[THOMAS, CREAN AND SERTSIOS, JJ.]

1934.
Jan. 26.

POLICE

v.

THEODOSI KYRIACOU.

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v.
KYRIACOU.

Criminal Law—Procedure—Summary trial—Question reserved by Magisterial Court—Courts of Justice Order, 1927, Clauses 94 and 158.

The accused was charged before the Magisterial Court, Famagusta, with being in possession of tumbeki contrary to Sections 52 (1), 52 (2) and 53 of the Tobacco Law, 1932. After hearing evidence the Court held that the tumbeki produced was found in accused's possession, but, being uncertain if the possession established by the evidence was an offence under the sections of the charge, reserved the point for the opinion of the Supreme Court.

Held: The Magistrate had no power to reserve a question for the Supreme Court before deciding the case.

Question reserved by the Magisterial Court, Famagusta, for the opinion of the Supreme Court.

Andreas Gavrielides for the accused.

Pavlides, Crown Counsel, for the Crown.

JUDGMENT:—

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Thomas, J.

THOMAS, J.: The accused was charged before the Magisterial Court in Famagusta with "possessing 13 okes of tumbeki without any licence, the cultivation of which is prohibited", contrary to Sections 52 (1), (2) and 53 of the Tobacco Law, 1932. Evidence was given by Customs officers that they found the accused in possession of tins containing tumbeki. It was submitted on his behalf that the sections under which the charge was laid only apply to persons who plant and grow tumbeki, and are not applicable to mere possession such as the witnesses alleged in this case. At this stage a fortnight's adjournment was granted to enable the Customs officer prosecuting to reply to the legal point raised. After the adjournment the reply of the Customs officer was: "As to the point of law, I leave it to the Court to decide." The Court was not willing to decide the point, and the record continues: "*Held*: There is no doubt that the tumbeki produced in Court was found in accused's possession . . . ". The learned Magistrate thereupon reserved the question for the Supreme Court as to whether the sections under which the charge was laid applied to the case. The Magistrate in reserving the question for the Supreme Court purported to do so in accordance with Clause 94 (2) of the Courts of Justice Order, 1927. Under this clause "if any question

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of law arises on the trial of any person before a Magisterial Court, the Court may, in its discretion reserve such question for the Supreme Court." Similar powers are contained in Clause 158 with regard to any question arising on the trial of any person upon information and upon such question being reserved the Supreme Court is empowered (1) to confirm the judgment appealed from; (2) set it aside; (3) give such judgment as ought to have been given at the trial, or direct the trial Court to do so; (4) " or, if the Court has not delivered judgment, remit the case to it in order that it may deliver judgment." In *Rex* v. *Michael Savva* (1) the Assize Court of Nicosia stayed the trial pending the decision of the Supreme Court on a point reserved under Clause 158. It was held that a question of law may only be reserved after the accused has been convicted. In delivering judgment the Chief Justice said: " The words ' if the Court by which any person is convicted ' in Clause 158, paragraph 2, govern all reserved cases and these though rightly recorded as they occur, are not in our view of the clause, to be determined until and unless a verdict of guilty is come to. The proceedings must, in our opinion, have terminated except, it may be, for the actual words of judgment."

Clause 94 dealing with reserving questions of law by Magisterial Courts is in the same terms as Clause 158 with this important difference that it omits the words " by which any person is convicted " following the words " If the Court." The question arises whether by the omission of these words the draftsman intended to create an entirely new condition on which questions could be reserved by Magisterial Courts, viz., that a question could be reserved without the Court having made any decision? In the first place such an interpretation is directly opposed to the scope and language of Clause 94 considered as a whole. Further, it is most unlikely that such a clumsy means would have been adopted to bring about such an important change, when it could have been done merely by inserting the words " whether before or after conviction." The powers given to the Court in dealing with reserved cases are the same in both clauses of the Order. All these clauses, except one, clearly contemplate a judgment having been given by the Court before reserving the question. There is, however, one clause which says: " Or if the Magisterial Court has not given judgment, remit the case to it in order that it may deliver judgment." I think that it would only be in the presence of compelling reasons that the Court could come to the conclusion that, while " judgment " in Clause 158 means completion of the judgment supplementing an already

