JAMAICA

IN THE COURT OF APPEAL

CRIMINAL APPEAL Nos. 94 & 96 of 1970

BEFORE: The Hon. Mr. Justice Luckhoo, Presiding
The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Hercules, J.A. (Ag.)

R. v. JUNIOR HINES AND PAUL KING

Hugh Small and R. Small for the appellant Hines.
H. DeLisser for the appellant King.
S. Panton for the Crown.

July 28, 29, 30, September 24, 1971

LUCKHOO J.A.

On July 30, 1971, we allowed the appeal of Hines, quashing his convictions and setting aside the sentences imposed on him and dismissed the appeal of King, affirming his convictions and sentences and directing that the sentences should run from April 29, 1971. We now give our reasons for so doing.

The appellants were tried in the Home Circuit Court on an indictment containing three counts. The first count charged them jointly with assaulting John Haughton on January 3, 1969. The second count charged them jointly with robbing John Haughton with aggravation on the same date and the third count charged them jointly with malicious damage on the same date to a motor bus, the property of the Jamaica Omnibus Services, Ltd. to an extent exceeding £5. They were acquitted on the second count but were both convicted on the first and third counts.

Briefly put the evidence for the prosecution was to the effect that Haughton, the driver of a J.O.S. bus, drove his bus to the terminus at Mars Drive in Harbour View where the passengers disembarked. Four men, including the two appellants came into the bus through the exit door. An altercation took place between Haughton and Hines when Hines demanded to be driven in the direction of Kingston and was told by Haughton to go over to the other side of the road to take a bus which would go in that

direction. Hines pushed Haughton in the face and coming off the bus took up a small metal tin and threw it at Haughton hitting him over the left eye. King then asked Haughton if he wanted him to drive the bus and Haughton replied "you drive it at your own risk". King and the other two men wrestled in the bus with the conductress. Another bus came up and they all ran from Haughton's bus. Hines, King and the other two men then threw stones at Haughton's bus and as a result some glass windows on the bus were broken. Hines came to the exit door with two large stones with which he proceeded to break off the door. Hines, King and the other two men continued to throw stones at the bus. Haughton, who was still in the bus sought to make his escape but in running away was struck on the foot by a stone thrown by one of the men. Hines, King and one of the two other men held Haughton and Hines proceeded to relieve him of £5.13s.6d. which he had in his pocket, Hines overcoming the resistance Haughton was putting up by pulling a gun from his waist and using it to strike him on the hand. Hines, King and the other men then ran away.

At the close of the case for the prosecution King gave sworn testimony putting forward an alibi in his defence. On the completion of his testimony he closed his case. Hines then elected to give evidence on oath in his own defence. What transpired thereafter forms the foundation for the appeals brought by both Hines and King against their convictions and must be examined in relation to the grounds of appeal argued on their behalf. The upshot was that Hines declined to take the oath in the form prescribed by s.3 of the Oaths Law, Cap.264 as substituted by s.2 of the Oaths (Amendment) Law, 1954 (No. 43 of 1954) and the trial judge ruled that it was not competent for Hines to take the oath in the form in which he desired to take it. As Hines in answer to the trial judge declined to testify on affirmation he did not give evidence and he did not make any statement from the dock. He thereupon rested his case. Counsel proceeded to address the jury and the trial judge in his summing up after adverting to what had taken place when Hines elected to give sworn testimony in his own behalf, pointed out to the jury what was put by way of cross-examination by counsel for Hines as indicating the nature of his defence - that though he boarded the bus (alone and not in company with any other person) he did not take part in any attack on Haughton or on the bus.

The appeal of Hines turns on the question whether the learned trial judge was in error in refusing to permit Hines to take the oath in the form which Hines indicated to the trial judge would be binding on his conscience.

