JOTTEE D. v. INDEPENDENT COMMISSION AGAINST CORRUPTION & OTHERS

2020 SCJ 224

Record No. SCR: 9308 – 3/20/2019

IN THE SUPREME COURT OF MAURITIUS

In the matter of:

D. Jottee

Appellant

v.

1. **Independent Commission Against Corruption**
2. **The Director of Public Prosecutions**
3. **The State**

Respondents

Judgment

The appellant was prosecuted before the Intermediate Court for an offence of "*bribery by a public official"* in breach of section 4(1)(b)(2) of the Prevention of Corruption Act (POCA) 2002; he pleaded not guilty.

After hearing evidence, the trial Magistrate dismissed the information. The DPP's appeal against the dismissal was successful.

In its judgment delivered on 2 August 2017 the Appellate Court took the view that the prosecution had proved the offence beyond reasonable doubt. The Appellate Court consequently quashed *"the decision of not guilty entered by the learned Magistrate and entered a finding of guilty"* against the appellant.

The Appellate Court further took *"notice that the learned Magistrate who heard the case is no longer a member of the judiciary"* and *"decided that on a correct understanding of the scope of the principle in* ***Sip Heng Wong Ng & Anor v R (Privy Council Appeal No. 52 of 1985)*** [1985 MR 142]*, another magistrate may pass sentence. (**See Jean Marc Sevene v The State*** [2005 SCJ 204]*)."*

The court went on to direct that *"the matter be remitted to the lower court and that the Presiding Magistrate designate another Magistrate to hear evidence on the appropriate sentence to be passed and proceed to sentence".*

Another Magistrate was accordingly designated to decide the sentence. After hearing evidence, she sentenced the appellant to undergo six months' imprisonment. She however stated that –

> *"Bearing in mind the delay, that the accused was in his early 30's at the time of the commission of the offence and all above factors, I consider it appropriate to make use of section 151 of the Criminal Procedure Act to impose imprisonment instead of penal servitude on the accused. I finally consider that a suspended sentence will be more proportionate."*

The appellant has now appealed against the sentence only on the following ground –

> *"The Learned Magistrate erred when she ruled that she could assume jurisdiction in order to pass sentence without having heard the evidence during the trial and this in breach of the Constitutional rights of the appellant as enunciated in Sip Heng Wong Ng & Anor v R (Privy Council Appeal No. 52 of 1985)* [1985 MR 142]*"*

Counsel for the appellant submitted that the ground of appeal encompasses the two questions which had been raised by the appellant before the sentencing Magistrate, in a motion which he had made for a referral to the Supreme Court under section 84 of the Constitution.

When the case was called for the sentencing hearing, counsel for the appellant took issue that the sentencing Magistrate who had not heard evidence during the trial proceedings, proceeds to hear evidence on the appropriate sentence and to pass sentence.

Counsel submitted to the sentencing Magistrate that the order of the Supreme Court directing that a new Magistrate be designated to pass sentence, was in breach of the fundamental rights of the appellant inasmuch as the bench appointed solely for hearing evidence for sentencing purposes, would not have heard all the evidence and seen all witnesses who deponed in the course of the trial.

Counsel moved that the matter be referred to the Supreme Court under section 84 of the Constitution for a pronouncement on the ground that the points raised, involved constitutional issues.

The questions which according to the appellant would need to be answered by the Supreme Court on a referral under section 84 of the Constitution were:

> *"(a) whether the Court on appeal can remit a case back to the lower Court with the direction that another Magistrate, other than the one who decided the case, should hear evidence and proceed to pass sentence in the teeth of section 10 of the Constitution; and*
>
> *(b) whether a newly constituted bench can sentence an accused without hearing all the evidence on record in the light of the Privy Council decision of* ***Sip Heng Wong Ng and Anor, Privy Council Appeal No. 52 reported in*** [1985 MR 142] *inasmuch as the decision of* ***Sevene v The State*** [2005 SCJ 204] *is not one which interprets the decision of Wong Ng in the manner the Appellate court said it does."*

After hearing arguments, the Magistrate found that there was no justification for any referral to the Supreme Court under section 84(1) of the Constitution.

The Magistrate further found that the circumstances in the present situation were distinguishable from the case of **Wong** in that:

> *"(i) there had already been a finding of guilt by the Appellate Court. The present situation was not one wherein part of the evidence had been heard and there was a need to replace the trial Magistrate;*
>
> *(ii) the trial Magistrate was no more in the Judiciary;*
>
> *(iii) in the light of the decision of* ***Sevene v The State*** [2005 SCJ 204] *and on a correct understanding of the principle in* ***Wong****, there is no impediment for another Magistrate to step in for the sentencing process."*

She accordingly set aside the motion and proceeded to the hearing, for sentencing purposes only.

Following the hearing of the evidence before her, the Magistrate proceeded to pass sentence on the appellant.

