

~~P.C.~~
~~C.12~~

No.10 of 1963

Judgment
17/1964

IN THE PRIVY COUNCIL

<p>ON APPEAL</p> <p>FROM THE SUPREME COURT OF HONG KONG</p>	<p>UNIVERSITY OF LONDON</p> <p>INSTITUTE OF ADVANCED</p> <p>LEGAL STUDIES</p> <p>22 JUN 1965</p> <p>25 RUSSELL SQUARE</p> <p>LONDON, W.C.1.</p>
---	---

B E T W E E N :-

LI KEUNG PONG alias
LI SIU CHEUNG Appellant

78574

- and -

ATTORNEY-GENERAL OF
HONG KONG Respondent

10

CASE FOR THE APPELLANT

RECORD

1. This appeal is from a Judgment of the Supreme Court of Hong Kong pronounced on the 3rd October, 1962, which reversed a ruling of the District Court of Hong Kong dated the 18th September, 1962, that the said District Court had no jurisdiction to hear certain charges against the Appellant of obtaining credit by fraud.

p.17

p. 8

20

2. The question which arises for consideration on this appeal is whether the District Court was (as the Appellant submits) right in deciding that it had no jurisdiction to hear the said charges, and could not proceed with them.

3. On the 23rd May, 1962, the Appellant was charged with six offences of obtaining credit by fraud other than false pretences, contrary to Section 51 (a) of the Larceny Ordinance, Cap. 210. It is provided by the said section that such offence is :-

pp.2-4.

"a misdemeanour triable summarily".

30

4. On the 20th July, 1962, upon an application in writing by the Respondent, the Magistrate (Derek Cons, Esq.) at the Central Magistracy, Hong Kong, ordered that the charges against the Appellant be transferred to the District Court. In so doing he

p.19, l.13.

RECORD

purported to act in accordance with Section 87A (1) in Part III A of the Magistrates Ordinance, Cap. 227, which reads as follows :-

"Notwithstanding anything contained in any other provision of this Ordinance, whenever any person is accused before a magistrate of any indictable offence not included in any of the categories specified in Part III of the Second Schedule, the magistrate shall, upon application made by or on behalf of the Attorney General, make an order transferring the charge or complaint to the District Court." 10

p.5, l.7.
p.14,l.19.
p.33,l.34.

5. The Appellant submits that an offence under Section 51 (a) of the Larceny Ordinance is not an indictable offence and therefore the Magistrate could not lawfully transfer the charges to the District Court under the said Section 87A(1), and both the District Court and the Supreme Court have so held.

p. 2 l.7

6. On the 6th September, 1962, the Respondent preferred the said charges against your Petitioner in the District Court purporting to do so under the provisions of Section 24 of the District Court Ordinance, 1953. This is a court of limited jurisdiction. Its criminal jurisdiction is conferred upon it by Section 24 of the said Ordinance, read together with Section 25 thereof, and with Section 87A(1) of the Magistrates Ordinance (set out above.) The said Section 24 reads as follows :- 20 30

"The District Court shall have jurisdiction to hear and determine in accordance with the provisions of this Ordinance all such charges as the Attorney General may lawfully prefer under the provisions of Section 25."

Section 25 of the District Court Ordinance reads as follows :-

"(1) Where a charge or complaint has been transferred to the District Court by a magistrate in accordance with the provisions of Part IIIA of the Magistrates Ordinance, the District Court shall have jurisdiction and powers over all proceedings in relation to the offence therein alleged similar to the jurisdiction and powers the Supreme Court 40

would have had if the accused person had been committed to that Court for trial on indictment for a similar offence, save that nothing in this section shall be deemed to give jurisdiction to hear and determine such charge or complaint".

"(2) Where a charge or complaint has been transferred as aforesaid, the Attorney General shall..... deliver to the registrar a charge sheet setting forth the charge or charges preferred....."

10

7. The Appellant submits that the Respondent could not "lawfully prefer" the charges in the District Court under Section 24 of the District Court Ordinance because they could not be, and therefore were not, lawfully transferred into that Court by the Magistrate under Section 87A(1) of the Magistrates Ordinance. It follows (as the Appellant submits) that the District Court had no jurisdiction under the said Section 24 to hear the charges, and both the District Court and the Supreme Court have so held.

20

p.5, l.7.
p.14, l.19.
p.33, l.34.

8. The charges were heard before the District Court (Pickering D.J.) on the 6th September, 1962, and subsequent dates, but on the 18th September, 1962, after the conclusion of the evidence and before any judgment was delivered, a submission was made on behalf of the Appellant that the District Court had no jurisdiction to hear the charges.

p. 4, l.21.
p. 7, l.2.
p. 4, l.26.

9. On the said 18th September, 1962, the learned District Judge gave a fully reasoned Ruling upon the said submission. He held that he had no jurisdiction to hear the charges, and discharged the Appellant's recognisance.

30

pp.6 et seq
p.16, l.34.
p.4, l.30.