Hines is a member of a religious sect known as Rastafarians. The members of that sect regard the Emperor of Ethiopia (referred to by the sect as Rastafari) as their living God, the returned Messiah and representative of God the Father on earth, and they do so despite the fact that the Emperor has not been known to claim any divine powers. When Hines elected to give evidence on oath, much to the trial judge's and to his counsel's surprise he declined to take the oath in the form usually administered to witnesses - "I swear by Almighty God that ....." - but instead wished to take the oath in the form - "I swear by Almighty God, King Rastafari ....." As transpired later the trial judge seemed to think that an oath could only be taken lawfully by a witness in the form, namely, "I swear by Almighty God that ....." prescribed by s.3 of the Oaths Law, Cap. 264 as substituted by s.2 of the Oaths (Amendment) Law, 1954 (No. 43 of 1954). He adjourned the further hearing to the following day. On the resumption of the trial counsel for Hines informed the trial judge that in the interval he had taken instructions from his client and that his instructions were that Hines "does not in all consciousness feel that the prescribed form of oath is binding on his conscience in accordance with his religious persuasion and that he would not wish to give sworn evidence if he was obliged to do so under the prescribed oath." Counsel then gave the trial judge as indeed he has given us the benefit of his researches into the law relating to the taking of oaths by witnesses and concluded by submitting that, upon the authority of R. v. Clark (1962) 1 W.L.R. 180, it was the duty of the court to ascertain from Hines what form of oath he considers to be binding on his conscience and to permit him to take the oath in that form. Reference was also made to the provisions of s.21(5) of the Constitution of Jamaica which enact -

> " (5) No person shall be compelled to take any oath which is contrary to his religion or belief or to take any oath in a manner which is contrary to his religion or belief. "

The learned trial judge thereupon ascertained from Hines that he would not take the oath in the "prescribed" form and would not affirm and that the only

form of oath he would take "bearing on my conscience" would be by reference to "I God" Rastafari. Hines had endeavoured to explain the reason for this stand in the following words -

> "I do not want to make any alteration or legislate any law in this European Court or this court-room. This thing is this, as I referred to you before, according to the ancient council of the ancient dread, according to the order of Melchisedech which has neither beginning nor ending of days, who worship the true and living God that sits on the throne of David, and being at the very first instance refused to be accepted, I think I will not on any occasion proceed in taking any oath for I explain why."

It would appear that the words "the true and living God that sits on the throne of David" in the passage just recited is a reference to the Emperor of Ethiopia who was known in that country as Ras Tafari prior to his accession to the throne, the Emperor like David and succeeding Kings who sat on that throne being, in the belief members of the Rastafarian sect, representatives of God the Father. This incidentally is comparable to the belief held by Sikhs who regard the founder of their religion Wahi Guru and each succeeding Guru as the representative of the Omnipotent on earth. The learned trial judge, thus apprised of the fact that Hines did believe in a Deity albeit one in human form, declined to permit Hines to take the oath in the form in which Hines wished to do so adding that as far as he was aware that form of oath was not lawful.

Section 3 of the Oaths Law, Cap. 264 as substituted by s.2 of the Oaths (Amendment) Law, 1954 (No. 43 of 1954) provides as follows:

> "(1) Any oath may be administered and taken in the form and manner following, that is to say, the person taking the oath shall hold the Bible in his uplifted hand, and shall say or repeat after the officer administering the oath the words -
>
> "I swear by Almighty God that ....."
>
> followed by the words of the oath prescribed by law.
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> (2) The officer shall (unless the person about to take the oath voluntarily objects thereto or is physically incapable of so taking the oath) administer the oath in the form and manner aforesaid without question: Provided that, in the case of a person who is neither a Christian nor a Jew, the oath shall be administered in any manner which is now lawful."

