87. 1947

APPELLANT'S CASE

Appeal No. 94 of 1946.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF FIJI
(CRIMINAL JURISDICTION).

BETWEEN

PATESARI MAHARAJ - *Appellant,*

AND

THE KING - - - - - *Respondent.*

CASE FOR THE APPELLANT.

RECORD.

1. This is an appeal, by Special Leave, against the judgment and sentence of the Supreme Court of Fiji dated the 18th March, 1946, whereby the Appellant was found guilty of possession of a revolver without a licence contrary to Section 4 of the Arms Ordinance, 1937, and sentenced to nine months' imprisonment with hard labour. p. 17, l. 16.

2. Special Leave to appeal to His Majesty in Council was granted by Order in Council dated the 6th November, 1946. pp. 17—18.

3. The principal grounds upon which the Appellant submits that his conviction should be quashed and his sentence set aside are as follows:—

(a) The learned Trial Judge failed to comply with the imperative provisions of Sections 248 and 308 (2) of the Criminal Procedure Code (19 of 1944) which enact (*inter alia*) that, in a case tried with the aid of assessors, the Judge shall require each of the assessors to state his opinion orally on all the charges on which the accused has been tried and shall record such opinion, and shall thereafter himself give judgment but in doing so shall not be bound to conform to the opinions of the assessors. The learned Judge, who sat with two assessors, summed up to the said assessors as if they had been a jury and treated their opinions as if such opinions constituted a verdict and failed to deliver any judgment as required by the said Sections or at all.

(b) There was no evidence that the Appellant was aware that the revolver was concealed on his premises until it was discovered

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by the police and in the absence of *mens rea* there can be no offence under Section 4 of the said Ordinance.

(c) Even if *mens rea* is not an essential element in the said offence there can be no offence under the said Section without evidence of knowledge.

(d) The learned Trial Judge wrongly directed the assessors that the effect of Section 37 of the said Ordinance was to shift the onus of proof and to place upon the Appellant the burden of satisfying the Court that he had no knowledge of the said revolver.

(e) The learned Judge failed to direct the assessors that the onus of proof on the defence was less onerous than the onus on the prosecution.

(f) Even if the onus of proof lay on the Appellant he discharged it by his positive denial that he knew of the said revolver and, in the absence of any evidence to the contrary, he should have been acquitted.

4. Section 248 of the Criminal Procedure Code reads as follows:—

" 248. Every trial before the Supreme Court in which the accused or one of them or the person against whom the crime or offence has been committed or one of them is a native or of native descent, or of Asiatic origin or descent, shall be with the aid of assessors in lieu of a jury, unless the presiding judge for special reasons to be recorded in the minutes of the court thinks fit otherwise to order, and upon every such trial the decision of the presiding judge with the aid of such assessors on all matters arising thereupon which in the case of a trial by jury would be left to the decision of the jurors shall have the same force and effect as the finding or verdict of a jury thereon."

Section 308 of the Criminal Procedure Code reads as follows:—

" 308 (1) When, in a case tried with assessors, the case on both sides is closed, the judge may sum up the evidence for the prosecution and the defence, and shall then require each of the assessors to state his opinion orally, and shall record such opinions.

" (2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.

" (3) If the accused person is convicted the judge shall pass sentence on him according to law.

" (4) Nothing in this section shall be read as prohibiting the assessors or any of them, from retiring to consider their opinions if they so wish, or, during any such retirement or at any time during the trial, from consultations with one another."

The Arms Ordinance, 1937, is expressed to be " An Ordinance to regulate the possession sale import and export of certain arms " and the material sections are as follows:—

4. (1) No person shall have in his possession or custody any

arms except under a licence or permit in that behalf under this Ordinance and in accordance with the conditions of such licence or permit and such conditions as may be prescribed.

