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ATTORNEY-GENERAL

v.

MARIAPPAN GOUNDER

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[SUPREME COURT, 1967 (Mills-Owens C.J.)), 15th May, 30th June]

Appellate Jurisdiction

Criminal law—perjury—no offence created by ss.(2) of s.106 of Penal Code—affidavit of service of notice to attend court—Penal Code (Cap. 8) ss.106(1) (2), 107—Criminal
C *Procedure Code (Cap. 9) s.81—Perjury Act 1911 (1 & 2 Geo. 5, c.6) (Imperial) ss.1, 1(2), 1(3)—Larceny Act 1916(6 & 7 Geo. 5, c.50) (Imperial).*

Criminal law—sentence—perjury—police officer in course of official duties—appropriate sentence.

Subsection (2) of section 106 of the Penal Code does not of itself create an offence but operates to extend the ambit of subsection (1); therefore
D the respondent was rightly acquitted upon a charge of swearing a false affidavit contrary to subsection (2).

Raj Moti Lal v. Reginam (1967) 13 F.L.R. 1, followed.

Upon the conviction of a police officer for perjury commited in the course of his official duties the overriding consideration as regards sentence must be that of the integrity of the police force, and such a conviction
E must inevitably, in the absence of exceptional redeeming features, attract a sentence of imprisonment.

Cases referred to: *Budh Ram v. R.* (Supreme Court Criminal Appeal No. 30 of 1966 — unreported) — *R. v. Sabini* (1941) 5 J. of Cr. Law.

Appeals by the Crown against a sentence imposed in the Magistrate's Court (on the first count) and the acquittal of the respondent (on the
F second count). The judgment is reported only in relation to these two appeals and not to a cross appeal by the respondent against his conviction on the first count, which was dismissed.

B. A. Palmer for the appellant.

K. C. Ramrakha for the respondent.

G The relevant facts sufficiently appear from the portions of the judgment appearing below.

MILLS-OWENS C.J. : [30th June, 1967]—

The respondent (appellant in the cross-appeal), a police constable of some two years' standing, 'booked' one Mrs. Murray for an alleged minor traffic offence on the 19th September 1966. Thereupon a notice
H to attend Court was prepared in the prescribed form under section 81 of the Criminal Procedure Code for service on Mrs. Murray. This appeal is concerned with the question whether the respondent was properly convicted of perjury in swearing that the notice was served on Mrs. Murray. It is an undisputed fact that the respondent signed and swore

to the form of affidavit of service appearing on the reverse of the notice. The affidavit purported to have been sworn before a Mr. Singh in his capacity of a Justice of the Peace, and it purports to depose to service of the notice on the 28th September 1966. When the traffic case came on for hearing on the 11th October 1966, Mrs. Murray was not present; the presiding Magistrate was not satisfied, on a perusal of the affidavit, that the notice to attend Court had been duly served on her and adjourned the case to the 25th October. At the adjourned hearing on the 25th October Mrs. Murray was again absent; the respondent was called as a witness and, as it is alleged, then gave oral evidence to the effect that he had served the notice on Mrs. Murray on the 28th September and he identified the affidavit. The presiding Magistrate thereupon imposed a fine on Mrs. Murray. In November a police officer interviewed Mrs. Murray concerning non-payment of the fine. She claimed never to have been served with any notice or summons to attend Court and accordingly the matter became the subject of investigation. In the result the respondent was charged with two offences: (1) committing perjury in his oral testimony at the hearing of the 25th October, contrary to section 106(1) of the Penal Code; (2) swearing a false affidavit, contrary to section 106(2). He was convicted on the first count, and fined £50 with £10 costs; on the second count he was acquitted, on the ground that section 106 does not apply to an affidavit of service sworn before a Justice of the Peace.

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The Crown appeals against the sentence on the first count and against the acquittal on the second count. The respondent cross-appeals against his conviction on the first count.

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It follows that the appeal against conviction on the first count is dismissed. The Crown appeals against the sentence on that count of a fine of £50 with £10 costs and a binding over in the sum of £50 for 12 months. Mr. Palmer submits that the only proper sentence in the case of perjury by a police officer in relation to judicial proceedings is one of imprisonment. Mr. Ramrakha referred to the youth of the respondent (he is aged 22 years), the lack of any motive, of gain or otherwise, the minor nature of the traffic offence in question and the fact that Mrs. Murray would probably have pleaded guilty anyway, the stupidity of the offence, and the already serious consequences to the respondent of a conviction for perjury. I certainly take those matters into account, but the over-riding consideration must be that of the integrity of the Police Force. Perjury committed by a police officer in the course of his official duties must, in my view, inevitably attract a sentence of imprisonment in the absence of exceptional redeeming features. I see no such features in this case and therefore substitute for the sentence passed by the Magistrate a sentence of 6 months' imprisonment.

