JHAWERILAL AND BALLAB BHAI *v.* THE POLICE

[Appellate Jurisdiction (Carew, P.J.) November 4th, 1949]

Mining Ordinance—s. 129—gold dealer's licence—need for licensed jeweller to possess one.

One appellant sold gold to the other appellant and both were convicted, one of selling, the other of buying gold, neither being the holder of a gold dealer's licence, contrary to section 129 (1) of the Mining Ordinance by the 1st Class Magistrate at Nausori.

The Magistrate rejected the argument of the appellants that since they both were licensed jewellers, the provisions of the Mining Ordinance did not apply.

On appeal against conviction and sentence.

HELD.—That a licensed jeweller who buys and sells gold needs a gold dealer's licence. (This case is also reported on account of the observations concerning sentence.)

Cases referred to:—

R. v. John James Quinn 23 Cr. App. R. 196.

[**EDITOR'S NOTE.**—The definition of gold in section 128 of the Mining Ordinance reads as follows:—

> " Gold includes gold, gold bullion, retorted gold, gold ores, gold-dust, gold amalgam, gold alloys . . . but does not include coin or things manufactured of gold which on view have apparently been worked or manufactured for trade purposes."

Section 129 (1) of the Mining Ordinance reads as follows:—

> " 129 (1) Except as hereinafter provided no person shall buy or sell gold unless either the buyer or the seller is holder of a gold-dealer's licence."]

R. Crompton for the appellant.

W. G. Bryce, Acting Solicitor-General, for the respondent.

CAREW, P.J.—The sale is not denied, but it is contended that, as licensed jewellers, they were entitled to carry out the sale and that the Mining Ordinance (Cap. 127) does not apply.

No doubt before the enactment of the Mining Ordinance this would have been true, but in view of the clear words in the definition of " gold " in section 128 of the Mining Ordinance (Cap. 127) it is doubtful whether this can be said today. It is suggested that the intention of this Ordinance is to restrict the sale of gold to " mined " gold, and in support of this view attention is drawn to the Regulations, at page 932 Volume V of the *Laws of Fiji,* made under the Mining Ordinance (Cap. 127).

I agree that these Regulations refer only to gold " gotten " or " won "; and it may be that the Legislature intended to restrict only the sales of such gold. However, one cannot ignore the clear words of section 128 of the Mining Ordinance (Cap. 127) which define gold.

At the trial in the lower Court there was some evidence suggesting that the gold in question was melted down jewellery. This was not accepted by the learned Magistrate; but, if it had been, it is argued now by Counsel for the Crown that it could make no difference, as it would still have come within the definition of gold as laid down by section 128 of the Mining Ordinance (Cap. 127).

I agree with this view. It would, in my opinion, be gold within the definition.

" The rule of construction is ' to intend the Legislature to have meant what they have actually expressed '. It matters not, in such a case, what the consequences may be. Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the Legislature, it must be enforced, even though it be absurd or mischievous. The underlying principle is that the meaning and intention of a statute must be collected from the plain and unambiguous expressions used therein rather than from any notions which may be entertained by the Court as to what is just or expedient . . . whenever the meaning is plain, it is not in the province of the Court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands, accordingly to the real sense of the words." (*Maxwell's Interpretation of Statutes,* 9th Ed. page 4).

The conviction is affirmed.

It is submitted that the sentence of a fine of £150 on each appellant and in default five months imprisonment is excessive. This is a first offence, and there is nothing to show that the practice complained of is common. Mr. Crompton, for the appellants, said that the whole proceedings seemed to have been clouded by an air of suspicion—suspicion that the gold was stolen.

I confess that on reading the record this impression formed itself in my mind. When the premises of the appellant, Ballab Bhai, and the person of the appellant, Jhawerilal, were searched, they were informed that the search was for stolen gold. The statement of the appellant, Jhawerilal, put in evidence as Exhibit " H " was made in answer to a charge of being unlawfully in possession of gold suspected of having been stolen, and he was cross-examined at length by the police constable who took the statement. The matter was not raised, but it seems to me to have been a little unfair to have tendered that statement as evidence on a charge of having sold and bought gold without a licence.

There is no evidence that the gold had been stolen; but there is no doubt that the suspicion was created that it had been stolen. This is indefensible.

On the question of sentence I find myself in some difficulty. Had the suspicion that the gold was stolen any affect on the mind of the learned Magistrate when he imposed sentence on the appellants for the offences of buying and selling gold without holding gold dealers' licenses?

The answer to the question is to be found, I think, in the last five paragraphs of the judgment of the learned Magistrate, who, it is relevant to remark, had, earlier in his judgment, found that there was no proof that the gold ever had been jewellery. These five paragraphs read as follows:—

" The second accused lives at Ba. In his statement he said that this gold came from Ba. He dashes into the shop of 1st accused who says that although he knows 2nd accused he has never bought gold from him before and who, although he says he must first weigh the gold, accepts this unweighed gold and pays for it. This hardly looks like an ordinary transaction as between Indian jewellers.

Then there are the exceedingly large number of Nitric Acid jars. The failure to attempt to prove 2nd accused's story as to how he got the jewellery.

The behaviour of 1st accused denying he bought the gold. If it was an honest transaction why deny it? His ommission to enter the purchase in his jeweller's book although entered in his other book.

All these point to a shady transaction. In fact it all shows that these two men are not a pair of innocent persons who have unwittingly infringed the law, but a pair of rogues.

I find that there was a buying and selling of gold between the two accused and that neither being the holder of a gold dealer's licence they both committed an offence against section 129 (1), Cap. 127, and I find them both guilty."

The remark: " The failure to attempt to prove 2nd accused's story as to how he got the jewellery " in the second paragraph of the exerpt would seem to suggest that this accused was expected to have cleared himself of the suspicion that the gold was wrongfully in his possession (a matter irrelevant to the charge) and that he had not done so.

in the case of *R. v. John James Quinn* 23 Cr. App. R. at page 196, Swift, J. said in the course of his judgment on an application for leave to appeal: " In our view, it is not the function of a court which has to pass sentence for a particular offence of which a man has been found guilty to add to that sentence some further term of imprisonment for the commission of a supposed offence of perjury with which the prisoner has not been charged and of which there has been no proof and of which the jury has not found him guilty."

When the same matter came before the Court of Appeal the Lord Chief Justice said in the course of the judgment of the Court of Appeal: " . . . it appears to this Court to be clear that some part of this sentence is to be attributed to the fact that, in view of the Deputy Chairman, the appellant had given false evidence. . . . In our opinion it is not correct to increase a sentence on that ground. That is, in effect, to find the prisoner guilty of perjury without a charge and without a trial, and to punish him for that offence."

Applying these principles to the present case can it be said that some part of the sentence was to be attributed to the fact that the gold was suspected to have been stolen ? In my view, the answer to this is in the affirmative.

What then is an appropriate sentence for this offence of dealing in gold without a licence? There is an absolute prohibition against such dealing or trafficking in gold, and the maximum penalty is a heavy one. There is, however, no evidence that this practice is common and this is a first offence.

The sentence imposed on each appellant by the Court below is set aside and substituted by a fine of £50 against each appellant and in default of payment each appellant is ordered to be imprisoned for 2 months.