These provisions are identical with those contained in s.2 of the Oaths Act, 1909 (9 Edw.7, c.39) enacted in England save that in sub-s. (1) of the latter the words "shall hold the New Testament, or in the case of a Jew, the Old Testament," appear where the words "shall hold the Bible" appear in the local counterpart. The only difference therefore between these enactments is as to the manner of taking the oath. In England the New Testament will be handed the witness or if he is a Jew the Old Testament whereas in Jamaica the Bible will be handed the witness whether a Jew or not. The Oaths Law, Cap. 254 as amended in 1954 also provides that where an oath has been duly administered and taken, the fact that the person to whom the same was administered had, at the time of administering such oath, no religious belief, shall not for any purpose affect the validity of such an oath. (s. 4). A similar provision appears in s.3 of the Oaths Act, 1888, enacted in England. The remainder of the provisions of the Jamaica enactment are identical with those contained in s.1 (as amended by s.17 of the Perjury Act, 1911), ss. 2 and 5 of the Oaths Act, 1888 and relate respectively to the substitution of affirmation for oaths in certain cases, the form of every such affirmation and the administration of an oath in the Scotch Form. It will therefore be seen that so far as these statutory enactments go the position in England and in Jamaica in relation to the administration and taking of an oath or making an affirmation (apart from the difference already noted which is not germane to the issue in this case) appears to be the same. The first question to be determined is this - is the form and manner prescribed by s.3 of the Oaths Law, Cap. 264 (s.2 of the English Oaths Act, 1909) for the administration and taking of an oath compulsory or permissive? That was a question which had to be decided by the English Court of Criminal Appeal in R. v. Frank Palm (1910) 4 Cr. App. R. 201, where the witnesses appear to have been sworn in the old form and not in accordance with the form prescribed by s.2 of the Oaths Act, 1909 which had then only recently been enacted. Lord Alverstone, C.J., had no difficulty in holding that the provisions of s.2 of the Oaths Acts, 1909, were permissive only and not compulsory.

He said (at p. 202) :

> "The Act does not say that the old oath is an illegal one. It says that persons shall not be sworn in the old way unless they voluntarily ask to be so sworn."

It follows therefore that Christians and Jews may lawfully be sworn in any manner which was lawful before the enactment of the Oaths Act, 1909 (The Oaths Laws, Cap. 264 in Jamaica) provided they voluntarily object to being sworn in the form and manner therein prescribed while persons who are neither Christians nor Jews may in any event be sworn in any manner which was lawful before the enactment of the above-mentioned laws.

The next question to be determined is - what was lawful in relation to the form and the manner of administration and taking of an oath before the enactment in 1954 of what is now s.3 of the Oaths Law? Instead of going step by step backwards chronologically it might be more convenient to trace the development of this aspect of the law by starting from the position of witnesses under the common law. If justification be needed for endeavouring to ascertain the state of the common law in this regard it will be remembered that though a conquered colony, Jamaica is, for the reasons given in Jacquet v. Edwards (1867) 1 Stephens Repts. 414, to be treated as a settled colony on the British taking over the Island in 1655. Now at that time there was some doubt in England whether any but Christians could lawfully be sworn as witnesses. This doubt was finally resolved in Omichund v. Barker (1774) 1 Atk. 21, when it was held that a person professing the Gentoo religion could give evidence on oath. The importance of the decision in that case is that it established that once a witness has been shown to have a religious belief the mode of administering the oath may be adapted to the special religious belief of the witness it being in accordance with the "wisdom of all nations to administer such oaths as are agreeable to the notion of the person taking" the same "and does not at all affect the conscience of the person administering, nor does it in any respect adopt such religion; it is not so much a breaking in upon the rule of law, as admitting a person to be an evidence in his own cause ..." per Lord Hardwicke, L.C. (at p. 50) citing Lord Stair, Puffendorf, etc. The important thing was that the oath must be such as the witness considered to be binding on his conscience. Having regard to the multitude of different religious beliefs which exist in this world it is but to be expected that an oath under the common law would take one of very many forms. A Sikh for instance might swear on the Granth in the following form -

"I swear by our Wahi Guru the founder of the Sikh religion, that the evidence I shall give, shall be the truth, the whole truth, and nothing but the truth."

A Sikh might swear by the founder of his religion. The appellant Hines, a Rastafarian, wished to be sworn by his "Almighty God, King Rastafari."

Such was the state of the common law in England and in Jamaica on this subject when in 1828 Quakers and Moravians in Jamaica were allowed to affirm instead of taking an oath in criminal cases. It will be recalled that in 1833 and 1838 there were enactments in England (not limited to criminal cases) allowing Quakers and Moravians or former Quakers and former Moravians to affirm in a prescribed form instead of taking an oath. In 1872, by Law No. 41 of that year, a witness in the Supreme Court of Jamaica was allowed to affirm instead of taking an oath if he had no religious belief or if objected to as incompetent to take an oath. In 1877 a witness was permitted tc affirm in any Court of Justice in Jamaica on similar grounds if the presiding judge or other officer was satisfied that the taking of an oath had no binding effect on the witness' conscience. Then by the Oaths Law 1889 (No.1 of 1889) there were enacted in Jamaica the provisions which in England had been enacted by the Oaths Act, 1888. The 1889 Jamaica Law was later reproduced in Cap. 264 in the 1953 Edition of the Laws of Jamaica and as already mentioned was amended in 1954 in which form it embraced the provisions of the 1888 and 1909 English Acts. It will therefore be seen that the law in Jamaica relating to the administration and taking of oaths immediately before the enactment of 1954 in Jamaica (the present statutory provisions) was in all respects that which obtained in England immediately before the 1909 Act was passed. There is nothing in the enactments which have been traced - English or Jamaican - which would have the effect of rendering invalid an oath administered or taken in a form and manner permissible under the common law.

