

Privy Council Appeal No. 35 of 1943

Luis Lopez Cordon-Cuenca - - - - - *Appellant*

v.

The King - - - - - *Respondent*

FROM

THE SUPREME COURT OF GIBRALTAR SPECIAL COURT
UNDER THE TRIAL OF SPECIAL OFFENCES
ORDINANCE, 1943

REASONS FOR REPORT OF THE LORDS OF THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,
DELIVERED THE 13TH DECEMBER, 1943

Present at the Hearing:

THE LORD CHANCELLOR (VISCOUNT SIMON)
LORD ATKIN
LORD PORTER
LORD CLAUSON
SIR GEORGE RANKIN

[*Delivered by* THE LORD CHANCELLOR]

This appeal was heard on December 13, 1943. At the close of the argument for the appellant, their Lordships intimated that the appeal failed and humbly advised His Majesty accordingly. The reasons for this decision remain to be stated.

The appellant was convicted on 25th August last, before the Chief Justice of Gibraltar, sitting as a Special Court without a jury, under the provision of paragraph 2 of the Trial of Special Offences Ordinance, 1943 (Gibraltar), for an offence against regulation 23 of the Gibraltar Defence Regulations, 1939, and was sentenced to death. This Ordinance was made by the Governor under the authority of Letters Patent empowering him to make laws for the peace order and good government of the City and Garrison of Gibraltar, and paragraph 2 of the Ordinance enacted that—

“Where any person shall have been committed for trial before the Supreme Court in respect of an offence alleged to have been committed, whether before or after the coming into force of this Ordinance, against Regulation 23 of the Defence Regulations, 1939, the Chief Justice shall appoint and hold a special court for the trial of such cause and such trial shall have the same validity in every respect as if it had taken place at the time at which it would have been held in due course.”

Regulation 23, at the relevant date, was in the following terms:

“If, with intent to help the enemy, any person does, or attempts or conspires with any other person to do, any act which is designed or likely to give assistance to the naval, military or air operations of the enemy, to impede such operations of His Majesty’s forces, or to endanger life, he shall be guilty of felony and shall on conviction on indictment suffer death.”

The power to make defence regulations for Gibraltar is derived from the United Kingdom statute 2 & 3 Geo. VI. c. 62, which is cited as the Emergency Powers (Defence) Act, 1939. That Act authorises the making by Order in Council of defence regulations for the United Kingdom for securing the public safety, the defence of the realm, the maintenance of

public order, and so forth, and by sect. 1 subsect. (2) enacted that "Defence Regulations may (a) make provision for the apprehension trial and punishment of persons offending against the regulations". Further, by section 4 of the Act, His Majesty may by Order in Council direct that the provisions of the Act shall extend, with the modifications specified in the Order, to any Colony. This was done by an Order in Council of 25th August, 1939 (the day after the statute of 1939 became law)—S.R. & O. 1939 No. 968—as a consequence of which the Governor of Gibraltar was empowered to make defence regulations for the colony. But the Act nowhere enables those defence regulations to make provision for the trial by Special Courts of those offenders who are not subject to the jurisdiction of Courts Martial.

This omission is cured by the U.K. Emergency Powers (Defence) (No. 2) Act, 1940 (3 & 4 Geo. VI. Ch. 45): an act the purpose of which is stated to be "to remove doubts as to the extent of the powers which may be exercised by His Majesty under the Emergency Powers (Defence) Act 1939".

After reciting that "by the Emergency Powers (Defence) Act 1939 His Majesty was enabled to exercise certain powers for the purpose of meeting the emergency existing at the date of the passing of that Act", but that "the said powers did not enable provision to be made for the trial by Courts Martial of persons not being subject to the Naval Discipline Act, to military law, or to the Air Force Act" and that "by reason of the development of hostilities since that date it had become expedient to remove doubts as to the extent of the said powers in order to secure that provision for the trial of such persons by special Courts may be made where necessary" the statute enacts that "the powers conferred on His Majesty by the Emergency Powers (Defence) Act 1939 (hereinafter referred to as "the principal Act") to make by Order in Council such Defence Regulations as appear to him to be necessary or expedient for securing the public safety . . . include power to make provisions for securing that . . . persons . . . may in such circumstances as may be provided by the Regulations be tried by such Special Courts . . . as may be provided." and further enacts that:—

"(2) After para. (a) of subsect. (2) of section one of the principal Act there shall be inserted "(a.a.) make provision for their" (i.e. offenders) "trial by such Courts and in accordance with such procedure as may be provided for by the Regulations . . ., so however that provision shall be made for such proceedings being reviewed by not less than three persons who hold or have held high judicial office in all cases in which sentence of death is passed."

Finally it declares that:—

"2. This Act may be cited as the Emergency Powers (Defence) (No. 2) Act 1940 and shall be included amongst the Acts which may be cited together as the Emergency Powers Acts 1939 and 1940."

It was submitted to their Lordships that as the conviction and death sentence pronounced by the Chief Justice were not subject to review as described above the Special Court presided over by the Chief Justice which tried and convicted the appellant was without jurisdiction and its proceedings invalid.

The argument, as their Lordships understood, was that, the offence being constituted by regulations made under the Act of 1939, the Court to try such offences must be appointed under the additional powers inserted in that Act by the provisions of the Act of 1940. The combined provisions of the two Acts, it was said alone gave power to create Special Courts to deal with such offences.

The conclusive answer to this contention, in their Lordships view, is that the Special Court which tried the appellant was created by the trial of Special Offences Ordinance (cited above) and not under the Emergency Powers Acts or regulations made thereunder. Nor need it be created under these Acts or regulations. The regulation defines the offence, but it does not establish the Court, and the Court exists and exercises its jurisdiction

quite apart from the regulations. It is true that the later Act empowers the appointment of Special Courts to try offences created by defence regulations, but it does not confine the trial of these offences to such Courts nor compel their creation for that purpose. The power is permissive and not obligatory, and the validity of the regulations and of the trial is not dependent upon the appointment of the Special Courts whose creation is permitted by the Act of 1940. The offence can be tried by any Court exercising jurisdiction either as a result of the powers conferred by that Act or under any other lawful authority.

In their Lordships opinion the objection to the jurisdiction of the Court cannot be sustained and in these circumstances the conviction and sentence must stand.

Counsel for the appellant rightly abandoned the remaining point taken in the appellant's case, viz. that the Chief Justice, having in the first instance declared himself satisfied that the objection taken was a good one, could not, after further argument and reflection, rule that it failed. No consequences followed from the expression of the Chief Justice's original view, except an adjournment. There was no acquittal or discharge, and the argument is untenable.

For purposes of record, their Lordships think it well to add that after conviction and sentence, the Chief Justice entertained an application for leave to appeal to His Majesty in Council, and purported to grant leave, under the impression that the Order in Council regulating appeals to His Majesty in Council from Gibraltar (S.R. & O. 1909 No. 794), applies to a criminal case. It does not; the Order in Council is in the same terms as that considered by the Judicial Committee in *Chung-Chuck v. The King* [1930] A.C.244, when it was held that the language of the Order did not authorise such leave to appeal in a criminal matter. If such leave is given, it must be by His Majesty in Council. In order to avoid the frustration of the proceedings from this cause, their Lordships advised His Majesty that special leave to appeal should be given, and this was so given by Order in Council of the 10th December, 1943.

In the Privy Council

LUIS LOPEZ CORDON-CUENCA

v.

THE KING

[DELIVERED BY THE LORD CHANCELLOR]

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