MARC LESPOIR Appellant

v/s v/s

THE REPUBLIC Respondent

Criminal Appeal No. 9 of 1989

Mrs Twomey for the appellant
Mr Derjacques for the respondent

JUDGMENT OF THE COURT:

On 23rd March 1989, the appellant pleaded guilty before the Chief Justice to a charge of assaulting a judge on account of an act done by him in the execution of a duty imposed on him by law. The Chief Justice convicted the appellant on his plea and imposed a sentence of 3 years imprisonment.

In her plea of mitigation before sentence was passed, counsel for the appellant asked particularly that any sentence imposed be made concurrent with a sentence of 7 years for rape which had been imposed by the judge who had been the victim of the assault.

In his remarks on sentence the Chief Justice is recorded as stating :-

> "If everyone behaved like you did, then the Administration of the Law will become much more difficult. I therefore sentence you to three (3) years imprisonment on Count 1. We do not generally make sentence concurrent with other sentence (sic) unless they occurred at the same time and this offence of assault did not occur at the same time as the offence of rape"

Remarks then follow on Count 2 on which the Chief Justice imposed no sentence and he then continued -

> "The sentence of 3 years imprisonment will from (sic) the date of today and the time that you spent in custody awaiting this case will be taken into consideration."

On that day the Chief Justice signed a warrant of commitment stating that the appellant had been sentenced to 3 years imprisonment. In typescript on the warrant appears the words :

"Sentence to start as from 23rd March 1989".

In his own handwriting the Chief Justice added -

> "but time spent in custody awaiting trial for this offence to be taken into consideration".

On 16th May 1989, the only national daily newspaper, the 'Seychelles Nation' carried an account of the appellant's plea of guilty and his sentencing. The final paragraph stated that the Chief Justice had explained that Courts did not generally make a sentence concurrent with another unless they occurred at the same time. It concluded with the comment that the appellant's sentence of three years would be consecutive to the sentence of 7 years.

This comment appears to have come to the notice of the appellant who was understandably perturbed. Steps were taken which led to a motion by counsel on his behalf before the Chief Justice. The motion asked

> "that the Honourable Chief Justice clarify the sentence passed on the accused on 23rd March 1989 in the light of comments made to a National newspaper on 16th May 1989"

In his ruling the Chief Justice quoted the excerpts from his remarks on sentencing and the parts of the commitment warrant already set out above. He then stated :-

> "It is an established rule that two sentences awarded in two separate trials are to run consecutively unless there is a direction that they should be concurrent. The omission in the judgment to direct that the sentences should be consecutive could not be taken as an indication that they should run concurrently because the court had clearly explained in response to an express response from the prisoner the rule of procedure why the sentence passed could not be made concurrent with the sentence he was then serving".

The Chief Justice then stated that the sentence of 3 years was to run consecutive to the sentence the prisoner was then serving. He amended the warrant of commitment to give effect to his order. The phrases from the warrant of 23rd March 1989 already cited above no longer appeared and in their stead appeared the words :-

> "The Court has on the 20th July 1989 clarified the said sentence and stated that it shall run consecutively".

From this order the appellant has appealed arguing in effect that the Chief Jutsice was functus officio when he made the order of 20th July 1989 and [illegible] it should be set aside.

In our view it appears on the [illegible] Justice misdirected himself on [illegible]

a positive statement as to the date from which the sentence should start viz. 23rd March 1989. While it is the case that the stenographer's note omits a word between the words "will" and "from", it is plain that the missing word must be the word "run" or some synonym of it.

Section 36 of the Penal Code Cap 73 provides in part:

> "Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence any sentence ... passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the Court directs that it shall be executed concurrently with the former sentence or any part thereof:
>
> Provided that it shall not be lawful for a court to direct that a sentence of imprisonment in default of the payment a fine shall be executed concurrently with a former sentence under sentence 28(iii)(a) of this Code or any part thereof."

The Chief Justice did have the power to make the sentences in this case concurrent, even though sentences would not normally be made concurrent when imposed at different times for offences not committed at the same time. The fact that the Chief Justice had stated the rule would not be inconsistent with his having exercised his discretion in imposing a concurrent sentence.

The Chief Justice must have based his justification on his comment that there had been an omission to state that the sentences were concurrent. As has been noted there was more than an omission.

Mrs Twomey drew attention to a number of cases in order to establish the stage at which a court becomes functus officio. Reference need be made only to Parsons v. Recorder of Manchester and ors. [1971] A.C. 481. At issue there was the power of magistrates to allow a defendant to change a "guilty" plea to one of "not guilty" after the magistrates had convicted him on his plea and remanded him for sentence to allow inquiries to be made.

At page 499 he discusses the case of Rex v. Norfolk Justices Ex Parte Director of Public Prosecutions [1950] 2 K.B. 588 where the order made by the justices committing a defendant to quarter sessions for sentence was held to be a nullity. The case was remitted to them to be dealt with. He concludes :-

> "The Attorney General submitted that as the commital was a nullity the proceedings before the justices had not concluded and they were therefore not functi officio. Counsel for the accused, on the other hand, argued that the cases could not be sent back for sentence as the justices had given judgment and were functi officio. The Divisional Court unanimously decided that they were not functi officio. Lord Goddard, after summarising what a judgment means, summarised his conclusion then at page 569 :-
>
> > 'there must have been something which puts an end to the case; there must be a final adjudication and there has been no final adjudication in the present case. Therefore in my opinion the justices were not functi officio."
>
> By parity of reasoning when the matter has been conclusively finalised out, the order perfected, the Court becomes functus".

We understand Mr Derjacques to accept this approach. He contends that in this case there was an ambiguity. This ambiguity needed clarification. The power to clarify remained and for that purpose the court in this case was not functus.

In our view there was no ambiguity. The sentence had been clearly expressed on 23rd Marc 1989 and the warrant of commitment confirmed that clear statement. The Court was, accordingly, functus and had no jurisdiction to effect what was a variation on 20th July 1989.

Our attention was drawn to section 294 of the Criminal Procedure Code. This empowers the Court at "any time [to] amend any defect in substance or in form in any order or warrant". The fact is that there was no defect either in substance or form in the warrant of 23rd March 1989. It set out the sentence passed by the Chief Justice as it was recorded and one would have expected as he had expressed it, since he signed both the record of the proceedings and the warrant. It may well have been that his intention was otherwise, but the record is in our view far too plain to permit a later variation to effect that intention. He was by then functus officio.

The appeal must accordingly be allowed. The warrant of 20th July 1989 is quashed. The warrant of 23rd March 1989 is valid and correctly record the period

during which the appellant is to be detained in custody on the conviction therein set out.

..... A. MUSTAFA (PRESIDENT)

..... (JUSTICE OF APPEAL)

..... (JUSTICE OF APPEAL)

Dated this 27th day of October 1989.