

UGANDA / JUDGMENT

The Queen v Jessop and Another (Criminal Appeal No. 127 of 1956) [1956] EACA 31 (1 January 1956) [1956] EACA 31

COURT

East African Court of Appeal

BEFORE

O'Connor CJ, Rudd J

CASE / FILE NUMBER

Criminal Appeal No. 127 of 1956

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APPELLATE CRIMINAL

Before SIR KENNETH O'CONNOR, C. J., and RUDD, J.

THE QUEEN, Appellant v.

(1) ERIC JESSOP and (2) FITZGERALD BAYNES & CO. LTD., Respondents

Criminal Appeal No. 127 of 1956

CASE STATED

Criminal Procedure Code, section 367—The meaning of hearing and determination by any subordinate court—Offences arising under section 164 of the Customs Management Act, 1952—Section 218 of the Criminal Procedure Code in respect of offences committed by Europeans—Magistrate's order to hold preliminary enquiry under Part VIII of the Criminal Procedure Code—Whether such order appealable by the Crown by way of Case Stated under section 367 of the Criminal Procedure Code.

The two accused were originally charged with three offences under sections 143, 149 (b) and 149 (e) of the Customs Management Act, 1952. These charges were later withdrawn and six charges of offences contrary to sections 143 and 149 of the Customs Management Act, 1952, were then filed. An objection on behalf of the accused was lodged under section 218 of the Criminal Procedure Code. The trial magistrate upheld the right of the accused to be tried exclusively as Europeans by the Supreme Court and then proceeded to hold a preliminary enquiry into the offences under Part VIII of the Criminal Procedure Code. The Crown stated a case by way of appeal against the trial magistrate's order. The respondents took a preliminary objection and argued that there had

been no "hearing and determination" in the Court below under section 367 of the Code and that, accordingly a case could not be stated.

Held (9-6-56).—(1) The preliminary objection must succeed as there had been no "hearing and determination by any subordinate Court of any summons, charge, information or a complaint" within section 367 of the Criminal Procedure Code.

- (2) The Magistrate, having refused to hear and determine the charges himself on the basis that one of the accused was a European who claimed his rights as such, was then empowered only to hold a preliminary enquiry and commit to the Supreme Court.
- (3) The Magistrate, having declined to exercise the jurisdiction under section 164 (1) of the Customs Management Act, and having declined to dispose of the matter himself, had not made a "hearing and determination" of it.
- (4) Prima facie "hearing" includes a "determination"—a final disposal. A fortiori where as in section 367 the words are "hearing and determination".

where as in section 30/ the words are hearing and determination¹⁷.

Cases cited: Attorney-General v. Hill, 23 K. R. L. Part I p. 25; Commissioner of Stamps, Straits Settlements v. Oei Tjong Swan and Others

Referred to: Halsbury, Laws of England, 2nd edn., Vol. 21, p. 724; Short and Mellor, 2nd edn., 431.

Newbold, Q. C., with Horton for the Crown.

Salter, Q. C., with Wollen for the respondents.

EDITOR'S NOTE.—The Supreme Court, after the review of all the authorities cited above, held that it had jurisdiction to decide the question if an application

were to be made for a mandamus *to.* the magistrate directing him to hear and determine according to law but refrained from expressing an opinion as to whether upon such an application a mandamus would be granted.-

Reported by: A. Q. Malik, Esq., Resident Magistrate, Nairobi.

JUDGMENT.—This purports to be a Case Stated at the instance of the Attorney-General under section 367 of the Criminal Procedure Code.

At the outset a preliminary point was taken by counsel for the respondents who argued that this Court had no jurisdiction to hear the so-called Case Stated, as there had been no "hearing and determination" by the subordinate court "of any summons, charge, information or complaint" within section 367 of the Criminal Procedure Code and, accordingly, there was no power in the magistrate to state a case. Learned counsel on both sides were heard on the preliminary point, the decision on which was reserved. At the request of both counsel, the Court also heard arguments on the point of law raised in the Case Stated though, if the decision on the preliminary point should go in favour of the respondents, this Court would have no jurisdiction to decide that

point.

In order to decide the preliminary point it is necessary first to see exactly what happened in the Court below

In brief, the respondents were charged on 27th February, 1956, before a Nairobi resident magistrate, with offences against sections 143 and 149 of the East African Customs Management Act, 1952.'

