[COURT OF APPEAL]

Freetown
Nov. 3,
1960

Ames P
Wiseham C.J.
Bankole
Jones J

IN THE MATTER OF A CONTEMPT OF COURT ALLEGED AGAINST BERTHAN MACAULAY, BARRISTER AND SOLICITOR OF THE SUPREME COURT OF SIERRA LEONE

[Cr.App. 38/60]

Contempt of court—Whether Supreme Court's power of committal for contempt must be exercised in accordance with Criminal Procedure Ordinance (Cap. 52, Laws of Sierra Leone, 1946)—Courts Ordinance (Cap. 7, Laws of Sierra Leone, 1960) ss. 11, 12—Whether trial judge competent to try appellant—Whether necessary to lead evidence in support of charge of contempt—Whether appellant's conduct amounted in law to contempt of court—Sentence.

Appellant was counsel for the defence in the trial of J. A. Garber at the Assizes held at Freetown in August 1960. During the course of the trial, appellant was found guilty of contempt of court by the trial judge and fined a total of £500. In his appeal, appellant argued (1) that section 12 of the Courts Ordinance required the trial judge to exercise his power of committal for contempt in the manner provided by the Criminal Procedure Ordinance; (2) that the trial judge was incompetent to try appellant because he was a person interested in the proceedings; (3) that the trial judge erred in convicting appellant on the second charge since no evidence had been led in support of said charge; (4) that the matters complained of did not amount in law to contempt of court; and (5) that the fines imposed were excessive.

Held, (1) that the trial judge was not required to exercise his power of committal for contempt in accordance with the Criminal Procedure Ordinance;

(2) that the fact that the trial judge was a person interested in the proceedings did not render him incompetent to try the appellant;

(3) that it is not necessary for evidence to be led in support of a charge of contempt;

(4) that appellant's conduct amounted to contempt of court; but

(5) that the fines imposed were excessive.

Cases referred to: *Cortis* v. *Kent Waterworks* (1827) 7 B. & C. 314; *Cox* v. *Hakes* (1890) 15 App.Cas. 506; *Ex parte Pater* (1864) 122 E.R. 842; *Jones* v. *National Coal Board* [1957] 2 Q.B. 55.

The appellant appeared in person.

John H. Smythe, Ag. Solicitor-General, for the respondent.

AMES P. The appellant was counsel for the defence in the trial of one J. A. Garber at the Assizes held at Freetown in August of this year. Before the conclusion of the trial, he was called upon by the learned trial judge (the Acting Chief Justice) to show cause why he should not be summarily committed for contempt of court in respect of certain conduct and statements of his during the trial, the particulars of which were given to him in writing. The matter was then adjourned until the next day.

On that next day he said that he wished to show cause. He was allowed to call witnesses and thereafter to give evidence himself and also to address the court. At the end, the learned judge told him that he found him guilty on all the charges and indicated that he would put his reasons in writing and read

them on the next day, again which he did. There were three matters in the particulars, and on two of them the appellant was fined £300 and £200, respectively, and on the other one he was reprimanded. There was an order for imprisonment in default but we understand that the fines have been paid.

It will, of course, be necessary to set out the particulars of the conduct and words complained of, but, before doing so, it is convenient to consider grounds of appeal Nos. 1, 3 and 4.

We will start with ground 4. It reads, and at the same time it states very clearly and concisely the substance of the appellant's argument to us concerning it:

> "That the Supreme Court of Sierra Leone being a creature of statute, that is to say, the Courts (Amendment) Ordinance of 1959 (No. 31 of 1959) possesses the same inherent jurisdiction to punish summarily the offence of contempt of court as Her Majesty's High Court of Justice in England; that the said inherent jurisdiction is conferred by section 11 of the Courts Ordinance, Chap. 50; that the exercise of the jurisdiction being governed by section 12 of the Courts Ordinance, Chap. 50, and the contempt of court alleged being a criminal matter within the meaning of the said section 12, the learned trial judge erred in not dealing with the offence in the summary manner authorised by the Ordinance."