10. In the course of his Ruling, the learned District Judge decided that he could not deal with the case under the provisions of Section 69(1) of the Criminal Procedure Ordinance, Cap. 221. That Ordinance is concerned with Criminal Procedure in the Supreme Court, but Section 29(1) of the District Court Ordinance, subject to the provisions of the District Court Ordinance, applies the procedure and practice of the Supreme Court, in relation to criminal proceedings so far as the same may be applicable, to the District Court.

40

p.15, l.17.
p.15, l.35.

Section 69(1) of the Criminal Procedure Ordinance reads as follows :-

RECORD

"(1) If, either before or during the trial of an accused person, it appears to the Court that such person has been guilty of an offence punishable only on summary conviction, the Court may either order that the case shall be remitted to a magistrate with such directions as it may think proper or allow the case to proceed, and, in case of conviction, impose such punishment upon the person so convicted as might have been imposed by a magistrate and as the Court may deem proper. 10
(2) It shall be the duty of the magistrate to whom any such directions are addressed to obey the same."

Section 29 of the District Court Ordinance, however, provides by sub-section 5(a) as follows :-

"(5) Nothing in this section shall be taken to authorise :- 20
(a) the institution of any criminal proceeding in the District Court save in accordance with the express provisions of this Part;"

(The Part therein referred to is Part IV of the Ordinance, which also contains the above-mentioned Sections 24 and 25.)

p.l. 11. On the 24th September, 1962, the learned District Judge, on the application of the Respondent, stated a case for the opinion of the Supreme Court. The statement contained the following :- 30

pp. 5-6.

(i) "The issue is that of jurisdiction. There are no facts which can here be set out.

(ii) The conclusion to which I came was that the offence of obtaining credit by Fraud other than False pretences contrary to section 51(a) of the Larceny Ordinance, Cap. 210 is not an indictable offence and therefore cannot properly be transferred to the District Court by a Magistrate under s. 87A(1) of the Magistrates Ordinance Cap. 227. 40

"(iii) I was further of the opinion that s. 29(5) (a) of the District Court Ordinance 1953 rendered me powerless to invoke Section 69 of the Criminal Procedure Ordinance, Cap. 221 and so either proceed with the case or remit it to a Magistrate.

.....

(vi) The questions of law arising on the above statement for the opinion of the Full Court are :-

(i) Was I right or wrong in holding that I lacked jurisdiction to try the case.

10 (ii) Having so held was I right or wrong in failing to apply the provisions of section 69 of the Criminal Procedure Ordinance."

12. On the 3rd October, 1962, the Supreme Court (Sir Michael Hogan, C.J., Scholes and Mills-Owens J.J.) gave their decision that the Appeal was allowed on the second ground only, i.e. that although the offences charged are not indictable offences, the learned District Judge could have applied the provisions of Section 69(1) of the Criminal Procedure Ordinance. The Court directed that the trial be resumed and that the learned District Judge should consider the said Section 69(1) and "the exercise of the discretion it confers upon him".

p.17.

p.17, 1.22

13. On the 13th November, 1962, the Supreme Court gave their reasons for allowing the appeal. The Court took the view that Section 29 of the District Court Ordinance, applying the procedure and practice of the Supreme Court to the District Court, has the effect of applying Section 69 of the Criminal Procedure Ordinance to the District Court, and stated their conclusion as to the application of the said Section 69 as follows :-

p.18.

pp.35-36.

"We think that the application of Section 69 would not in itself alter the jurisdiction of the District Court which is defined by the earlier sections, Sections 24 and 25, read in conjunction with Section 87(A) of the Magistrates Ordinance. Section 69 which appears in an Ordinance dealing substantially with procedure leaves that jurisdiction intact but in the circumstances detailed in it enables the District Judge temporarily to assume or take on the role of an officer exercising an inferior jurisdiction, i.e., a Magistrate, and to deal, within the limits of that lesser jurisdiction, with a case which has wrongly come before him."

p.37, 1.31.

RECORD

p.37, 1.46

"The questions of law put to us by the case stated are whether :-

- (1) the Judge was correct in holding that he lacked jurisdiction to try the case.
- (2) having so held was he right in holding that the provisions of Section 69 of the Criminal Procedure Ordinance were not applicable.

p.38, 1.6.

"We think the Judge was, for the reasons we have indicated, correct in holding that, apart from Section 69 of the Criminal Procedure Ordinance, he could not try the charge, but wrong in failing to apply the provisions of that section."

10

pp.34-37
p. 37, 1.28.

14. In arriving at their decision that Section 29 (1) of the District Court Ordinance has the effect of applying Section 69 of the Criminal Procedure Ordinance to the District Court, the Supreme Court rejected an argument advanced on behalf of the Appellant founded upon the provisions of Section 27(5) of the District Court Ordinance, which reads as follows :-

20

"(5) Nothing in this section or in section 29 or 36 or in the District Court Criminal Procedure Rules shall affect the law or practice relating to the jurisdiction of the District Court nor prejudice or diminish in any respect the obligation to establish by evidence according to law any act, omission or intention which is legally necessary to constitute the offence with which the person accused is charged, nor otherwise affect the law of evidence in criminal cases."