So far as can be ascertained from the record, there were then three charges, the first under section 143 of the Customs Management Act, 1952, and the second and third under section 149 (b) and (e) respectively of the same Act.

The accused (respondents) were arraigned. The charges were read in Court. Both accused pleaded not guilty to each of them.

The case was then set down for bearing on 21st, 22nd- and 23rd March.

The hearing date was subsequently, by consent, twice adjourned, once to 5th, 6th and 7th April, and later (to enable witnesses from the United Kingdom to attend) to 7th, 8th, 9th and 14th May.

On 7th May the first accused attended in person and the second accused attended by its secretary.

Mr. Hooton, the Senior Assistant Legal Secretary to the East Africa High Commission, prosecuted (by virtue of section 3 (2) (b) of the Advocates Ordinance, 1949). The magistrate's note reads "Prosecutor files amended charges". Six charges of offences contrary to sections 143 and 149 of the Customs Management Act, 1952, were then filed. None of the amended charges which the prosecutor substituted was precisely the same as any of the original charges and, as already mentioned, there were three additional charges. The magistrate marked each of the three original charges "Cancelled" and there were apparently no further proceedings on those charges. No evidence on them was ever heard.

The note in the record immediately after "Prosecutor files amended charges" continues:-

"Mr. Salter, Q. C., submits that under section 164, subsection 3, a European is not precluded from exercising his rights under C. P. C. 218 and 219. Section 164 (1) merely confers jurisdiction on a subordinate court of the first class to try cases under the East African Customs Management Act.

He submits that the exceptions to the general rule in 218 contained in section 219 of the C. P. C. and particularly that contained in subsection 3 of C. P. C. 219 do not arise. Section 164 of the East African Customs Management Act refers to a general power of jurisdiction to try any case arising under that Act. Subsection 3 of the same section refers to persons to be tried under that Ordinance. Nowhere is a specific power given to the subordinate court to try European accused under this Act except in accordance with the C. P. C." Pausing here, it is evident-

- (a) that the three charges to which the respondents had pleaded were marked "Cancelled" and six new charges were substituted;
- (b) that an objection to the magistrate's jurisdiction to hear and determine the matter himself, and an assertion of the rights of the respondents as Europeans to be tried by the Supreme Court only under section 218 of the Criminal Procedure Code, were made before any step has been taken to proceed upon the substituted charges; and
- (c) that, accordingly, the substance of the substituted charges was not stated to the accused persons by the Court in accordance with section 205 of the Criminal Procedure Code and they were not asked whether they admitted or denied the truth of these charges.

The learned magistrate having heard argument on both sides held that section 164 of the Customs Management Act, 1952, was governed by section 218 of the Criminal Procedure Code and that no special jurisdiction to try Europeans was conferred on a subordinate court of the first class by the provisions of section 164 of the Customs Management Act within the meaning of subsection (d) of section 219 of the Criminal Procedure Code; that, accordingly, the respondents were not deprived of their rights under sections 218 and 221 of the Criminal Procedure Code to elect to be treated as Europeans for the purpose of the case; and that if they claimed to be Europeans he (the magistrate) must hold a preliminary enquiry as laid down in section 218 of the Criminal Procedure Code.

Both the accused having claimed to be Europeans, the magistrate decided to hold a preliminary enquiry.

Further legal argument ensued as to whether or not the new charges were duplex. After an adjournment, the prosecutor submitted a further amended charge sheet with six counts. These charges were read in Court (presumably under section 228 of the Criminal Procedure Code) the accused not being required to plead to them.

The prosecutor then applied to the magistrate to state a case on his ruling to proceed with the case except as a preliminary enquiry, which the magistrate agreed to do and did.

The point of law raised on the Case Stated is whether the magistrate was correct "in determining that he had no power to hear and determine summarily a prosecution against the two accused for offences contrary to sections 143 and 149 of the East African Customs Management Act, 1952, by reason of one of the said accused being a European and claiming that the said charges should be enquired into under the provisions of Part XIII" (sic) "of the Criminal Procedure Code".

Mr. Salter for the respondents agreed that there had been no such hearing and determination. Mr. Newbold for the appellant argued that a summary trial commenced immediately the accused were arraigned and pleaded to the three original charges, that there was then a "hearing" and there must have been a determination by the subordinate court of those charges: for, if not, what had

happened to them? Those charges he contended, were amended, but the trial continued to subsist and the Court "determined" those charges by refusing to hear them further.