In his arguments before us, counsel for the appellant referred to section 124(1) of the Courts Act, section 10(1) of the Constitution and section 72(4) of the District and Intermediate Courts (Criminal Jurisdiction) Act as well as the judgment of the Judicial Committee of the Privy Council in the case of **Sip Heng Wong Ng and Anor v R** [1985 MR 142]. He relied essentially on section 124, as it was then formulated, and which has since been amended by the addition of the words "*subject to the Constitution*".

The material part of the judgment of the Judicial Committee in **Wong** upon which counsel relied, is set out below:

> *"… in a criminal trial, whether before a jury or before Magistrates, it is a fundamental requirement of justice that those called upon to deliver the verdict must have heard all the evidence."*
>
> *"… If, after part of the evidence has been heard in a trial in which the accused pleads not guilty, it becomes necessary to replace a Magistrate, there is no alternative but to recommence the trial and recall the evidence so that all the Magistrates hear all the evidence and the submissions made on behalf of the accused…"*
> (**Sip Heng Wong Ng and Ng Ping Man v R** [1985 MR 142])

Counsel also referred to the subsequent decision of the Judicial Committee in **Curpen Marday v The Queen** [1990 PRV 1] which reiterated the decision of **Wong** and held that *"section 10(1) of the Constitution requires that the principle in Wong should be complied with"*.

Counsel further referred to the subsequent cases of **Meghu v The State** [1993 SCJ 384] and **Gyantee Mutty v Ramba Bhugbuth** [1994 MR 113] which clarified the scope of the principles laid down in **Wong** and **Curpen**. According to counsel, the principles of **Wong** and **Curpen** require that the Magistrate who is returning a verdict, must have heard all the evidence and assessed the demeanour of the witnesses. A different bench cannot continue a case where witnesses have already been heard before another Bench. However, where no witness has been heard, a different bench may continue a case started before a previous bench.

In the present case according to counsel, the situation whereby the Magistrate was designated to hear evidence only in relation to sentence and pass sentence, infringes the Constitution because the same Magistrate did not hear all the evidence before bringing finality to the proceedings. Counsel argued that sentencing forms an integral part of a trial and proceedings only become final when the sentence is pronounced and it is only at that stage that the judgment is amenable to appeal.

Counsel submitted that the sentencing Magistrate did not hear all the witnesses and the evidence, she did not have the opportunity to watch the demeanour of the witnesses and to analyse the evidence as a whole in considering the appropriate penalty. Counsel added that the transcript of the proceedings before the trial Magistrate and before the Supreme Court and its judgment, would not be enough for the sentencing Magistrate to have *"the feel of the case".*

Finally counsel argued that the Supreme Court's decision to remit the case to a new bench of the Intermediate Court for a sentence hearing, goes against the principles of fair trial. Counsel referred to other cases wherein when remitting a case to a new bench of the lower court, the Supreme Court has directed that a fresh trial be started. He argued that similarly in the present case, a fresh trial could have been ordered since the bench which heard the trial, would not be able to pass sentence.

Counsel for the respondents submitted that the case of **Wong**, which has been relied upon by the appellant, should be distinguished from the facts of the present matter.

Firstly counsel have argued that the decision in **Wong** was in relation to the old version of section 124 of the District and Intermediate Courts (Criminal Jurisdiction) Act ('DIC Act')

whereas the present matter is not governed by the now repealed section 124 of the DIC Act so that the principle in **Wong**, has no application here.

Secondly the decision in **Wong** highlighted the need for oral evidence to be heard by those charged with returning a verdict in a case where the accused had pleaded not guilty, so as to make a proper determination of guilt. However, in the present case there was a trial for the determination of the charge by the Magistrate who had heard all the evidence adduced before him, following which there was an appeal against his judgment. As such counsel submitted that the sentence imposed by the sentencing Magistrate, was not in any way connected with the determination of guilt. It was rather following an appeal and a determination from the Supreme Court, that the matter was referred to the court below to pass sentence only.

Thirdly, there is here no infringement of appellant's right to a fair hearing as contemplated in **Wong**. We are not here in a situation such as in **Meghu v The State** [1993 SCJ 384] where a question of law which was inextricably linked with the determination of guilt was dealt with by one bench whereas another bench determined guilt.

Counsel argued that whilst the principles in **Wong** are still sound law, it is equally true that it is not an absolute principle since otherwise it would lead to awkward situation in cases with some particular distinguishing facts. (*vide* **Mutty & Ors v Bhugbuth & Ors** [1994 SCJ 215] as well as **Makound v The State** [1997 SCJ 58]).

The facts in the present case are distinguishable in all material respects from the situation in **Wong**. The present matter had already been tried by the Intermediate Court and it is following an appeal and a finding of guilt in relation to the charge that the Supreme Court directed that another bench decides upon the sentence only, since the Magistrate who initially heard and dismissed the charge, was no longer in the judiciary.