(1) 13 C.L.R. 63.

existing conviction, in identical wording in Clause 94 it means " conviction." I see no reasons at all—much less any compelling ones—that require such an interpretation. On the contrary to treat " judgment " in Clause 94 as being equivalent to " conviction " would be inconsistent with the remaining clauses dealing with the powers of the Supreme Court upon a question being reserved for its opinion, all of which clauses contemplate the Court having arrived at a decision before a question can be reserved. If " judgment " in Clause 94 be given the same meaning that it has in Clause 158, that is to say that part of the judgment subsequent to conviction, no inconsistency arises, and the Clause must be then taken as providing for the normal case where the opinion of the higher Court is sought, viz., the Magisterial Court decides the case, convicts the accused, but submits the case to the Supreme Court to say whether on the facts as decided the conviction was right in law. If the Supreme Court considers the conviction was right in law, it remits the case to the Magisterial Court to deliver judgment; if, on the contrary, it holds that the conviction was bad in law, it sends the case back for the Magisterial Court to give judgment in the form of an acquittal.

The draftsman of Clauses 94 and 158 of the Courts of Justice Order, 1927, must have had before him the provisions of the English Law, which are contained in the Summary Jurisdiction Acts, 1857 and 1879.

Under the former " after the hearing and determination by justices of the peace of any information or complaint . . . either party to the proceeding before the said justices may, if dissatisfied with the said determination, as being erroneous in a point of law, apply . . . . to the justices to state and sign a case setting forth the facts and grounds of such determination, for the opinion thereon of one of the superior Courts of law . . . . ". (Section 2).

Under this statute the power to state a case only arises after hearing and determination of any information or complaint.

By Section 33 of the Act of 1879 " any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a Court of summary jurisdiction, on the ground that it is erroneous in point of law, or in excess of jurisdiction, may apply to the Court to state a special case . . . . ".

I have looked at numerous authorities dealing with cases stated by courts of summary jurisdiction but have not been able to find a single example of the High Court allowing a case to be stated without there having been a " determination " of the matter in issue by the trial Court. I have been unable to find any instance of a point of law having been reserved for the opinion of the High Court

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during the hearing and before the Court had come to a decision on the matter before it for determination. The object of the procedure under the Acts of 1857 and 1879 is to enable either party dissatisfied with the justices' decision on a point of law to have the matter brought before the High Court for that to say whether or not the decision was right.

This procedure both in the case of Magisterial Courts or Quarter Sessions is treated as an appeal, and is called "appeal by way of case stated." The procedure provided for by Clauses 94 and 158 is based upon the English procedure, and it would be quite inconsistent with that procedure to allow a case to be stated before the trial Court has decided the issue before it for determination. It is instructive to see how the Courts in England have regarded the right to state a case under the Acts of 1857 and 1879. In the case of *Muir* v. *Hore* (1) it was held that "the justices having necessarily heard the case before they determined they had no jurisdiction, the opinion of the Court was properly applied for under the Summary Jurisdiction Act, 1857."

A person was charged under the Military Service Acts, 1916 and 1918, with failing to appear when called out to attend for military duty. He claimed he came within the exemption contained in those Acts in favour of "regular ministers of any religious denomination." The justices were not satisfied that he came within the exemption, and they found the offence proved but dismissed the information under the above Act, considering it inexpedient to inflict any punishment.

Held: there had been a "determination" by the justices within the Summary Jurisdiction Act, 1879, Section 33, and the accused was entitled to appeal by way of case stated." *Oaten* v. *Auty* (2). In the same authority a case is referred to where a constable arrested a man and brought him before a justice who at once discharged him on the ground that he had been illegally apprehended. It was held that, as there had been no determination of the information, there was no power to state a case. *Wilhamson* v. *Bilborough* (3).

