1 and 2(3) of Part II are in *inter alia* the following terms:-

"1(1) Any person in or resident in Mauritius who contravenes any restriction or requirement imposed by or under this Act, and any such person who conspires or attempts, or aids, abets, counsels or procures any other person, to contravene any such restriction or requirement shall commit an offence punishable under this Part.

(2) An offence punishable by virtue of Part III shall not be punishable under this Part.

...

2(3) Any proceedings under a law establishing summary jurisdiction which may be taken against any person in respect of any offence punishable under this Part may, notwithstanding anything to the contrary in that law, be taken at any time within 12 months from the date of the commission of the offence or within 3 months from the date on which evidence sufficient in the opinion of the Financial Secretary to justify the proceedings comes to the knowledge of the Financial Secretary, whichever period expires last, or, where the person in question was outside Mauritius at the date last mentioned, within 12 months from the date on which he first arrives in Mauritius thereafter."

Paragraph 1(1) of Part III is in the following terms:-

"1(1) The enactments relating to customs shall, subject to any modifications that may be prescribed to adapt them to this Act, apply in relation to anything prohibited to be imported or exported by Part IV of this Act except with the permission of the

Financial Secretary as they apply in relation to goods prohibited to be imported or exported by or under any of those enactments, and any reference in them to goods shall be construed as including a reference to anything prohibited to be imported or exported by Part IV of this Act except with the permission of the Financial Secretary."

Finally section 158(1) of the Customs Act 1988 which, their Lordships were informed, was a consolidation Act, provides:-

"158 Customs offences

(1) Every person who -

(a) evades or attempts to evade payment of any duty, levy or taxes which are payable;

(b) obtains or attempts to obtain any drawback which is not payable; or

(c) smuggles out of Mauritius any goods or exports any prohibited or restricted goods,

shall commit an offence."

Sir Hamid Moollan, whose argument on this matter was adopted by Mr. Ollivry Q.C., for the second and third appellants, argued that paragraph 2(3) of Part II of the Fourth Schedule applied to the information with the result that the proceedings were time barred, they having been initiated more than 12 months after the commission of the offences. Paragraph 1(1) was in quite general terms and the specific reference to conspiracy to contravene a restriction or requirement imposed by the Act applied to all contraventions of the Act and excluded the application of section 109 of the Criminal Code to exchange control offences. In short the charges were bad from the outset since they should have been brought under paragraph 1(1) and not section 109. Their Lordships however consider that Mr. Guthrie for the Crown was correct in submitting that Part II of Schedule 4 relates solely to Parts I, II and III of the Act whereas Part III of the Schedule relates to Part IV of the Act.

In *Reg. v. Goswami* [1969] 1 Q.B. 453 the Court of Appeal held that Part 3 of Schedule 5 of the Exchange Control Act 1947 contained a complete code for the enforcement of sections 21, 22 and 23 which comprised Part IV of that Act with the result that paragraph 1(1) of Part 2 of Schedule 5 did not cover a contravention of the provisions of Part IV of the Act. Schedule 5 of the Act of 1947 was for all practical purposes in terms identical to those of Schedule 4 of the Mauritius Act of 1952 and sections 21, 22 and 23 of the former Act corresponded similarly to the same sections in the latter Act. Their Lordships have no doubt that that case was correctly decided. Paragraph 1(1) of Part II of

