Privy Council Appeal No. 85 *of* 1944

Thomas Shorunke - - - - - - - - *Appellant*

v.

The King - - - - - - - - - - *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH APRIL, 1946

Present at the Hearing:

LORD PORTER

LORD DU PARCQ

SIR JOHN BEAUMONT

[*Delivered by* LORD PORTER]

This is an appeal *in forma pauperis* brought by special leave from a judgment of the West African Court of Appeal dated the 27th April, 1940, whereby the appellant appeals against his conviction by the High Court of the Protectorate of Nigeria on the 13th February, 1940, for breaking and entering a building and committing a felony therein.

The appellant, a police constable, was charged, together with three other constables and three other persons, with having broken and entered a store at Ogbomosho and having stolen therefrom £300. There were other indictments not now material.

The charge was originally investigated in the District Magistrate's Court at Ibadan and after the evidence had been given for the prosecution the appellant together with the rest of the accused reserved his defence.

All seven defendants were then committed for trial at the next Ibadan Assizes.

The trial began on the 1st February, 1940, when the appellant pleaded not guilty and stated that he was represented by a barrister—a Mr. Wells Palmer. As this gentleman was not in Court the learned Judge adjourned the trial until the following morning and gave instructions that a wire was to be sent to Mr. Wells Palmer informing him of the adjournment. He also asked the police to give every facility to the appellant to get in touch with his lawyer or employ one locally if necessary. Mr. Wells Palmer replied that he was not appearing and the trial proceeded on the 2nd February and continued on the following days. During that day's sitting a list of witnesses and documents was handed by the appellant to the Court, but he refused to tell the police anything about the contents of the papers required for production or the evidence expected to be given by the witnesses whose names were set out. The learned Judge at the end of the sitting warned the appellant that he must give the gist of the evidence required, in order that it could be judged if relevant, and told him that if relevant, free subpoenas would be issued, but not otherwise.

On the 3rd of February the Solicitor-General, who was appearing for the prosecution, informed the Court that he had endeavoured to assist the appellant to sort out his witnesses and documents. The appellant, however, had refused his assistance—quite rightly, as the learned Judge observes in the course of his judgment—as he did not want to disclose his defence to the Crown's representatives.

The Solicitor-General appears mistakenly to have thought that the learned Judge had instructed the police to assist the appellant and accordingly asked that they might be relieved from any further obligation to assist in collecting witnesses or documents.

In the circumstances the learned Judge reconsidered his decision and determined to see the accused in chambers on the rising of the Court in order to discover what witnesses and documents would be necessary in the interests of justice to be produced on the appellant's behalf. In the course of this day's proceedings and during the appellant's cross-examination of one of the prosecution witnesses, the Solicitor-General objected to one of the questions put as being irrelevant and the appellant thereupon informed the Court that he would ask no more questions and make no statement until he got a lawyer. He did thereafter throughout the whole course of the trial remain mute and refuse to take any further part in the proceedings. Nevertheless in accordance with his promise the learned Judge saw the accused in his private room at the close of the day.

At this interview the learned Judge, the interpreter, the appellant and one other accused alone were present, though a police officer had been in the room originally and the Solicitor-General came in for a moment to say that all the necessary documents would be produced.

On this occasion the appellant repeated his assertion that a lawyer was being sent to defend him and was then asked to give a list of the names of the witnesses he wished to call, and the reasons for calling them, in order that subpoenas could be issued by the Court to avoid delay. The reason for this requirement, the learned Judge says, was because it appeared that several were being called from Ondo and it was doubted if they could give any relevant evidence.

The appellant replied that he did not wish to give the purpose for which his witnesses were being called and that a list had already been furnished. The learned Judge seems to have thought this list confused and to have asked for a fresh one; the accused man however failed to furnish a fresh list and again refused, whether from timidity, suspicion or obstinacy, to state the purpose for which he was calling his witnesses.

Their Lordships have seen the list furnished by the appellant, and, though it contains a list of both witnesses and documents and perhaps might be clearer, think it sufficient to show the names of the witnesses desired and the places where they were to be found. At a later point in his judgment the learned Judge states that on this occasion the accused was told that he would get no further assistance, and that he could make his own arrangements about subpoenas, but as the appellant was then, and had for some three months previously, been in prison, it is difficult to see what further arrangements he could make.

The appellant lodged an objection on the morning of the 5th February against the case being continued before the learned Judge because of what happened at the interview of the 3rd February and indeed if his own statement is to be accepted he made the same objection when the Solicitor-General contended that his cross-examination was irrelevant and the learned Judge so ruled.

In these circumstances the learned Judge took the view that the appellant had lost heart when he was unable to shake the testimony of the principal witness for the prosecution and was adopting the course he had pursued for the purpose of endeavouring to intimidate the Court and delay the proceedings and not from any genuine desire to have witnesses called.

He accordingly proceeded with the trial and found the appellant and all save one of the other prisoners guilty and sentenced the appellant to seven years' imprisonment.