We think that in the ordinary meaning of the words a criminal charge is "heard and determined" when evidence in support of it (and, if called upon and adduced, evidence *contra*) is heard, and the charge is disposed of either by the acquittal or the conviction of the accused.

We have considered other sections of the Code which might have a bearing on the question of what is meant by "hearing and determination" in section 367.

The rejection of a formal charge under section 89 (5) of the Criminal Procedure Code would not, we think, be a "hearing and determination" of it.

If evidence has been heard upon a charge, a discharge or acquittal following a withdrawal by a public prosecutor under section 87 of the Criminal Procedure Code might we think amount to a hearing and determination of that charge, without prejudice to further proceedings on the same facts.

It was held in **Attorney-General v. Hill.** 23 K. L. R. Part (1) p. 25, that where a magistrate, having heard all the prosecution evidence in a preliminary enquiry considered it insufficient to justify a committal to the Supreme Court, it was very doubtful whether procedure by way of Case Stated was available to the prosecutor. A fortiori where under section 217 of the Criminal Procedure Code the magistrate having heard some evidence only in a trial before him, or having heard no evidence, stops those proceedings and proceeds by way of preliminary enquiry with a view to committal to the Supreme Court, it cannot, we think, be said that the magistrate has "heard and determined" the charge or complaint. in the ordinary sense of those words. No "determination" of the charge has been made; the magistrate has merely decided to let the determination of it be made by the Supreme Court.

Similarly, we do not think that a refusal by a subordinate court to try accused persons upon a charge, because the court considers that it lacks jurisdiction to try those persons on that charge and can only conduct a preliminary enquiry with a view to committal to the Supreme Court, can be said to be a "hearing and determination" of that charge, especially if no evidence has been heard.

In the instant case what happened to the three original charges to which the respondents pleaded was that they were withdrawn and six new ones were substituted for them before any evidence had been heard. Clearly this was not a hearing and determination of the original charges. If it was, that determination did not give rise to the question of law raised by the Case Stated. If, however, as Mr. Newbold argues, the trial which had started on the original charges continued on the substituted charges (and would not have been commenced de novo if and when the accused were arraigned on the substituted and additional charges), those charges cannot be said to have been "heard and determined". The accused were never required to, and did not plead to them and no evidence was heard upon them. The fact that the magistrate declined to try the charges himself, as having no jurisdiction over a European accused of them, was not, in our view, a

determination of the charges: certainly it was not a "hearing and determination" of them.

We arrive at this conclusion primarily upon a construction of section 367 of the Criminal Procedure Code according to the ordinary and grammatical meaning of the words used, and upon consideration of other sections in the Code which might have a bearing. "For the best and safest guide to all legislation is afforded

by what the legislature itself has said" (Commissioner of Stamps, Straits Settlements v. Oei Tjong Swan and Others, (1933) A. C. 378 (P. C.)). But we think that considerable support for our conclusion can be found in English authorities on the somewhat similar language of section 2 of the Summary Jurisdiction Act, 1857, and section 1 of the Summary Jurisdiction Act, 1879, upon which section 367 of the Criminal Procedure Code seems to be based.

The wording of section 2 of the Summary Jurisdiction Act, 1857, so far as material, is:

"After the hearing and determination by a justice or justices of the peace of any information or complaint which he or they have power to determine in a summary way . . . either party to the proceeding may, if dissatisfied with the said determination as being erroneous in point of law apply in writing ... to the said justices to sign and state a case...."

Section 33 (1) of the Summary Jurisdiction Act, 1879, extended the power to apply for a Case to be Stated, to "any person aggrieved who desires to question a conviction, order, determination or other proceeding", and extended the grounds upon which an application might be made not only to alleged errors in point of law, but to cases where it was alleged that the conviction, order, determination or other proceeding was in excess of jurisdiction. The second of these extensions has been adopted in the Kenya section: the first has not.

Regina v. Justices of the West Riding of Yorkshire, (1866) 6 B. and S. 802; 122 E. R. 1389, 1390, was a case on the Summary Jurisdiction Act, 1857. In that case justices, upon an objection that one of them was interested, determined that the objection was valid and declined to proceed further, but stated a case for the opinion of the Court as to whether the justice had a disqualifying interest. It was held that they ought not to have stated a case under the Summary Jurisdiction Act, 1857; the proper procedure being by **mandamus** or a rule under 11 and 12 Vict., Cap. 44, section 5.