Counsel argued that the present situation is similar to **Sevene v The State** [2005 SCJ 204] in which the Appellate Court considered the principles in **Wong** but found no impediment that another Magistrate proceeds with the sentencing in the absence of the Magistrate before whom the case was initially heard.

According to counsel, the principle in **Wong** has no application in the light of the particular facts of the present case so that the ground of appeal which is formulated on the principles in **Wong**, has no merits. Furthermore none of the constitutional rights of the appellant have been breached and more particularly it cannot be said that there has been a breach of his right to a fair hearing.

The appellant was duly represented during the sentencing stage; he had all the latitude to adduce any evidence that he wished in mitigation and he in fact deponed under oath as regards his personal and family circumstances as well as his health issues. His counsel made a full submission in mitigation of sentence which was duly considered by the Magistrate so that it cannot be said that any of his rights to a fair hearing was in any way breached.

Decision

The Supreme Court is entitled pursuant to section 82(1) of the Constitution to supervise any criminal proceedings before the Intermediate Court *"and to make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by any such court".*

There is a right of appeal by the DPP pursuant to section 92(b) of the District and Intermediate Courts (Criminal Jurisdiction) Act against *"any dismissal of a charge"* and the Appellate Court on hearing an appeal, has wide powers to *"revise, amend or alter"* any order made by the trial court.

Section 96 thus sets outs the powers of the Supreme Court on appeal as follows:

> *"96.* ***Powers of Supreme Court on appeal***
>
> *(2) Subject to subsections (3), (4) and (5) the Supreme Court may affirm or reverse, amend or alter the conviction, order or sentence, and may, if the order made or sentence passed is one which the trial court had no power to make or pass, as the case may be, amend the judgment by substituting for the order or sentence such*

> *order or sentence as the court had power to make or pass, as the case may be."*

In its judgment the Appellate Court quashed the dismissal of the charge by the trial Magistrate and after entering a finding of guilt against the appellant, the Appellate Court ordered that the appropriate sentence be imposed by a Magistrate appointed for that purpose.

The Presiding Magistrate of the Intermediate Court had to comply with such order and duly designated a Magistrate to pass sentence only. The sentencing Magistrate was also bound in such circumstances to comply with and carry out the order made by the Appellate Court which remained to all intents and purposes, a valid order unperturbed by any further appellate decision. The sentencing Magistrate was thus entitled to assume jurisdiction by proceeding with the sentencing of the appellant.

The sentencing Magistrate could not in the circumstances, refer the matter to the Supreme Court for determination for any of the reasons invoked by counsel for the appellant inasmuch as the Supreme Court had already, in the exercise of its (sections 92 and 96) constitutional and legal powers under section 82(1) of the Constitution and the District and Intermediate Courts Act (supra), pronounced a final finding of guilt and given a direction for sentencing purposes only in order to complete the process.

There was no further question which called for the determination of the Supreme Court. The Appellate Court had in its judgment of 2 August 2017 already made a final pronouncement of guilt. The judgment of the Supreme Court bore all the characteristics of finality on the issue of guilt and which had never been challenged before the appropriate forum, could only be possibly reversed or altered, by way of a timely appeal to the Judicial Committee or ultimately by having recourse to a residual constitutional remedy, if any, under the Constitution.

The Magistrate's refusal to refer the matter to the Supreme Court as moved by the appellant, is not flawed for any of the reasons advanced by the appellant.

There is therefore no merit in the first limb of the appellant's argument that there should have been a referral under section 84 of the Constitution as to whether the Appellate Court could remit a case to the Intermediate Court as it did, in the present circumstances.

In any event we are of the considered view that the fact that a Magistrate other than the trial Magistrate proceeded to pass sentence, did not result in any injustice to the appellant and there was no breach of any of the constitutional rights of the appellant including the right to a fair hearing at sentence stage (*vide* **Teeluck v State** [2014 SCJ 16] and **Moss v The Queen [2013 UKPC 32]**) inasmuch as the sentencing Magistrate conducted a hearing for the purpose of sentence.

The hearing which was conducted by the sentencing Magistrate, was carried out in a manner which secured all the inherent rights of the appellant to a fair hearing with regards to the determination of sentence which it must be emphasised, was the only live issue before the Magistrate.

The appellant was represented by counsel at the hearing and had all possible latitude to adduce evidence in mitigation including evidence already adduced before the trial court. He was given the opportunity to bring forth any further evidence he deemed necessary. The appellant deponed under solemn affirmation as regards his personal and family circumstances, his health issues and financial commitments.

At the close of the hearing, his counsel made full submissions in mitigation on his behalf.