It is stated in Stone's *Justices Manual* (58th Ed.), p. 115, that the Court will decline to hear a case which has been so stated that the judgment will not finally dispose of it, and, as a rule, will refuse to decide an academic question.

It is quite clear that under English law a case can be stated only where there has been a "determination" by the justices. Under the 1927 Order in Court a case arising upon a trial an information can only be reserved after the

(1) (1877) 47 L.J. (M.C) 17.

(2) (1919) 2 K.B. 278, cited in English and Empire Digest, Vol. 33 at p. 407.

(3) 28 J.P. at p. 745.

Court has convicted, or, as the Court says in the judgment already referred to, " after the proceedings have terminated, except, it may be, for the actual words of judgment." In my opinion the object and intention of the earlier clause is the same, viz., to permit a Magisterial Court to reserve a question of law for the Supreme Court only where the proceedings have terminated in a conviction.

I am aware that Magisterial Courts have occasionally submitted for the opinion of the Supreme Court questions of law arising during the hearing of a charge prior to conviction—Crown Counsel referred the Court to three such cases heard in June, 1930, one of which is reported in the 1931 *Gazette*, p. 536—but the point whether it was competent for questions to be reserved by Magisterial Courts prior to conviction was never raised, nor, so far as I am aware, has it ever been raised before.

For the reasons given above I am of opinion that the learned Magistrate had no power to reserve this case for the opinion of the Supreme Court in that the trial had not terminated in a conviction, and the case should, therefore, go back to the Magisterial Court with the intimation that the question submitted cannot be entertained unless a decision has been reached.

CREAN, J.: I have read the judgments of the other members of the Court and I fully concur in the conclusions arrived at.

SERTSIOS, J.: The accused in the criminal case No. 2443/33 was charged before the Magisterial Court, Famagusta, with having been on or about the 3rd July, 1933, in possession of tumbeki, without any licence, the cultivation of which is prohibited. Evidence was heard in Court, and after the case was closed both for the Crown and the defence, the learned Magistrate, who tried the case, said that he had no doubt that the tumbeki which was produced in Court was found in the possession of the accused. As, however, a question of law had cropped up as to whether Sections 42 and 53 of Law 40 of 1932 were applicable to the case before him, the Magistrate, without convicting the accused, reserved the question of law for the opinion of the Supreme Court under Clause 94 of the Cyprus Courts of Justice Order, 1927, as follows :— " Can Section 52 or 53 of Law 40 of 1932 be applied to this case ? "

Before dealing with the question under consideration in this case, I think it proper to refer first to the procedure followed in a case triable on information in similar circumstances, namely, when a question of law is reserved by an Assize Court, which Court, I may say incidentally, can alone under the Cyprus Courts of Justice Order, 1927, try criminal cases on information, for the opinion of the

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Supreme Court. Under Clause, namely, 158 of the Cyprus Courts of Justice Order, 1927, if any question of law arises in the trial upon information of any person for any offence not triable summarily, the Assize Court may in its discretion reserve such question for the Supreme Court . . . . . "If the Court by which any person is convicted of an offence not summarily triable reserves any question of law for the opinion of the Supreme Court in manner hereinbefore mentioned, the Supreme Court shall consider and determine such question, etc.".

In the case *Rex* v. *Michael Savva* reported in C.L.R., Vol. 13, p. 63, this Court, dealing with the point under consideration, held that the words "if the Court by which any person is convicted" in Clause 158, paragraph 2, govern all reserved cases, and these are not to be determined until and unless a verdict of guilty is come to. Consequently, a question of law may be reserved by the Assize Court for the determination of the Supreme Court, but not till after the accused has been convicted by the Court in question. The powers of the Supreme Court on determining such a reserved question of law are enumerated in Clause 158 aforementioned. The Supreme Court, namely, may in such a case "either confirm the judgment of the Court appealed from, or direct that the judgment of the Court appealed from shall be set aside; or direct that the judgment of the Court shall be set aside, and that instead thereof, such judgment shall be given by the Court before which the trial took place as ought to have been given at the trial; or, *if the Court has not delivered judgment*, remit the case to it in order that it may deliver judgment; or itself give such judgment as ought to have been given at the trial; or make such other order as justice may require."