30

It is submitted that this provision has the effect of preventing any of the provisions of the Criminal Procedure Ordinance, when applied to the District Court, from expanding or increasing in any way the jurisdiction of that Court as prescribed by the District Court Ordinance.

40

15. The Appellant submits that the Judgment of the Supreme Court is wrong, in particular for the following reasons :-

10 (i) The criminal jurisdiction of the District Court is that (and only that) conferred upon it by Section 24 of the District Court Ordinance. As the jurisdiction so conferred does not extend to the trial of offences which are not indictable offences, the Supreme Court could not properly hold that the District Court has power "temporarily to assume or take on the role of an officer exercising an inferior jurisdiction, i.e. a Magistrate", and in that role proceed to try such offences.

p.37 1.40.

20 (ii) The decision of the Supreme Court depends upon construing Section 29(1) of the District Court Ordinance as applying Section 69 of the Criminal Procedure Ordinance to the District Court. It is to be observed, however, that Section 29(1) is expressed to be "subject to the provisions of this Ordinance", and it is submitted that the decision of the Supreme Court fails to give effect to those words or to the express limitation of the jurisdiction of the District Court contained in Section 27(5) of the District Court Ordinance.

pp.35-37

(iii) The learned District Judge was right in the view which he took that the provisions of Section 29 (5) (a) of the District Court Ordinance precluded him from applying Section 69 of the Criminal Procedure Ordinance.

30 (iv) Section 69(1) of the Criminal Procedure Ordinance cannot be construed as enlarging the jurisdiction of the District Court in view of the provisions of the District Court Ordinance. And the said Section 69(1) does not and cannot, by reason of its terms, apply to the District Court in the circumstances which arose in this case.

40 16. On the 3rd October, 1962, the learned District Judge, in view of the decision of the Supreme Court, proceeded to deal with the case under Section 69(1) of the Criminal Procedure Ordinance, and gave a Judgment finding the Appellant guilty on the evidence. However, Section 10 (2) (a) of the Magistrates Ordinance lays down a general rule that a person accused of more offences than one of the same or a similar character cannot be tried at the same time for more than three. The learned District Judge sought to meet this provision by purporting to find the Appellant guilty of the first three charges only, although in arriving at his verdict he took into consideration the evidence relating to all six charges.

p. 38

RECORD

He said :-

p.46, 1.5.

"All the ingredients of the offences are present and I find the accused guilty but of the first three charges only. Since only three charges could have been heard by a Magistrate."

The Appellant submits that such verdict ought not to be allowed to stand.

17. The Appellant has appealed to the Supreme Court against the said Judgment of the District Court delivered on the 3rd October, 1962. On the 20th November, 1962 the Supreme Court granted an application to adjourn the hearing of the said appeal, with a view to this Appeal being heard before the said appeal to the Supreme Court is dealt with.

10

p. 46.

18. On the 20th February 1963 the Appellant was granted Special Leave to Appeal to Her Majesty in Council.

19. The Appellant submits that by the said Judgment of the Supreme Court dated the 3rd October, 1962, he has suffered a substantial and grave injustice, and that this Appeal should be allowed with Costs for the following amongst other,

20

R E A S O N S

(1) BECAUSE the offences charged are not indictable offences, and both the Courts below were right in so holding.

(2) BECAUSE the Magistrate could not lawfully transfer the said charges to the District Court, and both the Courts below were right in so holding.

30

(3) BECAUSE the Respondent could not lawfully prefer the said charges in the District Court under Section 24 of the District Court Ordinance, and both the Courts below were right in so holding.

(4) BECAUSE the District Court had no jurisdiction to hear the said charges or to proceed with them either under

40

Section 24 of the District Court Ordinance or Section 69 of the Criminal Procedure Ordinance, and the District Court was right in so holding.

- 10 (5) BECAUSE the Supreme Court was right in holding that, apart from Section 69 of the Criminal Procedure Ordinance, the District Court had no jurisdiction to hear the said charges, but wrong in holding that the District Court could and should apply the provisions of the said Section 69.
- (6) BECAUSE Section 69 of the Criminal Procedure Ordinance has no application to this case.
- (7) BECAUSE, on the proper construction of the relevant statutory provisions, the decision of the District Court contained in the Ruling given on the 18th September, 1962 was right and ought to be restored.
- 20 (8) BECAUSE the verdict of the District Court arrived at on the 3rd October, 1962, is unjust and ought not to be allowed to stand.

RALPH MILLNER

No. 10 of 1963

IN THE PRIVY COUNCIL
ON APPEAL FROM THE SUPREME COURT
OF HONG KONG.

B E T W E E N :-

LI KEUNG PONG alias
LI SIU CHEUNG

Appellant

- and -

ATTORNEY-GENERAL OF
HONG KONG

Respondent

CASE FOR THE APPELLANT

DARLEY CUMBERLAND & CO.,
36, John Street,
Bedford Row,
London, W.C.1.