It is interesting to find as appears in a note under the Caption "Unusual Oaths" in (1944) 17 A.L.J.372, that in England in 1943 at Clerkenwell County Court a man claiming to be king of Poland swore by Apollo to give true evidence. It would seem from this reference that had Hines endeavoured to take an oath in that court in the manner he sought to do in Jamaica declaring as he did here that he objected to take an oath

in in the prescribed form, and that the form of oath he wished to take would be binding on his conscience, there would have been no objection offered to his doing so.

It was urged by Mr. Panton for the Crown that an oath cannot properly be taken swearing by a human being such as the Emperor of Ethiopia undoubtedly is and what is more swearing by a person who is yet alive. However, once it is borne in mind that the whole object of administering an oath is to bind the conscience of the person taking it then it matters not that it involves an appeal to a human, dead or alive.

As Lord Hardwicke, L.C. (citing Lord Stair, Puffendorf, etc.) observed in Omichund v. Barker (1744) 1 Atk. at p.50 the administration of an oath to a witness who professes a religious belief in the form the witness declares to be binding on his conscience does not in any respect adopt such religion and it is interesting to observe that in the course of the opinion delivered by Parker, C.B. in the same case stating (at p.42) that "it is plain by the policy of all countries, oaths are to be administered to all persons according to their own opinion, and as it most affects their conscience" the Chief Baron added that "laying the hand was borrowed from the pagans." Lord Willes, C.J. in his opinion in the same case said (at p.45) "There can be no evidence admitted without oath, it would be absurd for him to swear according to the Christian oath, which he does not believe; and therefore, out of necessity, he must be allowed to swear according to his own notion of an oath ...". He had observed (at p.44) that oaths are not of Christian institution but are as old as creation. He further observed (p.45): "there is nothing in the argument that as Christianity is the law of England, no other oath is consistent with it."

There is but one qualification to be made and it is this - and we adopt the phraseology of a similar qualification made in India by s.8 of the Indian Oaths Act, 1873, - that no oath must be repugnant to justice or to decency, nor must it purport to affect any third person. Section 8 of the Indian Oaths Act, 1873 provided as follows:-

> "If any party to, or witness in, any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the race or persuasion to which he belongs, and not

repugnant to justice or decency, and not purporting to affect any third person, the Court may, if it thinks fit, notwithstanding anything hereinbefore contained, tender such oath or affirmation to him."

That provision fell to be considered by the Privy Council in the case of Lala Indar Prasad and anor. v. Lala Jagmohan Das and anor. (1927) 43 T.L.R. 536, where the evidence of one of the witnesses, a Hindu, given before the family deity Lachmi Narsinghi though without invocation to the deity was binding by reason of the provisions of that enactment (s.8). The Privy Council (at pp. 540, 541) was of the opinion that the Indian view established long before the 1873 Act, and embodied afresh in that Act, had come to be that which may be taken from the words of Lord Hardwicke, L.C. in Omichund v. Barker to which reference has already been made. Before reaching that conclusion Lord Blanesburgh in delivering their Lordships opinion said (at p.540):-

"Upon the point of construction the cardinal consideration to note is that the "oath or solemn affirmation" referred to in section 8 and following sections is something quite distinct from the oaths and affirmations referred to in section 5. These are to be in such form as the High Court shall prescribe (section 7)."

Section 5 of the Indian enactment corresponds to s.3(1) of the Jamaica enactment.

