PRIVY COUNCIL.

P. C.*
1913

Nov. 17.

CLIFFORD
v.
KING-EMPEROR.

[APPEAL, FROM, THE CHIEF COURT OF LOWER BURMA.]

Privy Council, practice of—Special leave to appeal—Appeal in criminal case—Grounds for refusing special leave to appeal.

In this case the main grounds of appeal were that the Judge had, during the trial, wrongly amended the charge to the prejudice of the petitioners; improper admission of evidence; misdirection; and that the sentences contravened the provisions of s. 71 of the Penal Code (Act XLV of 1860). But their Lordships were of opinion that in what had been done there was nothing grossly contrary to the forms of justice, nor any violation of fundamental principles, and therefore refused to grant special leave to appeal to His Majesty in Council on the ground that they had no power to interfere.

Dillett, In re (1) followed.

PETITION for special leave to appeal from convictions and sentences (11th April 1913) of a Judge of the Chief Court of Lower Burma sitting with a jury in the exercise of its Original Criminal Jurisdiction, which were confirmed by judgments (20th June 1913) of a Bench of three Judges of the same Court on questions reserved by the Original Court.

The following were the material facts as stated in the petition: The petitioners Clifford and Mower were Directors, and Strachan General Manager of the Bank of Burma, Limited, a Company incorporated in

* *Present*: THE LORD CHANCELLOR (LORD HALDANE); LORD MOULTON, LORD PARKER of WADDINGTON AND LORD SUMNER.

(1) (1887) L. R. 12 A. C. 459.

November 1904 under the Companies Act (VI of 1882), which under an order of the Chief Court of Lower Burma dated 27th June 1912 was ordered to be wound up by the Court and an official liquidator was appointed. The Bank had issued its last balance-sheet up to 30th June 1911 about 1st August 1911, and closed its doors on 14th November of that year. On 9th October 1912, the Official Liquidator filed a complaint in the Court of the District Magistrate of Rangoon alleging that the petitioners had "by knowingly issuing a false balance-sheet for the half-year ending 30th June 1911, and by continuing to advertise the Bank as prosperous and going concern up to the time of its close, dishonestly induced certain persons to deposit moneys with the Bank." The District Magistrate having held an inquiry under Chapter XVIII of the Criminal Procedure Code framed against each of the petitioners a charge with three heads in which he charged them "that they did respectively by means of a false and fraudulent balance-sheet and by false advertisements," falsely and fraudulently induce three persons specified to deposit moneys with the Bank of Burma, and committed them for trial by the Sessions Court on those charges.

In the Magistrate's Court the complainant (the Official Liquidator) attacked the balance-sheet on four grounds: (i) that the amount of the contingency funds was included in the total of debts shown as secured; (ii) that the balance-sheet showed a larger amount of the debts due to the Bank to be secured, and a smaller amount to be unsecured, than was correct or justifiable; (iii) that there had been placed to profit and loss account and treated as profit, interest which had not been actually earned and was not secured, and which had accrued due under circumstances which rendered it necessary to place such interest to an interest

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suspense account; and (iv) that it was not stated that certain Government Promissory Notes were deposited by way of security with the Bank of Bengal. The petitioners alleged that the Magistrate dealt in his judgment with the above four charges, but nowhere did he state that he understood it to be part of the case for the prosecution that the petitioners had falsely and fraudulently shown as "considered good" unsecured balances of debts which should have been taken as doubtful or bad.

On 17th February 1913, the petitioners were put on their trial at Rangoon before Mr. Justice Twomey, one of the Judges of the Chief Court, and a jury, and on that day counsel for the petitioners objected to that part of the charge which referred to false advertisements on the ground that none of the persons who were alleged to have been deceived had stated in the Magistrate's Court that they had seen the advertisements or been induced by them to deposit moneys with the Bank, and the Judge after hearing counsel for the prosecution struck out that part of the charge. On the next day (18th February) the Judge of his own motion amended the charge by adding the words, "and by intentionally keeping the Bank open as a going concern after it had ceased to be solvent." That amendment was objected to by counsel for the petitioners on the grounds that it was bad in law, and that they would be prejudiced thereby. No evidence, the petitioners alleged, was at any time given to the effect that the persons alleged to have been deceived, were deceived by the fact that the Bank remained open and continued to carry on business.

Up to the close of the prosecution no statement was made and no indication was given that the grounds of attack upon the balance-sheet had been enlarged beyond the four grounds above referred to,

and that the petitioners were being charged with falsely and fraudulently showing as "considered good" debts which they knew should be taken as doubtful or bad. In the case of the only debt of this kind which was referred to by the prosecution as one which should have been treated as a bad debt, the petitioners had the debtor specially sent for to Madras, and he was called as a witness for the defence.

The Judge in summing up stated that the fundamental issue in the case was whether the balance-sheet was false in taking as good assets "a large amount of debts which could not honestly be considered as good debts, and in crediting to profit and loss and treating as earned income a large amount of interest on these doubtful and bad debts which interest was unpaid, and which there was no reasonable prospect of recovering." He then proceeded to specify to the jury debts amounting to a total of about 22 lakhs of rupees, and to direct them to consider whether such debts should not have been regarded by the petitioners as doubtful or bad. This was the first time, the petitioners alleged, in the whole course of the trial on which such debts were specified. With regard to each of these debts and with regard to the question of crediting interest to profit or loss, the Judge, directed the jury to consider the evidence which had been admitted as to facts which occurred after the balance-sheet was signed and issued, which evidence had been specially objected to by the petitioners' counsel during the trial.