Now, dealing with the present case, under Clause 94, sub-clause 2 (i) and (ii), the Magisterial Court also is given power, whenever a question of law arises on the trial of any person before it, to reserve in its discretion such question for the opinion of the Supreme Court. It is worth noticing that exactly and verbatim the same powers are given to the Supreme Court under Clause 94 of the Order in Council, 1927, as these given to it by Clause 158 of the same Order in Council, in dealing with a case reserved by the Assize Court for their opinion. The only difference between the Clause 158, paragraph 2, and Clause 94, paragraph 2, is that the words in paragraph 2 of Clause 153, reading: "If the Court by which any person is convicted" have been omitted from the corresponding Clause 94, sub-clause 2, paragraph (ii), in respect of trial by Magisterial Courts. But was this omission casual or was it an intentional one? We might perhaps, not unreasonably, be led to think that, one of the powers of the Supreme Court in dealing with a reserved question under

Clause 94 of the Order in Council, 1927, being that " if the Magisterial Court has not delivered judgment the Supreme Court may remit the case *to it in order that it may deliver judgment*," we might, I say, be led from these words to think that the Magisterial Court can reserve a question of law for the opinion of the Supreme Court without having first convicted the person charged with an offence before them. The same power, however, exactly is given to the Supreme Court under Clause 158, paragraph 2, even though the words " if the Court by which any person is convicted, etc." are used in the same clause, namely, Clause 158.

In view of the apparent anomaly of the words : " If the Court has not delivered judgment " used in Clause 158 of the Cyprus Courts of Justice Order, 1927, this Court in the case *Rex* v. *Michael Savva*, cited above, was of the opinion that the words in question raised no real contradiction, if the expression " is convicted " used in the same clause, is given a reasonably wide meaning, and that the proceedings before the Assize Court must have terminated, except, it may be, for the actual words of judgment.

As I have stated the words " is convicted " have been omitted from Clause 94, sub-clause 2, paragraph (ii), but the power given to the Supreme Court by the words " if the Magisterial Court has not delivered judgment " is the same as that given to this Court under Clause 158, in spite of the existence therein of the words " if convicted." One, therefore, might not without much difficulty say that, in the circumstances, what applies under Clause 158 would equally apply under Clause 94 regarding cases reserved from a Magisterial Court. Namely in either case a determination of proceedings ending in a conviction before the Magisterial Court, in the same way as before an Assize Court, is necessary before a question of law may be reserved for the opinion of the Supreme Court. But was the omission of the words : " if a person is convicted " from Clause 94 casual or was it intentional? In my view it was neither, because the use of this expression in Clause 94 had become unnecessary and it would have been redundant. The whole Clause 94 of the C.C.J.O., 1927, should be read in one and the same sense. The governing words of Clause 94 are those expressed at the very beginning of it, which read : " If the Court convicts the accused, etc.". So, for the purposes of that clause there must be a conviction of the accused person and, if any question of law arises on the trial of such an offence, of which a person is found guilty, the Magisterial Court may, in its discretion reserve such question for the Supreme Court. As regards the words " if the Magisterial Court has not delivered judgment ", in my view they do not present any difficulty, because the word " judgment " therein is used in

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the meaning of "sentence." That this is so becomes clear from paragraph 4 of Clause 94, sub-clause (i), where an interchange of the two words "judgment" and "sentence" respectively used in the same meaning, is quite manifest. The passage in this respect reads: "If the Court is of opinion that judgment should be passed upon the accused, the Court may either proceed to pass sentence upon him according to law, or may postpone the passing of such sentence to a future time."