Schedule 4 of the Act of 1952 uses the words "Any restriction or requirement imposed" whereas paragraph 1(1) of Part III of that Schedule uses the words "anything prohibited to be imported or exported by Part IV of this Act except with the permission of the Financial Secretary". The latter form of words is only to be found in Part IV whereas there are restrictions or requirements throughout Parts I, II and III of the Act. The use of different forms of words in the two paragraphs 1(1) suggests that they were each intended to apply to different contraventions of the Act. Had it been intended that paragraph 1(1) of Part II of Schedule 4 should be all embracing, it would have been simple so to provide. In their Lordships' view Part II of that Schedule was never intended to apply to Part IV of the Act, from which it follows that it would have been impossible to charge the appellants under paragraph 1(1) of Part II with conspiracy to export currency contrary to section 22. The position at the time of enactment of the Act was that there came into existence an offence of conspiracy to contravene provisions in Parts II and III but that there was no such offence in relation to Part IV. Only when a general law of conspiracy was introduced by section 109 of the Criminal Code did conspiracy to import or export currency become an offence. There are time bar provisions neither in Part III of Schedule 4 of the Act of 1952, nor in relation to section 109 of the Criminal Code, nor in the relevant part of the Customs Act 1988. It follows that the appellants' argument on time bar fails.

Merits

One Peerbaccus was, on 12th June 1985, arrested at Plaisance Airport while attempting to smuggle to Bombay some US$19,500 hidden in a sealed tin of Vita Ghee. He was later charged under the Customs Act and sentenced to a heavy fine in accordance with the relevant section. He was unable to pay this fine and was arrested for non-payment but obtained from time to time a respite from the Commission on the Prerogative of Mercy. Towards the end of 1986 he volunteered to give evidence before a Commission of Enquiry on the drug problem and for his own safety he removed from his house to live under police protection. The evidence which he gave to the Commission implicated a number of persons, including the three appellants, in drug dealing and smuggling, which drug smuggling was the reason for his attempt to take the United States dollars to Bombay. Peerbaccus had on a previous occasion in March 1985 successfully transported United States dollars to Bombay in a tin of Vita Ghee. Following upon Peerbaccus' disclosure the information was brought before the Intermediate Court. Count I related to Peerbaccus' trip to Bombay in March and the third appellant was an employee at the factory where the ghee tin was filled and sealed. Count VI related to the abortive trip to Bombay in June. The second appellant was a taxi driver involved in taking the dollars to the factory for sealing in the tin, and the first appellant was

a barrister and member of the Legislative Assembly who had advised Peerbaccus professionally and had become a friend of his.

At the trial the only evidence implicating the three appellants with the offences charged was that of Peerbaccus. Three main grounds of appeal were advanced before this Board namely (1) what may be conveniently described as inducement, (2) lack of corroboration and (3) lack of specificity in the charges.

(1) Inducement.

Peerbaccus was still living under police protection at the time of the trial and it emerged in the course of the evidence of a senior police officer that he had from time to time received payments from the police informers' fund including a payment of 1,000 rupees which he had demanded a few days before he was due to give evidence. Receipt of this latter payment was denied by Peerbaccus. It was submitted that this payment was clearly an inducement to Peerbaccus to give evidence and that his evidence was thereby rendered inadmissible. It was argued that Peerbaccus was an accomplice who had not been fully dealt with in as much as he had not yet paid his fine and that in any event the ratio of *Reg. v. Pipe* [1967] 51 Cr.App.R. 17 should be extended to cover this appeal. In *Pipe* the prosecution called as a witness an accomplice against whom proceedings had been brought but had not been concluded and it was held that the conviction must be quashed. Lord Parker C.J. at page 21 said:-

> "In the judgment of this court, it is one thing to call for the prosecution an accomplice, a witness whose evidence is suspect, and about whom the jury must be warned in the recognised way. It is quite another to call a man who is not only an accomplice, but is an accomplice against whom proceedings have been brought which have not been concluded."

Their Lordships do not consider that the second sentence (*supra*) has any application to this case where a prosecution had been brought, a conviction obtained and sentence passed. Furthermore they see no justification for extending the ratio of that decision. The magistrates of the Intermediate Court gave careful consideration to the circumstances of the above payment and concluded that there was no inducement to Peerbaccus to give evidence. Peerbaccus' evidence was accordingly admissible and it was open to the Intermediate Court to accord to it such weight as they considered appropriate.

(2) Corroboration.