It is also necessary to set out sections 11 and 13 of the Courts Ordinance:

> "11. In addition to the jurisdiction conferred by this or any other Ordinance, the Supreme Court shall within Sierra Leone and subject as in this Ordinance mentioned possess and exercise all the jurisdiction, powers and authorities, which are vested in or capable of being exercised by His Majesty's High Court of Justice in England.
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> "Provided that the Admiralty jurisdiction and authority of the Supreme Court shall be exercised by virtue and in pursuance of the provisions of the Colonial Courts of Admiralty Act, 1890, or any other Act of the Imperial Parliament:
>
> "Provided further that nothing in this Ordinance shall be deemed to invest the court with jurisdiction in regard to—
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> (*a*) any question arising exclusively between natives—
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> (i) involving title to land situate within the Protectorate, or
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> (ii) relating to marriage or divorce by native customary law or any matrimonial claim founded on such a marriage, or
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> (iii) where the claim or matter in dispute does not exceed fifty pounds in value, or
>
> (*b*) the administration of estates of deceased persons who are natives where such estates lie within the jurisdiction of any native court, or to oust the jurisdiction of any native court in such matters.
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> "12. The jurisdiction conferred upon the Supreme Court by this Ordinance shall in respect of civil matters be exercised in the manner provided by this Ordinance and by such rules and orders of court as may be made pursuant to this Ordinance and in criminal matters in the manner provided by the Criminal Procedure Ordinance, or by any Ordinance by which such Ordinance is replaced."

The appellant agrees that the Supreme Court possesses the same inherent powers of summary committal for contempt, as are possessed by the High Court in England, and argues that they are conferred upon it by section 11 and

we agree with him. The argument goes on that they are consequently within the meaning of the words " The jurisdiction conferred upon the Supreme Court by this Ordinance " which are at the beginning of section 12, and that consequently, and because the exercise of these powers is considered to be a criminal matter, they can only be exercised " in the manner provided by the Criminal Procedure Ordinance." This means, of course, that they cannot be exercised in the only way in which the inherent powers of summary committal are exercised or can be exercised if they are to be summary in the sense of this context and that instead, either a summary prosecution must be instituted in a magistrates' court or the proper steps taken to proceed by trial on information in the Supreme Court before another judge.

Can it be that powers specifically conferred upon the Supreme Court by section 11 are taken away by the very next section, a procedural section? Had it been so, we would have expected, instead, some proviso to section 11 by which these powers were excepted from the operation of the section.

A statute must be interpreted as a whole, and not in part without the context in which the part is and also interpreted, if possible, so that every part has meaning and effect.

Maxwell on the Interpretation of Statutes (10th ed., p. 79) cites the case of *Cortis* v. *Kent Waterworks* (1827) 7 B. & C. 314. This case concerned the imposition of a local rate in Woolwich in the County of Kent by virtue of an Act passed in Session 2 of 47 Geo. III. A right of appeal was given by the Act to any dissatisfied person. There was also a procedural provision by which a would-be appellant was required to enter into a recognisance to prosecute the appeal. Two years later certain persons were incorporated by Act of Parliament to be the company of proprietors of the Kent Water Works. Eventually this corporation wished to appeal under the former Act. A question arose as to whether it could do so, because it could not enter into a recognisance. It was decided that the object of the statute being to enable a rate to be imposed together with the creation of a right of appeal, the procedural provision must only apply to persons able to comply with the procedure.

Bayley J. said at p. 331:

> " . . . But assuming that they cannot enter into a recognisance, yet if they are persons capable of being aggrieved by and of appealing against a rate, I should say that that part of the clause which . . . requires a recognisance to be entered into applies only to those persons who are capable of entering into a recognisance, but is inapplicable to those who are not. . . ."

Holroyd J. agreed with that opinion.

Maxwell (at p. 89) cites another case of the same nature but the other way round. It is *Cox* v. *Hakes* (1890) 15 App.Cas. 506. This case turned on the construction of a section of the Judicature Act, 1873, which gave the Court of Appeal jurisdiction to hear appeals from " any judgment or order " save as thereinafter mentioned. No exception was made for an appeal against an order of discharge of a prisoner on habeas corpus. The procedural section of the Ordinance made no provision for re-arresting a prisoner, were such an appeal made and the order of discharge reversed. Eventually, a case went to the House of Lords to decide whether or not an appeal could be made against such an Order. It was decided that it could not. Lord Halsbury L.C., after stating the history of habeas corpus and emphasising that a prisoner could go from judge to judge and that every judge could make his own decision, the

essence of the procedure being the immediate determination of the right to the applicant's freedom, said at p. 520:

> ". . . It is surely one mode of arriving at the intention of the legislature to consider whether the machinery provided by the statute is appropriate to the alleged intention," and later on he said, ". . . If in the words themselves or in the machinery ancillary to the exercise of the jurisdiction it can be discovered that the legislature did not intend the exercise of the jurisdiction in a particular case, it is no straining of the words to assume the limit which the legislature has thus expressed by the limitation of the machinery."

