Privy Council Appeal No. 47 of 1989

S.M.A. Goolfee *Appellant*

v.

The Queen *Respondent*

FROM

THE SUPREME COURT OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH NOVEMBER 1991

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD TEMPLEMAN
LORD GOFF OF CHIEVELEY
LORD BROWNE-WILKINSON
SIR MAURICE CASEY

*[Delivered by **Lord Goff of Chieveley**]*

On 9th May 1988 the appellant, S.M.A. Goolfee, together with a co-defendant, was convicted by the Intermediate Court of Mauritius of three offences contrary to the Dangerous Drugs Act 1986, viz. (1) possession of heroin; (2) possession of a pipe, and (3) possession of utensils, both for use in connection with the smoking of heroin. The quantity of powder found in the possession of the defendants, in which heroin was detected, was 1.2 grams. On 2nd September 1988 the court sentenced the appellant to two years' imprisonment with hard labour, and to pay a fine of Rs.1000/- under each of the three counts; and sentenced his co-defendant to pay a fine of Rs.3000/- under each count. The appellant appealed to the Supreme Court of Mauritius against the sentence of two years' imprisonment, but on 2nd May 1989 the Supreme Court dismissed his appeal. He now appeals from that decision to Her Majesty in Council.

Having regard to the view which their Lordships have formed of this appeal, it is not necessary for them to set out the factual background of the case in any detail. In brief, both defendants were found smoking heroin on the appellant's premises; and the magistrates of the Intermediate Court, rejecting the defence of the co-defendant that he was only watching, found that both defendants were engaged in a

joint venture and were in possession of the heroin, the pipe and the other utensils which were the subject-matter of the three counts. However, the magistrates differentiated between the two defendants when they came to impose sentence, taking into account that, whereas his co-defendant had a clean record, the appellant had a previous conviction for being in possession of heroin, having been sentenced for that offence about a year before (on 27th September 1985) to a period of four weeks' imprisonment with hard labour.

In his appeal to the Supreme Court against his sentence of imprisonment, the appellant relied upon three grounds - that the magistrates failed to have regard to the relevant circumstances; that his sentence was manifestly harsh and excessive; and that he was in possession of the heroin for his own use, i.e. he was not trafficking in drugs. It was suggested that a probation order, or an order for treatment, should have been imposed rather than a custodial sentence. This latter submission was founded upon section 28 of the Dangerous Drugs Act, the offences of which the appellant and his co-defendant were convicted being contrary to subsection (1)(a) of that section. Subsections (3), (4) and (5) of the section provide as follows:-

> "(3) Notwithstanding section 37, the Probation of Offender's Act shall apply to a conviction under subsection (1)(a).
>
> (4) Where a person is convicted of an offence under subsection (1)(a), the Court may also order that the person shall undergo such treatment, education, after care, rehabilitation or social reintegration as the Court thinks appropriate at such institution as may be prescribed and for such period not exceeding 5 years as the Court may specify.
>
> (5) Where the Court makes an order under subsection (4), the Court may also order that any sentence of imprisonment not exceeding 12 months shall be suspended."

However, the appellant's submissions were rejected by the Supreme Court. The Court said:-

> "Given the quantity of heroin found with the appellant and his recent previous conviction he could not expect to be treated with leniency. A sentence of two years imprisonment was not, in the circumstances, either wrong in principle or manifestly excessive."

Before their Lordships, Mr. Ollivry Q.C. advanced three submissions on behalf of the appellant. First he submitted that, since the magistrates in the

Intermediate Court did not call for a social enquiry report, they failed altogether to exercise the discretion under section 28(4) of the Act, since in the absence of such a report they could not have considered whether they should make an order that the appellant should undergo treatment rather than impose a custodial sentence. Second, the Supreme Court must likewise have failed to deal with the appellant's submission that an order should have been made under section 28(4). Third, the discrepancy between the sentences imposed on the two defendants was so great as to be unreasonable and unfair, and indeed to provoke a real sense of grievance on the part of the appellant. Mr. Ollivry further submitted, in the course of argument before their Lordships, that the magistrates in the Intermediate Court had given such undue weight to the previous conviction of the appellant as to be, in effect, sentencing the appellant twice for his previous offence.

However, Mr. Leung Shing Q.C., for the respondent, while submitting that the appellant's arguments should in any event be rejected on the merits, took the preliminary objection that this appeal was one which, on well-established principles, their Lordships should not entertain. He referred to *Badry v. D.P.P.* [1983] 2 A.C. 297, an appeal from Mauritius in which the advice of the Board was delivered by Lord Hailsham of St. Marylebone L.C. In the course of their advice, Lord Hailsham repeated and reaffirmed the well-known statements of principle by Lord Sumner in *Ibrahim v. R.* [1914] A.C. 599, 614-15, and by Viscount Dunedin in the Practice Direction reported in (1932) 48 T.L.R. 300, setting out the practice of the Board in relation to criminal appeals. In the former Lord Sumner stated that, for leave to appeal to be granted:-

> "There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future".

And in the latter, Viscount Dunedin said:-

> "Their Lordships have repeated ad nauseam the statement that they do not sit as a Court of Criminal Appeal. For them to interfere with a criminal sentence there must be something so irregular or so outrageous as to shake the very basis of justice."

Subsequently, in *Buxoo v. R.* [1988] 1 W.L.R. 820, where the advice of the Board was delivered by Lord Keith of Kinkel, it was stated that the same principles continued to apply following the enactment of section 70A of the Courts Act of Mauritius (introduced by amendment in 1980), under which it was enacted that an appeal lay from the Supreme Court or the Court of

Criminal Appeal of Mauritius to Her Majesty in Council as of right in all criminal cases.

Their Lordships are in no doubt that these principles apply with full force in the present case, and they are satisfied that, on these principles, the present appeal cannot be entertained. In truth, the appellant is seeking to do no more than use the Privy Council as a second court of criminal appeal. This is not only wrong in principle, but would require their Lordships to perform a function which the courts of Mauritius, with their knowledge and experience of local conditions and local needs, are far better equipped to perform.

Their Lordships are therefore satisfied that the preliminary objection taken by the respondent is well founded. They will humbly advise Her Majesty that the appeal should be dismissed.