From this passage it is manifest that first the word judgment and then instead of it twice the word "sentence" is used in conjunction with the verb "pass" the word judgment obviously meaning "sentence" and nothing else. Consequently, if the Magisterial Court, having convicted a person, has failed to deliver judgment, namely, has failed to pass sentence, the Supreme Court has got the power under Clause 94 of the C.C.J.O., 1927, to remit the case to it in order that it may deliver judgment, that is to say, in order to pass sentence. In view of the foregoing I am clearly of the opinion that the proceedings before the Magisterial Court must have terminated in a conviction before the Court in question may reserve a question of law for the opinion of the Supreme Court. The enactment, however, enabling a Magisterial Court in this Colony to reserve a question of law for the opinion of the Supreme Court is but in substance a transcript of the Summary Jurisdiction Act, 1857, and in applying our law here strict regard should be had both to the provisions laid down in the English Act I have just mentioned, and to the interpretation placed upon it at times by decided cases before the English Courts. The Act in question is providing "that, after the hearing and determination by a justice or justices of the peace on any information or complaint which he or they have power to determine in a summary way, either party to the proceeding before the said justice or justices may, if dissatisfied with the said determination, as being erroneous in a point of law, apply in writing . . . . to the said justice or justices to state and sign a case setting forth the facts and grounds of such determination, for the opinion thereon of one of the Superior Courts of Law to be named by the party applying, etc., etc.". Thus from the wording itself of the Summary Jurisdiction Act, 1857, it is quite clear that before a case may be stated by a court of summary jurisdiction for the opinion of one of the superior courts of law, there must be a hearing and determination by the court of any information or complaint which such court has power to determine in a summary way.

The English Act in question clearly gives a right of appeal as well against the dismissal of a complaint as against a conviction; and it was so interpreted in the case

Davys v. *Douglas* (1). Also in the case *R.* v. *Newport* (*Salop*) *Justices* (2) it was held that where an information has been dismissed by justices, the Court has jurisdiction, on the application of the unsuccessful prosecutor, to state a case. In the case again *R.* v. *St. Giles, Headington* and *R.* v. *Headington Union* (3), it was held that the Court will decline to hear a case which has been so stated that the judgment will not finally dispose of it.

There are any number of decisions showing that cases have been so stated but not until after determination of the complaint or information by the competent Court exercising its summary jurisdiction.

In the case of *Stonehouse and another* v. *Masson*, for instance (4), a case was stated by Mr. E. T. d'Eyncourt, one of the Magistrates of the Police Courts of the Metropolis, sitting at Marylebone Police Court, but not until after he had convicted both appellants and ordered each of them to pay a fine of £5 or in default to be imprisoned for one month.

Also in the case of *Lucas* v. *Reubens* (5) a case was stated by the Stipendiary Magistrate for the County borough of Middlesbrough, but not until after the informations were dismissed by the Court, namely, after the final determination of the criminal proceedings.

From all the above it is quite clear that in interpreting Clause 94 of the C.C.J.O., 1927, which, as I have already stated, sets up practically the same procedure as that in the Summary Jurisdiction Act, 1857, we should be governed by the principles laid down in the Act in question and the interpretation placed upon it by the English Courts, in dealing with cases of this kind. That being so this Court will decline to hear a case which has been so stated that the judgment will either not finally dispose of it, or will not have disposed of it at all, as has happened in the case before us, the learned Magistrate having failed to come to a determination of the complaint against the accused person, by convicting him. I am, therefore, of the opinion that the case must go back to the learned Magistrate with the intimation that we cannot hear it, until a decision has been arrived at as required by the law.

Case remitted to the Magisterial Court.

(1) (1859) 28 L.J. at p. 193.
(2) (1927) 2 K.B. 416.
(3) 47 J.P. (Newspaper) 756.
(4) 27 Cox C.C. 23 (5) 27 Cox C.C. 1.
(5) (1921) 27 Cox C.C. at p. 1.