After his conviction the accused man obtained legal assistance and appealed to the Court of Appeal complaining (*inter alia*) of the refusal of the Court to issue subpoenas, stating that his defence was an alibi, filing affidavits by himself and by his Counsel and applying that he himself and his witnesses should be called to give evidence. This application

was refused by the Court of Appeal and the conviction affirmed on the 27th April, 1940. From this dismissal he appeals to His Majesty in Council.

In these circumstances the only question which was or could be argued before their Lordships of the Judicial Committee was whether the learned Judge ought to have issued or caused to be issued the subpoenas asked for without attaching any conditions, or whether he was justified in requiring the appellant to satisfy him that there was a likelihood that they could give material evidence on the appellant's behalf.

It was conceded by the Crown's representatives that if this question had arisen in England, an accused man could have applied for and must have been furnished with subpoenas without the imposition of any conditions.

It is true that those subpoenas might afterwards have been set aside upon its being shown that those to secure whose presence they were issued could give no relevant evidence, but the onus would be on them to satisfy the Court to this effect. No consideration of that kind arises in the present case.

It might however be said that there was no duty on the Judge trying the case to see that the appropriate subpoenas were issued and that the taking of the necessary steps was a matter for the accused man.

Some such suggestion is contained in the judgment of the learned Judge when he says that at the vital interview the appellant was told that he would get no further assistance and could make his own arrangements about subpoenas.

Their Lordships did not understand that this argument was put forward before the Board on behalf of the prosecution and in any case, as has been pointed out above, it is difficult to see how a man under arrest in the midst of a trial could take steps to ensure that subpoenas would be issued without the assistance of the Court.

The representatives of the Crown however maintained that the position in Nigeria differed from that in England; that the English rule was established by the Common law whereas the whole procedure in Nigeria was governed by the appropriate Ordinances and the procedure thereby made applicable.

Before considering what procedure those Ordinances prescribe their Lordships would point out that the principal Ordinance dealing with the administration of justice in Nigeria is the Supreme Court Ordinance, Chapter 3, of the 1st October, 1914. Section 14 of that Ordinance enacts that subject to the terms of that or any other Ordinance the common law, the doctrines of equity and the statutes of general application which were in force in England on the 1st January, 1909, shall be in force within the jurisdiction of the Court (i.e. the Supreme Court of Nigeria). This provision is repeated in Section 12 of the Protectorate Courts Ordinance No. 45 of 1933.

Section 62 of the earlier Ordinance ordains that " in any cause or matter and at any stage thereof the Court either of its own motion or on the application of any party may summon any person within the jurisdiction to attend to give evidence or to produce any document within his possession, and may examine such person as a witness . . . and require him to produce any document in his possession or power, subject to just exceptions."

It is true that this latter section states only that the Court *may* summon any person, but their Lordships do not think that this provision does away with the right of the subject to the issue of a subpoena as of right. It merely gives an additional right for the Court to issue process at any stage either of its own motion or at the request of any party.

Moreover, a similar provision contained in Section 159 of Act XIV of 1882 and Section 149 of Act VIII of 1859 of Madras was discussed in the Courts of that province and it was decided in the case of *Veerabadran Chetty* v. *Nataraya Desikar* ((1904) I.L.R. 28 Mad. 28) that a party is entitled to obtain a summons for the attendance of any witness on application before the day fixed for disposal of the case and the judge cannot under the sections referred to refuse the application.

The prosecution, however, rely upon the terms of other sections of the Ordinances of Nigeria as showing that the judge trying the case has the right and duty to enquire into the relevancy of the evidence to be given before issuing a subpoena or directing it to be issued.

As establishing this contention they refer to—

Sections 66 and 67 of the Criminal Procedure Ordinance of Nigeria, ch. 20 of 1914. These sections are to be found in Part II of the Ordinance which deals with Preliminary Investigations. They read as follows:—

> Section 66. "Immediately after the accused shall so have had opportunity of making his answer to the charge, the Court shall ask him whether he desires to call any witnesses, and the depositions of such witnesses as the accused shall call and who shall appear on his behalf shall then be taken in the like manner as in the case of the witnesses for the prosecution:"
>
> Section 67. "If the accused person states that he has witnesses to call, but that they are not present in Court, and the Court is satisfied that the absence of the witnesses is not due to any fault or neglect of the accused, and that there is a likelihood that they could, if present, give material evidence on his behalf, the Court may adjourn the investigation and issue process, or take other steps, to compel the attendance of such witnesses."

On their face and having regard to the heading and terms of this fasciculus of sections in which they appear, these sections apply only to the procedure at preliminary investigations. Part III however of the same Ordinance which is headed Summary Trial contains Sections 77 and 82 and those sections provide:—

> Section 77. "Trials in Provincial Courts and before Commissioners of the Supreme Court shall be conducted summarily in the manner and subject to the conditions laid down in this part of this Ordinance."
>
> Section 82. "At the close of the evidence in support of the charge, if it appears to the Court that the case is made out against the accused sufficiently to require him to make a defence, the Court shall ask him if he wishes to say anything in answer to the charge, or has any witnesses to examine or other evidence to advance in his defence and the Court shall then hear the accused and his witnesses and other evidence, if any. If the accused states that he has witnesses to call but that they are not present, the Court may under the circumstances set forth in Section 67 take the steps therein mentioned to compel their attendance."