Lord Bramwell said at p. 524:

> "Of course if the statute in express terms said the appeal should lie, it must be obeyed. But when the question is one of construction, surely it is a good argument to show that a particular construction would be futile. . . ."

In our Courts Ordinance, section 11 expressly confers various and wide powers and jurisdiction, which can be exercised, whether in civil or criminal matters, in accordance with the procedural provisions of section 12, and this power of summary committal which cannot be so exercised. In our view, the true construction of section 12 is that the requirement that in criminal matters the jurisdiction shall be exercised in the manner provided by the Criminal Procedure Ordinance only applies to matters in which it is capable of being exercised in that manner, to the exclusion of other matters, for which the Criminal Procedure Ordinance makes no provision whatever and so does not apply to the exercise of this power of summary committal.

Grounds 1 and 3 can be considered together. They are:

> "1. That the learned trial judge was incompetent to try the appellant because the matters complained of were disputed by the appellant and the only statements in support of the allegation were statements made by the learned trial judge himself, who, in the light of the evidence, was a person interested in the proceedings and because the learned trial judge, in the light of his judgment, had prejudged the issue.
>
> "3. That no evidence having been led in support of the second charge, the learned trial judge erred in law in convicting the appellant on the second charge."

We do not find any merit in these. It is a necessary consequence of the exercise of this power. In the case of *Ex parte Pater* (1864) 122 E.R. 842, 846, Cockburn C.J. said in reference to the High Court's inherent powers of summary committal for contempt of court, that it "is a case in which it becomes the unfortunate duty of a court to act as both party and judge, and to decide whether it has been treated with contempt. . . ." It is an exception to the fundamental legal maxim Nemo debet esse judex in sua propria causa.

It is not necessary for the judge or anyone else to lead evidence "in support of the charge." The charge does this, so to speak, by stating what is complained of on calling upon the person in question to show cause. Consequently after having heard the appellant and his witnesses, it was open to the learned judge, if he was of opinion that the appellant had not shown sufficient cause, to proceed to summary punishment.

We now turn to ground of appeal 2 which is:

"2. That the matters complained of could not and did not in fact by themselves amount in law to contempt of court."

It is necessary here to set out particulars of the words and conduct complained of. They were as follows:

You are hereby called upon to show cause why you should not be committed for contempt of court in that on the 25th and 26th days of August, 1960, in the Supreme Court, at Freetown, in the Colony of Sierra Leone—

1. In addressing the court and assessors in the case of *Regina* v. *J. Garber* you stated, inter alia, "In this country, the normal method of trial in a criminal case is by judge and jury. Why did the Attorney-General apply for assessors in this case? Sections 40 and 41 of Cap. 114 are the sections providing for trial by assessors—they are to be used in the interest of the accused—the defence have not applied under section 40. Trial by jury is the *only* protection that the ordinary person has against the Crown when the Crown wants to put people in prison improperly. In England they had in the olden days a court called the Court of Star Chamber which was used when the Kings wanted to ensure the conviction of a person; they never took him for a trial by jury but to the Star Chamber. You might have to think why the Attorney-General applied for trial by assessors in this case—whether it is because he thinks a more fair and impartial trial can be obtained by trial with assessors." These statements (a) tend to and are calculated to prejudice and interfere with the fair trial of the accused and to improperly influence the result of the trial; (b) tend to scandalise the court and bring it into contempt and ridicule.