(2) Any person who shall have in his possession or custody any arms without such licence or permit or otherwise than in accordance with such conditions as aforesaid or who while holding such permit shall have in his possession or custody any arms in respect of which no licence is in force shall be liable to imprisonment with or without hard labour for a term not exceeding two years or to a fine not exceeding fifty pounds in respect of every such arm or to both.

30. (1) Whenever a District Commissioner has reason to believe that any person residing within the limits of his jurisdiction—

(a) has in his possession any arms without a licence or permit or in contravention of the conditions upon which any licence or permit is issued or for any unlawful purpose; or

(b) has in his possession any arms whereof he cannot be left in possession without danger to the public peace;

such District Commissioner may by warrant directed to any member or members of the Fiji Constabulary authorise such member or members by day or by night—

(i) to enter and search the house or premises occupied by such person or any house or premises wherein the District Commissioner has reason to believe that such arms are to be found; and

(ii) to seize and detain such arms; and

(iii) to arrest any person found in such house or on such premises whom such member or members has or have reason to suspect to have committed any offence punishable under this Ordinance.

(2) In the execution of such warrant any person to whom such warrant is directed may employ such assistants as may be necessary.

(3) Whoever upon a search being made under this section having in his possession or custody any arms or knowing where any arms are concealed refuses to produce or point out the same to the person making the search or intentionally conceals the same shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding fifty pounds or to both.

37. The occupier of any house or premises in which any arms shall be found shall be deemed until the contrary is proved to be the possessor of such arms for the purposes of this Ordinance.

The Defence (Explosives) Order, 1944, was made by the Officer Administering the Government in pursuance of Regulation 84 (1) of the Defence (General) Regulations, 1942, and was in the following terms:—

(1) This Order may be cited as the Defence (Explosives) Order, 1944.

(2) No person shall have in his possession in the island of Viti Levu any explosive.

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(3) This Order shall not apply to any member of His Majesty's Forces or to any person in possession of a valid permit to possess issued under the Explosives Regulations, 1938.

pp. 4—5. 5. The Appellant was indicted on four counts. The Crown offered
p. 6, l. 20. no evidence on the first and third counts and the Appellant was accordingly
p. 4, l. 30. acquitted thereon. The Trial then proceeded on the second count, under which the Appellant was charged with possession of arms without a licence
p. 5, l. 11. contrary to Section 4 of the Arms Ordinance, 1937, and the fourth count under which the Appellant was charged with unlawful possession of explosives contrary to the Defence (Explosives) Order, 1944, made under Regulation 84 (1) of the Defence (General) Regulations, 1942.

pp. 6—11. 6. The Crown relied solely upon the evidence of two police officers who deposed (*inter alia*) that they had searched the premises occupied by the Appellant and found a loaded revolver concealed in the thatch of a bure forming part of the compound and that it was completely buried in the thatch. These officers took the Appellant to the police station where he made the following statement:—

p. 10, l. 47. "That it is a bure, no doors, it is an open place it is containing a heap of paddy. It is true that it was found in my bure but I don't know who placed it there."

When charged with unlawful possession of three rounds of ammunition with which the revolver had been loaded the Appellant said:—

p. 11, l. 32. "I don't know how many rounds inside. I don't know how to load. I don't know anything about it."

p. 12, l. 16. 7. At the conclusion of the case for the Crown the Appellant's advocate submitted that there was no case to answer. He based his submission on the grounds that it was essential to establish *mens rea* in a case of this sort and that it must be shown that the accused had some knowledge
p. 12, l. 39. of the existence of the revolver. Counsel for the Crown agreed that if the
p. 13, l. 13. element of knowledge were not present and if an article was on a man's premises without his knowledge and without his sanction, that would not be possession of any description. He submitted ,however, that the question was as to the evidence in proof of the element of knowledge and that it was a very important point that the particular bure in this case was apparently occupied, possibly as sleeping quarters, by the accused. He referred to Section 37 of the Arms Ordinance.