Lord Blanesburgh continuing said:

"With regard to the oath or solemn affirmation referred to in section 8, however, all that is said is that it may be 'in any form common amongst, or held binding by, persons of the race or persuasion to which (the deponent) belongs, and not repugnant to justice or decency.' That is to say, it may be as infinite alike in form and content as racial custom or the dictates of any religious persuasion may, within the prescribed limits, sanction or require. But from its very nature and essence it can never be in any part of it dependent upon the direction or dictation of the High Court or of any other extra-racial or secular administrative authority. It would or might at once lose its essential distinctive sanction if any such outside interference were permitted to have effect. And this brings their Lordships to the second matter which it is necessary to note in the construction of these sections. There is no suggestion in either section 8,9, or 10 that when the separate 'oath or

> solemn affirmation' is permitted the ordinary oath or affirmation, as prescribed, or any part of it, is to be administered as well. The 'oath or solemn affirmation' when permitted is a complete substitute for the other. There is in the sections no warrant for the suggestion that any part of a procedure which, be it remembered, is only appropriate where it is gone through before any evidence at all is given, and is designed to cover that evidence when given, is to be transferred to a taking of evidence which, as in the present case, is solemnised only by its being given and while it is given in the actual presence and hearing of the deity himself."

None of the qualifications (as to justice or decency) contained in the Indian Oaths Act, 1879 apply to the form of oath Hines wished to take. However misguided one may think Hines to be in his professed belief as a member of the Rastafarian sect that the Emperor of Ethiopia is a Divine Being the fact remains that such is his professed belief and indeed the professed belief of the sect to which he belongs. The form in which Hines wished to take the oath was consistent with that professed belief and declared by him to be binding on his conscience and on so taking the oath he would have become subject to the provisions of the Perjury Law, Cap. 289, for s.3 of Cap. 289 provides as follows:

> " 3. For the purposes of this Law, the forms and ceremonies used in administering an oath are immaterial, if the Court or person before whom the oath is taken has power to administer an oath for the purpose of verifying the statement in question, and if the oath has been administered in a form and with ceremonies which the person taking the oath has accepted without objection, or has declared to be binding on him."

This is the local counterpart of s.15(1) of the English Perjury Act, 1911. It follows that Hines was wrongly deprived of making his defence to the charges laid against him and his convictions and sentences cannot stand and must be set aside. Before leaving Hines' case it ought to be noticed that the trial judge was also in error in enquiring of Hines whether he wished to affirm. Once a witness does not object to the taking of an oath on the ground that he has no religious belief or that an oath is contrary to his religious belief he is not to be permitted to affirm.

In so far as the appellant King is concerned, complaint has been made that by wrongly depriving Hines of testifying on oath in his own defence, King was deprived of testimony which might have resulted in his acquittal. Mr. DeLisser urged on King's behalf that had Hines been allowed to give sworn testimony, that testimony would have been evidence in the case in relation to both appellants and might have resulted in the jury taking a different view of the case against King. The short answer to that contention is that King was not deprived of any legal right to adduce evidence in the course of making his defence. King did not call Hines as a witness in his defence, Hines being a competent but not compellable witness if called for the defence, and he closed his case after testifying on oath in his own defence. Thereafter, it was open to Hines to take any of three courses - to testify on oath, to make an unsworn statement or to remain silent. The latter two courses if adopted by Hines would have availed King nothing and the first might or might not have resulted in strengthening the case for the prosecution against King. At that stage the choice was Hines' and King had no more right to control that choice than he had to control the prosecution's choice to call as a witness a person whose testimony King might think would be of some assistance to his defence. It should perhaps be mentioned that all of the evidence adduced in the case was admissible as against King even if he alone had been on trial. It was also urged on behalf of King that if Hines' convictions be quashed King's convictions cannot stand. Here Hines and King were principal and aider and abettor indicted together as principals in the misdemeanours charged but although the principal is acquitted the abettor may be convicted (see R. v. Burton (1875) 13 Cox. 71, C.C.R.).

For these reasons we dismissed King's appeal against his convictions.

As regards sentence it was submitted that the sentences of 6 months imprisonment at hard labour for assault and 18 months at hard labour for malicious damage to property were manifestly excessive. We do not take that view.

In the result we allowed the appeal of Hines, quashed the convictions and set aside the sentences imposed in relation thereto, and we dismissed the appeal of King, affirming both convictions and sentences.