Other instances of misdirection in the summing up were complained of in the petition; and objections were made to cases of improper admission of evidence.

On 11th April 1913, the jury returned a general verdict of guilty against each of the petitioners on

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all the charges; and the Judge sentenced Clifford and Strachan respectively to 8 months' rigorous imprisonment on each charge, and Mower to 6 months' imprisonment on each charge, the sentences to run consecutively in the case of each of the petitioners.

The petitioners applied to the Judge to reserve certain questions of law under section 434 of the Criminal Procedure Code for decision by a Bench of the Chief Court. Of the questions suggested, TWOMEY J. consented to refer four only, which were as follows: (i) Whether the amendment of the charge in the Sessions Court was bad in law, and if so, whether the accused were thereby prejudiced in their defence; (ii) whether the Presiding Judge erred in assuming it to be a substantial part of the case for the prosecution that a large amount (over 22 lakhs of rupees) showed as good debts in the balance-sheet of June 30th 1911 was really doubtful or bad debts, and whether the accused had sufficient notice of this part of the case; (iii) whether the Presiding Judge misdirected the Jury in instructing them as to the value and effect of certain tabular statements admitted in evidence showing the amounts of unpaid interest which (according to the complainant) were wrongly credited to profit and loss and treated as divisible as profit; and (iv) whether the sentences passed on the accused contravened section 71 of the Penal Code.

These questions were argued before a Bench of three Judges of the Chief Court, one of whom was TWOMEY J. who had presided at the trial; and on 20th June 1913 judgments were delivered in which all the questions reserved were decided against the petitioners.

The Court held that the petitioners should have inferred from the nature of the evidence given at the trial that the question whether the amount of debts shown as good were really bad or doubtful debts, was

in issue and that therefore they had sufficient notice that the balance-sheet was being attacked on that ground. All such evidence, however, was consistent with the position that it was merely the crediting of interest on such debts to profit and loss which was being attacked. With reference to the amendment of the charge, the Court held that, in view of the direction to the Jury on the charge as amended, the Court were unable to hold that the Jury might possibly have found the petitioners guilty on the ground that the Bank was kept open after it became insolvent. As to the objection that such amendment let in evidence of events which took place after the signing of the balance-sheet, the Court held that such evidence was admissible to show that the position grew worse *i. e.* "that the deceit being practised on the public of showing the Bank in a flourishing condition became worse," and that it was open to the prosecution to prove such subsequent events and the petitioners' knowledge of them as part of the deceit being practised, and also as showing the continuance of dishonest intention on their part. On question (iii) the Court held that there was no misdirection; and on question (iv) that as three persons had been induced to deposit money, three separate offences had been committed and therefore the passing of three separate sentences did not contravene the provisions of section 71 of the Penal Code.

Sir R. Finlay K. C. and *F. J. Coltman*, for the petitioners, contended that the amendment of the charge by the Judge during the trial was bad in law, and had prejudiced the petitioners. The verdict also was bad as being a general verdict on a charge which was in part bad in law. The Judge erred in leaving to the Jury the question whether a large amount of

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debts shown as good, should not have been shown in the balance-sheet as bad or doubtful, inasmuch as the petitioners had no sufficient notice that this was an allegation they had to meet, the debts not having been specified during the trial. Evidence was wrongly admitted during the trial especially as to matter which occurred after the issue of the balance-sheet. There was also misdirection in telling the Jury that for the purpose of deciding whether the balance-sheet was false and deceitful they should take into consideration matters which occurred after it was issued. The sentences passed upon the petitioners respectively were illegal as being in contravention of the provisions of section 71 of the Penal Code. The separate charges were part of the same offence and the passing of consecutive sentences was unwarranted.

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The judgment of their Lordships was delivered by LORD CHANCELLOR. Their Lordships do not propose in this case to recommend that leave to appeal be given. Their functions are not to sit as a Court of Criminal Appeal, and it would be contrary to their constitutional duty to assume that possession. A Court of Criminal Appeal can go into questions of evidence and into questions of procedure, and can deal with the case on the same footing as an ordinary Court of Appeal. Their Lordships' functions on the other hand are limited by the principle laid down in *Dillet's Case* (1) to something much more narrow, namely, this: that if they find that what has been done has been grossly contrary to the forms of justice, or violates fundamental principles, then they have power to interfere. But in the present case they think there was evidence to go to the jury on all the matters which have been dealt with, and it would

(1) (1887) L. R. 12 A. C. 459.

be contrary to their duty to express any opinion as to whether in that state of things the verdict found by the Jury was a right one, or the summing up a perfect one. As regards the sentences, it is obvious that the question is one of form only. The learned Judge has given three periods of eight months in one case and three periods of six months in another, taking each offence as a separate offence. Technically, their Lordships think that these were separate offences, and, moreover, it would have been possible to give a longer term upon any one or the whole of the charges in question. The analogy between this case and other cases which constantly occur in criminal jurisprudence is a perfect one, and their Lordships see no difficulty in treating these as separate offences. Their Lordships will humbly advise His Majesty that the petition ought to be dismissed.

Petition dismissed.

Solicitors for the appellants: *Arnould & Co.*

J. V. W.