In Halsbury's Laws of England (Hailsham edition) Vol. XXI, page 724, the commentary on **Reg. v. Justices of the West Riding (supra)** is "Where justices have declined to hear a matter for want of jurisdiction, they cannot state a case upon it". The learned author goes on, "but it is otherwise if, having heard the matter, they can determine that they have no jurisdiction". The authority given for the latter proposition is **Muir v. Hore**, (1877) 47 L. J. (M. C.) 17; 37 L. T. 315. In that case the justices heard all the prosecution evidence and found that all allegations in the information were proved; but, upon a submission by the defence that the cause of complaint occurred in Ireland and that the statutes under which the proceedings were brought did not apply to Ireland, held that they had no jurisdiction to convict. They then stated a case as to the correctness of this decision. The Common Pleas Division held that it must hear the Case Stated. Grove, J. said (at

page 316 of the Law Times Report):

"We must hear the case...

As to the second objection, I have more doubt, because of the dicta of Blackburn, J. in the case of *Wakefield Local Board of Health v. The West Riding Railway Company*, in which he says, 'Your proper course seems rather to have been to apply for a rule by way of mandamus calling on the justices to hear the case, for they have not heard it yet. I think there have never been an instance where the justices declined to hear the case for want of jurisdiction, and then stated a case for the opinion of the Superior Court. I think, however, that those observations would not be applicable in this case; for there the justices declined jurisdiction on account of a preliminary objection, which is not the case here, for in this case the justices did try and determine the case.'

In *Pratt v. A. A. Sites Ltd.*, (1938) 2 K. B. 459, a complaint was preferred by Pratt on behalf of the Willesden Corporation against A. A. Sites Ltd. alleging that that company had failed to comply with a requisition requiring removal of an advertisement. It was objected on behalf of the company that the procedure of the local authority was wrong, they were proceeding under a repealed Act. The justices upheld this objection and held that they had no jurisdiction to hear the complaint. They stated a case for the Divisional Court as to whether they had come to a correct determination in point of law. It was objected that as the justices had decided that they had no jurisdiction to hear the summonses, they had no power to state a case. This objection was upheld by the Divisional Court. Lord Hewart, C. J., said at page 461:—

"This is in form a case stated by justices, but, I think, only in form, because when it is examined a different complexion appears. The justices, having to some extent summarized the matter, say that they are of the opinion that the respondents were right in saying that they were not amenable to the jurisdiction and that they (the justices) had no jurisdiction to hear the complaints brought before them.

Whatever else may be doubtful in this case it seems to be perfectly clear that the justices expressed the view that they had no jurisdiction to hear the complaints which were before them. That being so, the position is the same as that disclosed in *Wakefield Local Board v. West Riding Railway Company* (30 J. P. 628, 629) where Blackburn, J., addressing counsel for the appellants, said: $\rightarrow$

Your proper course seems rather to have been to apply for a rule by way of *mandamus* calling on the justices to hear the case, for they have not heard it yet. I think there has never been an instance where the justices declined to hear the case for want of jurisdiction and then stated a case for the opinion of the superior Court'. In his judgment Blackburn, J., said: 'I think nothing can be clearer than that the justices made a mistake in granting the case, as the Statute 20 and 21 Vict. c. 43 (the Summary Jurisdiction Act, 1857) does not apply. The justices, when the question of jurisdiction was raised they had no jurisdiction. If they were right, then the parties can only go and renew the information before other justices who are not interested. If they were wrong then the remedy is to apply for a rule under Jervis's Act, commanding them to hear and determine the case.'

In the present case the justices have stated in language which is quite free from ambiguity that they had no jurisdiction to hear the complaints. . and in my opinion, this appeal should be dismissed on the preliminary point taken on behalf of the respondents."

Humphreys, J., said at page \$462:\$ —

"Where justices have not heard and determined the question before them, but have merely said: 'We decline jurisdiction in this matter and we have no power to adjudicate', this Court leaves the party aggrieved to his remedy. He is not without remedy.

This Court, therefore, has no power to entertain the present so-called case stated."

MacNaghten, J., was of the same opinion.