p. 13, l. 20. The learned Judge overruled the aforesaid submission by the Appellant's advocate and held that there was a case for the Appellant to answer on the grounds that Section 37 of the Arms Ordinance applied to the second count and that, as regards count four, the ammunition was "mixed up with the firearm" and he thought it followed that there was "some sort of case to answer."

pp. 13—16. 8. The Appellant deposed (*inter alia*) that he had never seen the revolver before it was found by the police in his bure and that he did not always sleep in the bure but, since it was an open building, he was accustomed to rest there when it was very hot in the house. Asked how he thought

that the revolver could have got into the place where it was found, he said that his enemies must have got it in somehow. The family slept in the wooden house during the night and there was then nobody in the bure. In cross-examination he stated that he believed that someone had come in the night and placed the revolver inside the bure. He reiterated that he himself knew nothing about it. p. 16, l. 6. p. 16, l. 19.

9. The learned Judge's note of his summing-up is as follows:— p. 16, l. 28.

"The two charges are different.

"The ordinary rule of burden of proof applies to the explosives charge.

"As regards the Arms charge, the position is altered by section 37 of the Arms Ordinance which says that once the arms are discovered on the premises then the occupier is to be deemed to be in possession unless he proves the contrary. Suspicion is not enough—there must be proof. You can accept his denials if you believe them but as far as the defence of planting is concerend there must be some specific item of evidence—mere evidence of enmity to create suspicion is not sufficient.

"Crown case is the evidence of finding plus the position in which they were found.

"Defence consists of his denials plus evidence of enmity of neighbours.

"You can believe his denials if you like but there is no evidence that the neighbours did anything suggesting they planted the gun.

"On arms charge, unless he has satisfied you of lack of knowledge, little option but to convict by reason of section 37. On ammunition, if the Defence have raised reasonable doubt in your minds, you can (and should) acquit."

10. The two assessors were of opinion that the Appellant was guilty on the second count and not guilty on the fourth count. After a police witness had given evidence of the Appellant's good character, the learned Judge, without giving judgment as required by Section 308 (2) of the Criminal Procedure Code, forthwith sentenced the Appellant to nine months' imprisonment with hard labour. p. 17, l. 2. p. 17, l. 10. p. 17, l. 16.

11. The Appellant respectfully submits that this appeal should be allowed, and his conviction should be quashed and his sentence set aside, for the following, among other,

REASONS:—

1. Because the learned Judge treated the assessors as if they were a jury and failed to arrive at his own decision and to give judgment as required by Sections 248 and 308 (2) of the Criminal Procedure Code and thereby failed to comply with the imperative requirements of the said Code.

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2. Because *mens rea* is an essential element in an offence under Section 4 of the Arms Ordinance and there was no evidence of the existence of *mens rea*.

3. Because, even if *mens rea* is held not to be essential to constitute the offence aforesaid, it was still necessary in order to establish a *primâ facie* case against the Appellant, for the Crown to show that the Appellant had knowledge of the revolver and, since there was no evidence of knowledge, no *primâ facie* case was established.

4. Because, in the absence of any *primâ facie* case against the Appellant, the stage was never reached at which the onus of proof shifted to the Defence under Section 37 of the Arms Ordinance.

5. Because, even if the learned Judge was correct in holding that, by reason of Section 37 aforesaid, the burden of proof had shifted on to the defence, he should have held and directed the assessors that the burden of proof on the accused was less than that required at the hands of the Crown in proving the case beyond reasonable doubt, and that this burden might be discharged by evidence satisfying the Court of the probability of the Appellant's statement that he had no knowledge of the revolver; and because the learned Judge failed so to hold or so to direct the assessors and drew no distinction between the burden of proof on the Crown and the burden of proof on the defence.

6. Because the Appellant gave evidence that he had no knowledge that the revolver was on his premises and had never seen it before it was discovered by the police and therefore, in the absence of any evidence to the contrary, the learned Judge should have held and should have directed the assessors that the Appellant had discharged whatever onus of proof rested upon him.

DINGLE FOOT.

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