It was submitted that if the evidence of Peerbaccus was admissible nevertheless having regard to the nature thereof it was unsafe to convict on that evidence alone. It is clear from the judgment of the Intermediate Court that very considerable criticism was levelled at the reliability of

Peerbaccus' evidence by counsel for the defence. It is also clear that the court gave the most careful consideration to these criticisms and to the fact that there were contradictions in his evidence. Nevertheless the Intermediate Court concluded that at the end of the day Peerbaccus was telling the truth. It is significant that none of the three appellants gave evidence to controvert that of Peerbaccus nor indeed did they give any evidence at all. In all these circumstances their Lordships consider that the Intermediate Court were entitled to accept the evidence of Peerbaccus without corroboration thereof.

(3) Lack of specificity in the charges.

At the beginning of the trial the defence sought particulars of the dates and places and amounts of currency involved in *inter alia* Counts I and VI. This request was refused although the Prosecution deleted the words in square brackets. The appellants could point to no specific prejudice suffered by them as a result of the lack of particulars and although the Board considers that it would have been better if the prosecution had complied with the defence request it does not appear that at the end of the day the appellants have suffered prejudice thereby.

Sentence

In sentencing the three appellants the Intermediate Courts stated "We are of the view that the charges before us, be it those of conspiracy or those of sequestration, revolve around drug trafficking". In rejecting the appeal against sentence by the first appellant Glover C.J. referred to the fact that the offence was connected with drug trafficking, referred to the ravages brought about by drugs to the health of citizens of all ages and to the nefarious influence of drugs on the crime rate, and concluded that there were compelling reasons for the trial court to impose the sentence under appeal. Ahnee J. who would have allowed the appeal on the ground of time bar would in any event have held the sentence to be excessive on the ground *inter alia* that the maximum penalty for the substantive offence of export of foreign currency was merely a fine.

It is very unusual for this Board to intervene or even to entertain argument in relation to sentences passed by a court of competent jurisdiction. However in the present case it appears to their Lordships that two questions of principle are involved. In the first place it is axiomatic that a court can sentence only for the offence charged and not for what might have been charged. It would have been perfectly possible for the prosecution to have charged the appellants with the conspiracies to export currency and to import drugs. They chose, no doubt for very good reasons, not to do so. It would in these circumstances be wrong in principle for the appellants to

be sentenced in respect of such conspiracies when they had only been charged with conspiring to export currency. It may be that it is proper to take into account the purpose of the illegal export but it can be proper only to the extent of warranting a sentence which would be in the higher rather than the lower range for illegal export of currency. It appears that the Intermediate Court in sentencing the appellants to the maximum sentence available under section 109 may have overlooked the necessity of concentrating upon the charges which were actually before them. In the second place, "normally it is not right to pass a higher sentence for conspiracy than could be passed for the substantive offence; it can be justified only in very exceptional cases". (*Verrier v. D.P.P.* [1967] 2 A.C. 195, per Lord Pearson at page 223G). In the absence of evidence that the first appellant had been involved in a series of illegal exports it does not appear to the Board that there here existed such exceptional circumstances as to warrant a departure from the normal rule, particularly where such departure involved so great a disparity between a fine, albeit substantial, and five years' penal servitude. The Board is therefore in general agreement with the views expressed upon this matter by Ahnee J.

Although the second and third appellants appealed against sentence neither to the Supreme Court nor in their cases to this Board, as questions of principle were involved it was clearly appropriate to consider the argument on sentence in relation to all three appellants. Their Lordships therefore gave them leave to appeal against their sentences. In the foregoing circumstances the Board considers that the proper course is to remit all three cases to the Supreme Court so that they may reconsider what would be appropriate sentences to impose in the light of the principles and observations referred to above.

For these reasons their Lordships dismiss these appeals against conviction but allow the appeals against sentence, quash the sentences of five years' penal servitude and remit the cases to the Supreme Court for sentence. There will be no order as to costs.