The Protectorate Courts Ordinance No. 45 of 1933 substituted the jurisdiction of the High Court for that of the Supreme Court and Section 14 of the Criminal Procedure (Amendment No. 2) Ordinance No. 48 of 1933 repealed Section 77 of Chapter 20 and substituted for it the following Section. "Trials before Commissioners of the Supreme Court and magistrates, and, subject to the provisions of the Protectorate Courts Ordinance, 1933, trials in the High Court shall be conducted summarily in the manner and subject to the conditions laid down in this part of the Ordinance": i.e. in accordance with the provisions of Section 82 set out above.

Finally, The Protectorate Courts Ordinance No. 45 of 1933 after dealing in Order V, Rule 1, with the summoning of witnesses in terms having a similar effect to those of Section 62 of the Supreme Court Ordinance, Chapter 3 of 1914, provides in "Part IV, Rules of Criminal Procedure, Order XXXIX. Rules for trials after committal to the High Court":—

> "Criminal Causes committed to the High Court for trial after a preliminary investigation shall not be tried upon information, but such trials shall be commenced by the Court placing upon record the charge or charges made against the accused, and thereafter shall, subject to the provisions of Section 19 of the Ordinance and of any Orders made thereunder be conducted, so far as may be, in the manner laid down in Part III of the Criminal Procedure Ordinance."

The appellant was committed to the High Court for trial after a preliminary investigation and the other steps prescribed in the last-named order were followed.

It follows that the provisions of Section 82 of the Criminal Procedure Ordinance of 1914 apply to his case.

The Crown then argue that the only obligations of the Court as to summoning witnesses are those contained in Section 62 of the Supreme Court Ordinance of 1914 or the similar terms of Order V Rule 1 of the Protectorate Courts Ordinance of 1933 and Section 82 of the Criminal Procedure Ordinance of 1914.

Both, they say, are permissive, not obligatory, and the latter requires in addition that the judge should be satisfied in accordance with the terms of Section 67 that the proposed witnesses should be likely to give relevant evidence on behalf of the accused.

Their Lordships have already stated that in their view the former section even if permissive does not cover the whole field, but deals merely with the time at which and the person at whose request a subpoena may be issued. Moreover it contains no provision enabling the Court to be satisfied that the evidence to be given is relevant.

The latter section, however, does contain such a provision and undoubtedly is made applicable by the later Ordinances not only to the procedure to be adopted where an investigation is taking place before a magistrate, but also to a summary trial and to a trial after previous investigation.

But the question still remains, as it remained in the case of the earlier section, whether its provisions superseded the Common Law rights enjoyed by inhabitants of this country on the 1st January, 1909, or whether its provisions do not take away, but supplement those rights.

In this connection it was urged on behalf of the appellant that both Section 82 and Sections 66 and 67 are dealing with the procedure to be adopted at a particular moment in the trial, viz., after the case for the prosecution is closed and the accused has had an opportunity of answering the charge. It does not deal with the accused man's right to apply for a subpoena before or in the course of the trial, but only enables the Court to adjourn and issue process even at the very end of the trial of the case.

It would be strange if a man charged with a crime could only obtain a subpoena for the attendance of witnesses at the very end of his trial and then subject to the discretion of the Court as to whether it will grant an adjournment or not.

In their Lordships' opinion the contention urged on behalf of the appellant is well founded.

As against this view it might indeed be argued that, if it were to prevail an accused man could put off his application for the issuing of process to compel the attendance of witnesses until his trial was nearing its end and so not only delay its conclusion but also cause excessive inconvenience in the retention of witnesses. Their Lordships would point out however, that in the present instance the trial lasted some 10 or 11 days after the first application made by the appellant to have his witnesses summoned and documents produced. So that this difficulty did not arise at any rate in any pronounced form. In any case the Court can always protect itself by issuing process but if convinced that the lateness of the application is not due to genuine mistake or justified reason, it can refuse to adjourn the trial. In their Lordships' opinion the contention that the Ordinances and Rules in force in Nigeria provide the only method by which subpoenas ad testificandum can be obtained in the colony cannot be supported. In their view there exists, side by side with them in appropriate cases, the English Common Law right of subpoena.

Having regard therefore to the fact that in their Lordships' opinion process ought to have issued at the request of the appellant without the imposition of the condition that he should disclose his reason for wishing to call the various witnesses set out in his list, they are unable to say that a grave miscarriage of justice has not occurred.

They will accordingly humbly advise His Majesty that the appeal should be allowed.

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In the Privy Council

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v.

THE KING

DELIVERED BY LORD PORTER

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