2. You behaved most insultingly to the court when so addressing the court and assessors in that—

(a) at a stage, you went close up to the assessors and as your speech could not be heard by the court or stenographer you were told by the court that you were not audible; whereupon you continued your speech by shouting at the top of your voice, most contemptuously and rudely, which caused general laughter in court;

(b) you addressed the assessors in law without first obtaining the permission of the court and in not addressing such law to the court and when at one stage the court called your attention that you had not stated the law quite correctly or fully—you shouted at the court "You are interrupting me whilst addressing the assessors" and later you told the assessors "This is the law, take it from me."

Each item needs to be considered separately.

Mr. Smythe, Acting Solicitor-General, submitted that the words must be considered in their context; and on the application of the appellant, we allowed pages 48 and 49 of the record of the trial of J. A. Garber to be put in evidence. These showed that Mr. Smythe made a protest early on in this passage, saying that it was an abuse of the privilege of counsel; and that later the appellant said: "I never equated 'Star Chamber' with these courts and I resent the remarks of the Crown."

Before us, the appellant submitted that the construction to be put upon the whole passage was that although the Attorney-General had obtained trial with assessors, hoping thereby to be better able to obtain a conviction, the assessors

should not allow themselves to be prejudiced by that. He also said that he was trying to tell the assessors that they should not come and consider themselves put there by the Attorney-General and should not allow it to affect them.

We notice that nowhere does it appear from the appeal record that he offered this explanation to the learned judge. There he admitted using the words, and said it was without intending to prejudice or interfere with a fair trial or to improperly influence the result or to scandalise the court or to bring it into contempt and that he was making a vigorous attack on the Attorney-General because: "I conceived it to be my duty as an advocate to say everything on behalf of my client whose brief I have accepted, everything which arises from the interpretation of the law and from the evidence in the case." Later he said, ". . . to show that my attack was always on the Attorney-General . . ." and on this mention of it he offered his "unqualified apology relating to the Attorney-General."

Section 40 of the Jurors and Assessors Ordinance, Cap. 114, provides that a person charged with an offence, not punishable by death, may elect to be tried by the court with the aid of assessors instead of trial by jury.

Section 41 provides as follows:

> "41. The Attorney-General, whenever he is of opinion that a more fair and impartial trial of any person or persons charged with any criminal offence, who has or have been committed for trial, can be obtained by such person or persons being tried by the court with the aid of assessors instead of by a judge and jury, may make an application to the court for an order, which shall be made as of course, that any such person or persons shall be tried by the court with the aid of assessors instead of by a judge and jury."

It should be noted that the order for such a trial "shall be made as of course"; that nevertheless it is made by the court; that the trial is not a trial by a judge and jury but trial by the court with the aid of assessors; that upon the making of the order this form of trial became the method of trial, wholly lawful and according to law, for this particular case, which was a complicated case of accounts; and that the merits of that form of trial were irrelevant and nothing to do with the sole issue in the trial, which was the guilt, or otherwise, of the accused person.

The appellant knew all this and yet when addressing the court and assessors upon this sole issue included this passage, which was set out in the particulars.

The learned judge said in his reasons for his decision:

> ". . . In my opinion it was too clear that the one and only intention was to prejudice the minds of assessors and public against trial by judge and assessors and thereby prejudicing a fair trial—it was intended to make the assessors feel that they were chosen—selected and considered mere stooges and puppets of the Crown to carry out what the Crown improperly wanted to do."

We bear in mind that, when Mr. Smythe made some objection to what was being said, the appellant said that he had not equated the court to the Star Chamber. But his statement very clearly inferred exactly that; and he had already said that the Star Chamber was used to imprison people improperly.

In our opinion this passage, in the circumstances and in its context, did amount to contempt of court.

We now come to items 2 (a) and (b).

In showing cause, the appellant said:

> "As Your Lordship quite rightly remarked in your summing-up to the assessors, it was quite a complicated case of accounts and it does not surprise me that apart from the fact that I do not speak loudly and the fact that my back was turned to the wall of the court Your Lordship and the stenographer found me inaudible several times—I never intended when I raised my voice once or twice when Your Lordship asked me to, to be contemptuous or rude or insulting."

This item (a) turns on how the voice was raised. Every one of the witnesses called by the appellant said: ". . . You made a big noise, shouting; it provoked laughter in court."

As to item (b) this likewise depends on how what was said was said.