The Magistrate took into account the submissions made by counsel, the evidence adduced before her in the course of the hearing the appellant's clean record and the time lapse since the commission of the offence and the passing of sentence. She sentenced the appellant to undergo twelve months' imprisonment which she suspended for a Community Service Order.

It cannot be said that there was in the circumstances, any breach of the principles enunciated in **Wong** since the sentencing Magistrate acted for the purpose of determining sentence on the evidence which had been adduced before her and submissions made to her.

The ratio in **Wong** is to the effect that *"<u>if after part of the evidence has been heard in a trial</u> in which the accused pleads not guilty, it becomes necessary to replace a Magistrate, there is no alternative but to recommence the trial and recall the evidence so that all the Magistrates hear all the evidence and the submissions made on behalf of the accused".*

In the present situation the Magistrate was only acting as the sentencing Magistrate. At that stage matters pertaining to guilt had become irrelevant and were never in issue before her inasmuch as the issue of guilt had already been finally resolved by the Appellate Court. The only remaining issue was that of sentence and in which respect, she had heard the totality of the evidence upon which she acted in order to decide the sentence.

The Magistrate's judgment indeed reveals clearly that she only acted on evidence adduced before her and did not take into account evidence that had been placed before the previous bench.

The sentence hearing which was conducted solely for the purpose of determining sentence by a different Magistrate, constituted in the circumstances a distinctly and separate exercise which had no connection or bearing with the determination of guilt and the conviction of the appellant. There would as a result, be no risk or apprehension of any prejudice of the type contemplated in **Wong**.

This approach has been consistently adopted in several common law jurisdictions including the United States as is illustrated by the Supreme Court decision in **Williams v. People of State of New York [69 S.Ct. 1079, 93 L.Ed. 1337, 2 Fed.Sent.R. 151** which under the heading *"Sentencing and Punishment"* states the following:

> *"The issue in trial before verdict is whether defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused, but a sentencing judge is not confined to the narrow issue of guilt and his task within fixed statutory or constitutional limits is to determine type and extent of punishment after the issue of guilt has been determined, and in thus determining sentence the fullest information possible concerning the defendant's life and characteristics is relevant."*

There is indeed in the present matter no splitting of the case into two different hearings regarding the *"verdict"*. The Magistrate was not called upon to deliver a *"verdict"* i.e. making a finding on the issue of guilt. The issue of guilt had already been finally resolved by the Supreme Court. The case had gone beyond that stage and had reached the distinct sentencing stage which would be resolved by the conduct of a separate hearing of evidence on that issue only.

Furthermore the Supreme Court has adopted a similar approach and remitted the case for sentence before a different bench where guilt was not in issue and the trial Magistrate was not available to pass sentence.

In **Mosaheb v The State** [2010 SCJ 340] the Supreme Court had quashed a sentence of imprisonment passed upon the appellant. Since the Magistrate who had conducted the hearing on the appellant's guilty plea was no longer available, the court remitted the matter for *"<u>a fresh hearing for sentence purposes</u> on the subsisting plea of guilty".*

Similarly in the case of **Sevene (supra)** the Supreme Court quashed the sentence of imprisonment inflicted upon the appellant and taking notice *"that the Magistrate who heard the case and inflicted the sentences has retired*, *directed that another Magistrate designated by the Presiding Magistrate shall proceed to sentence and make the community service order"*. The court specifically addressed the principle of **Wong** and held that on a correct understanding of *"the scope of the principle in **Wong** there is no impediment to another Magistrate stepping in at this stage in relation to the sentencing process in the particular circumstances of the present case"*.

The distinction which counsel for the appellant sought to draw from the above cases to the effect that in the above cases, contrary to the present one, the appellants had pleaded guilty, is untenable since in all these situations the sentencing Magistrate did not have to consider the evidence in order to determine the issue of guilt but was only concerned with the passing of sentence.

Likewise in the present matter, it was not incumbent upon the sentencing Magistrate to assess the evidence and the witnesses so as to determine the appellant's guilt, this having already been finally resolved by the Appellate Court. The situation is therefore in that respect on all fours with the approach adopted and approved in **Mosaheb** and **Sevene**.

We find no merit whatsoever in this appeal and we dismiss same. With costs.

B. R. Mungly-Gulbul
Judge

L. Aujayeb
Judge

24 September 2020

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Judgment delivered by Hon. B. R. Mungly-Gulbul, Judge

For Appellant	:	**Mr. G. Glover, SC** **Mr. Attorney P. Rangasamy**
For Respondent No.1	:	**Miss P. Bissoonauthsing, together with** **Messrs. K. Beeharry, T. Naga and L. Nulliah,** **all of Counsel** **Mr. Attorney S. Sohawon**
For Respondents Nos. 2 and 3	:	**Mr. M. I. A. Neerooa, Sr. Asst. DPP** **Mrs. D. Dabeesing Ramlugan,** **Principal State Attorney**