These cases appear to be still good law. The learned editor of the 1955 edition of Stone's Justices Manual says at page 98, note \$(g)\$:-

"A case cannot be stated to decide a question of jurisdiction where there has been no hearing by the Magistrate's Court (Wakefield L. B. v. West Riding

Rail. Co., (1866) 30 J. P. 278; *Pratt v. A. A. Sites Ltd. (supra)*; but where the Magistrate's Court has heard the case and dismissed it on the ground that it has no jurisdiction, a case may be stated *(R. v. Wisbech,* J. J., (1890) 54 J. P., 743; *Exp. McLeod* 25 J. P. 84; *Muir v. Hore (supra))."*

(The Justice of the Peace reports are not available here. Reference has already been made to *Muir v. Hore*.) *Paley on Summary Convictions, 1953 edition, at page 177 cites *Pratt's case (supra)* as authority for the proposition: "Where J. J. do not hear and determine a complaint but merely decide they have no jurisdiction to hear it, they have no power to state a case."

The reason for the distinction seems _to be that a remedy by *mandamus* to "hear and determine" is not open where the justices have already heard and determined the matter. Where they have not already heard and determined it. an application for a *mandamus* is, in general, the appropriate remedy. *(Wakefield L. B. v. West Riding Railway Company* quoted in *Muir v. Hore* and *Pratt v. A. A. Sites Ltd. (supra) Ex p. Gorman,* (1893) A. C. 23).

A similar rule, we think, prevails in England in cases stated from the decision of quarter sessions dismissing an appeal on a preliminary point. The remedy is by *mandamus* to compel the justices to enter continuances and hear the appeal, and not by special case. The superior Court will not entertain cases sent from Sessions merely for the purposes of putting the Court in motion *(Short and Mellor* 2nd edition, page 431; *Reg. v. Kesteven,* J. J., 114 E. R. 721; *R. v. Sutton Coldfield,* (1874) 9 Q. B. 153, 155).

Such local cases as we have been referred to or have been able to find, to the limited extent that they are in point, do not contradict the principles laid down in the English cases.

As already mentioned, in *Attorney-General v. Hill*,* (1948) 23 K. L. R. 25, it was held (following *Foss v. Best*,* (1906) 2 K. B. D. 105) that where a magistrate has heard the prosecution evidence and has refused to commit for trial upon the ground that the evidence did not justify a committal, it is very doubtful whether the procedure by way of case stated is then available to a prosecutor.

In *Attorney-General v. S. M. Bashir*,* (1948) 23 K. L. R. Part I 78 and *Reg. v. Economides*,* Kenya Cr. Appeal No. 108 of 1956, where the magistrate had held that there was no case to answer and had acquitted, cases were stated at the instance of the Attorney-General and dealt with by this Court. Clearly, in each of these instances, there had been a "hearing and determination" of the charge.

In *Sheikh Noordin v. Sheikh Bros. Ltd.*,* (1951) E. A. H. C. 42 it was held by the Court of Appeal that a refusal by the Rent Board to proceed with a case on the grounds that it involved a protracted review of accounts and family relations and that to pursue it would be a misuse of the Board's functions was not a "determination".

In our view, the instant case falls within the principle of the *West Riding case** and *Pratt's case* (supra)* and not within *Muir v. Hore* (supra)*. There has been no "hearing and determination of any summons, charge, information or complaint" within section 367. *Prima facie* "hearing" includes a "determination" a final disposal (re *Green** 51 L. J. Q. B. 25, 44) A *fortiori* where, as in section 367, the words are "hearing and determination".

The learned magistrate in the instant case refused to hear and determine the charges himself, holding that, as one of the accused was a European who claimed his rights as such, he could only hold a preliminary enquiry and commit to the Supreme Court. The magistrate did not arraign the respondents upon the substituted charges: he did not hear any evidence, but declined to exercise the jurisdiction under section 164 (1) of the Customs Management Act, as a subordinate court of the first class, which he was asked by the prosecution to exercise. He declined to dispose of the matter himself and he heard no evidence." In our view, based on the construction of section 367 of the Criminal Procedure Code, and upon authority, this was not a "hearing and determination by a subordinate court or any summons, charge, information or complaint" within section 367. As in the *Wakefield case** cited *supra** the magistrate declined jurisdiction on account of a preliminary objection, and it was not open to him to state a case for the opinion of this Court.

The preliminary objection must, therefore, succeed. We have no jurisdiction to decide the question raised upon a case stated. It would appear that this Court would have jurisdiction to decide the question if an application were to be made for a *mandamus** to the magistrate directing him to hear and determine according to law. At this stage, we ought to express no opinion as to whether, upon such an application, a *mandamus** would be granted.

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