The appellant referred us to several cases about interruptions of counsel by a judge, including two recent ones, where a conviction was quashed, and a retrial ordered respectively because of the quantity of interruptions by the judge, not only interruptions of counsel but interruptions into the hearing in general. In another case counsel was commended for persisting against interruption. These cases show no more than this, which does not need to be supported by any particular authority, that judges should allow counsel to address a jury or the court without interruption except for a proper purpose and the proper purposes were stated by Denning L.J. in *Jones* v. *National Coal Board* [1957] 2 Q.B. 55 at 64.

We are concerned not with the learned judge's conduct as some might have thought from the argument addressed to us by the appellant but with the appellant's conduct when the learned judge interrupted his address to the assessors to tell him that he was not stating the law correctly or fully, which the learned judge was entitled to do.

The appellant submitted to us that there was nothing in the evidence to show that thereupon his tone or his manner were offensive. We accept the learned judge's statement in his reasons for his findings, and it is clear that the appellant's tone and manner were offensive and insulting to the court—whether intentionally or whether due to an uncontrolled but momentary passion.

We find that the matters in each of 2 (a) and (b) amounted to contempt of court.

Lastly we come to the appeal against sentence.

Before the learned judge the appellant offered what he called his unqualified apologies, more than once; but at each mention they were equivocal: ". . . if the court construes my remarks as tending to have the effect . . ."; and because ". . . I think it appears that those remarks of mine have caused offence . . ."; and ". . . I am sincerely sorry that there should have been this regrettable misunderstanding. . . ."

On the other hand from the beginning to end of his argument before us, we did not hear one word of regret for anything that may have been said or done by him.

The learned judge took a serious view of the matter and it is not possible to take any other view. Nevertheless, and with all respect to the learned judge, we do not think that it required the desperate remedy of fines of £300 and £200. We are in a position to take an objective view of the matter and from that viewpoint we think that the fines should be reduced to fines of £100 and £25 respectively.

Freetown
Nov. 3,
1960
Ames P.
Wiseham C.J.
Marke J.

[COURT OF APPEAL]

IN THE MATTER OF A COMPLAINT BY C. A. HOLLIST AGAINST MR. S. C. BERTHAN MACAULAY AND MR. F. A. SHORT

[Civ. App. 44/60]

Allegation of professional misconduct by legal practitioner—Proceeding before Legal Practitioners Disciplinary Committee—Finding of Committee not in conformity with charge—Legal Practitioners (Disciplinary Committee) Ordinance (Cap. 118, Laws of Sierra Leone, 1946).

A charge was preferred by Mr. C. A. Hollist against Mr. Macaulay before the Legal Practitioners Disciplinary Committee as follows:

"That you being a registered legal practitioner of the Supreme Court of Sierra Leone and acting as legal practitioner in the Supreme Court case of *C. A. Hollist* v. *B. E. Vincent* No. 406/1957 you committed an act of professional misconduct in that you improperly retained the sum of £58 5s. 10d. out of the sum of £136 5s. 0d. received by you as solicitor for the said C. A. Hollist in the said matter."

The Committee found Mr. Macaulay guilty of retaining money improperly as a solicitor, but not as Mr. Hollist's solicitor. This finding formed the basis of a decision by the Sierra Leone Supreme Court which ordered that Mr. Macaulay be suspended from practice for one year. From this decision, Mr. Macaulay appealed.

Held, allowing the appeal, that the Legal Practitioners Disciplinary Committee cannot find a legal practitioner guilty of something absolutely different from, and inconsistent with, the charge made against him.

The court also said, by way of obiter dicta, that it did not accept the Committee's finding that Mr. Hollist never retained Mr. Macaulay in connection with his case, and that, even if he had not been retained by Mr. Hollist, it was still necessary to consider whether Mr. Macaulay honestly thought he was entitled to retain the money.

Case referred to: *Bhandari* v. *Advocates Committee* [1956] 3 All E.R. 742.

Thomas O. Kellock for the appellant.
John H. Smythe, Ag. Solicitor-General, for the respondent.

AMES P. This is an appeal against a decision of the Supreme Court of Sierra Leone, given as the culmination of proceedings against the appellant, a legal practitioner, under the provisions of the Legal Practitioners (Disciplinary Committee) Ordinance, Chap. 118, and ordering that he be suspended from practice for one year.