

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

THE SUPREME COURT OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
20TH FEBRUARY 1991

Present at the hearing:-

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

[Delivered by Lord Keith of Kinkel]

The appellant in each of these appeals was convicted by a Supreme Court judge sitting without a jury of the offence of importing heroin, contrary to section 28(1)(c) of the Dangerous Drugs Act 1986. Each appellant was found to be a trafficker in drugs under the provisions of section 38(1) of that Act and was sentenced to death under section 38(4).

At the hearing before the Board counsel for the appellants took two points. The first point was this. In each case the alleged offence took place before the coming into force, on 25th September 1987, of the Criminal Procedure (Amendment) Act 1986 which introduced a new section 10(1) to the Criminal Procedure Act, providing that offences under certain enactments specified in a Schedule to the (Amendment) Act, including the Dangerous Drugs Act 1986, may be prosecuted by the Director of Public Prosecutions before the Supreme Court without a jury. So it was argued that the trial judge had no jurisdiction to try the accused without a jury, notwithstanding that section 28(8) of the Dangerous Drugs Act 1986, which came into force on 12th September 1986, before the date of the alleged offences, provides:-

"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."

This point was argued before the trial judge and the Court of Criminal Appeal of the Supreme Court. It was rejected by them upon grounds which in their Lordships' opinion are entirely sound, and which it is unnecessary to recapitulate. That argument therefore fails.

The second point taken for the appellants is one which was not argued before either of the courts below. Their Lordships would not normally allow a fresh point to be taken for the first time before the Board, but capital cases are exceptional. The point is a constitutional one. Section 28(8) of the Dangerous Drugs Act 1986, which has already been quoted, confers upon the Director of Public Prosecutions a discretion as to the court before which he may choose to prosecute an offence under section 28(1)(b) or (1)(c) of the Act. Section 38(4) of the Act provides that 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. It is to be noted that section 41 of the Act, in relation to drugs offences, enlarges the jurisdiction of the Intermediate Court so as to enable it to impose any of the penalties prescribed by the Act other than the death penalty provided for in section 38(4). It was argued that the effect of sections 28(8) and 38(4) was to enable the Director of Public Prosecutions, an officer of the executive branch of government, to make the decision, through his choice of the court in which he decided to bring a prosecution under section 28(1)(c), as to the particular penalty to be inflicted on the accused if found guilty. If he opted for trial before a Supreme Court judge sitting without a jury, a finding of guilty, combined with a finding that the accused was a drug trafficker, necessarily involved imposition of the death penalty. It was maintained that to give an executive officer a discretion which could lead to that result was contrary to the Constitution of Mauritius. It may be observed that although section 28(8) confers a specific discretion on the Director of Public Prosecutions it appears that section 72(3) of the Constitution which gives him a general discretion as to the court in which to prosecute any offence, is capable, in the light of section 38(4) of the Act of 1986, of leading to a similar result. The existence of the discretion was said to contravene, in the circumstances, the doctrine of separation of powers between the legislative, executive and judicial branches of government. Reference was made to *Noordally v. A.G.*

(1986) M.R. 204, *Liyanage v. Reg.* [1966] 1 All E.R. 650, *Hinds v. The Queen* [1977] A.C. 195, *The State v. O'Brien* (1973) I.R. 50, and *Deaton v. A.G.* (1963) I.R. 170. The vice of the provisions in question was that they enabled an executive officer to select the penalty which might be imposed on a particular individual in a particular case.

In *Ong Ah Chuan v. Public Prosecutor* [1981] A.C. 648 this Board was asked to consider whether a certain provision of the Misuse of Drugs Act conflicted with the Constitution of Singapore, a point which had not been raised in the courts below. It was decided that there clearly was not any such conflict, but Lord Diplock, giving the Board's advice, said at page 644 that if there had been any doubt about the matter the appropriate course would have been to remit the case to the Court of Criminal Appeal in Singapore in order that the Board might have the benefit of its views.

In the present case their Lordships have not been able to conclude that the constitutional argument is so obviously ill-founded that it ought to be dismissed without the Board having the benefit of the views upon it of the Supreme Court of Mauritius. They will therefore remit the two cases to that court in order that it may consider and adjudicate upon the following question: 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.

It does not appear that the validity of the appellants' convictions is a matter which can now be reopened before the Supreme Court. It will therefore be necessary for the Board to resume consideration of the appeals after the Supreme Court has pronounced upon the question remitted to it.