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The Crown also appeals against the acquittal on the second count, which relates to the affidavit of service. The Magistrate acquitted on this count in reliance on a previous judgment of my own the effect of which was that subsection (2) of section 106 of the Penal Code does not create an offence in itself but is intended to extend the operation of subsection (1) of the section. The section reads as follows —

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"106. (1) Any person lawufully sworn as a witness or as an interpreter in a judicial proceeding who wilfully makes a statement

material in that proceedings which he knows to be false or does not believe to be true is guilty of the misdemeanour termed perjury, and is liable to imprisonment for seven years.

(2) Where a statement made for the purpose of a judicial proceeding is not made before the tribunal itself but is made on oath before a person authorized by law to administer an oath to the person who makes the statement and to record or authenticate the statement it shall, for the purposes of this section, be treated as having been made in a judicial proceeding.

(3) The question whether a statement on which perjury is assigned was material is a question of law to be determined by the court of trial."

The section is obviously taken from section 1 of the Perjury Act, 1911. It may be noted that "judicial proceeding" is defined earlier in the Penal Code, in terms corresponding with section 1 (2) of the Act. Prior to that Act perjury was an indictable misdemeanour at common law, and a number of statutes had made punishable the giving of false evidence or making of false statements in certain circumstances. The Act was passed to consolidate and simplify the law of perjury; therefore, as it appears to me, the earlier cases are not necessarily to be regarded as authoritative in any matter of construction of the Act; so it has been held in the case of the Larceny Act, 1916. In the previous case which came before me Raj Moti Lal v. Regnam (1967) 13 F.L.R.1, the charges related to affidavits sworn before a Commissioner for Oaths for the purpose of civil proceedings, affidavits intended to have a judgment by default set aside and to obtain leave to defend the action on the merits. I then said —

"Obviously there is no such thing as an offence contrary to subsection (2); that subsection merely extends the operation of subsection (1). This in itself might not, however, be regarded as a very serious matter. What is abundantly clear is that the section relates only to perjury committed by a person lawfully sworn as a witness or interpreter, and that it must be perjury committed in a judicial proceeding. The object of subsection (2), quite clearly, is to extend the provisions of subsection (1) to a statement made, by a witness, for the purpose of a judicial proceeding before some person other than the tribunal itself. The obvious case is where the statement in question is made in the course of evidence taken on commission (that is, where evidence is taken out of Court before an examiner or commissioner). The two affidavits were sworn before Mr. Whippy merely in his capacity as a Commissioner for Oaths that is as a person authorised to attest the signature of the deponent. It is quite clearly not the fact the Mr. Whippy was, in this case, in the terms of subsection (2), a person authorised to reord or authenticate the statements made by the appellant in those affidavits. A Commissioner for Oaths does not, as such, record or authenticate statements, although he may of course be specially appointed as an examiner or commissioner to take the evidence of a witness, as, for example, for the purpose of proceedings abroad. And by no stretch of imagination could the appellant be said to be making any statement as a "person lawfully sworn as a witness". The affidavits were made by him, unequivocally, in the capacity of a party to the suit, namely as the defendant; he was not giving evidence as a witness; he had never been sworn as a witness; the civil proceedings had not yet reached the stage at which the evidence of witnesses was required

to the given; the action never came to trial because it was discovered that the 'debt' was unenforceable. It follows that the prosecution was brought under a section which has no application to the case, and it is too late to alter the charges. The Crown make no application for a verdict to be substituted under the terms of any other relevant section of the Penal Code so that it is unnecessary for me to enter upon the question whether there was some minor offence in respect of which a verdict could be substituted. It is sufficient to say that prima facie the offence of making a false statement in an affidavit is not an offence which can be regarded as a minor offence where the alleged major offence is the making of false statements as a witness in a judicial proceeding; section 106 and section 107 (which relates to false statements on oath made otherwise than in a judicial proceeding) appear quite clearly to deal with entirely different sets of circumstances."

Mr. Palmer now draws my attention to the case of Criminal Appeal No. 30 of 1966* in which case the appellant was convicted under section 106 of perjury on (inter alia) two counts of false swearing of affidavits of service of judgment summonses. However, in that appeal the appellant appeared in person and there was no legal argument; he merely pleaded that the prosecution witnesses had lied. Mr. Palmer also referred to the case of *R. v. Sabini* a note of which appears in Volume 5 of the Criminal Law Journal (1941). That was a case of perjury committed in an affidavit sworn before a Commissioner for Oaths and filed for the purpose of a habeas corpus application. The note states — but, for the purposes of the indictment it (the affidavit) was treated as having been made in the judicial proceeding in the High Court for which it was intended, in accordance with the provision made by section 1, subsection 3 of the Perjury Act , 1911". Sabini was convicted before the Recorder of London, but no argument appears to have arisen on the propriety of the indictment. Moreover, the affidavit in that case formed the testimony on which the order nisi was made. So far as I am aware there is no other authority on the point decided after the coming into force of the Perjury Act. I remain of the opinion that subsection (2) of section 106 of the Penal Code does not itself create an offence; it operates to extend the ambit of subsection (1); that clearly appears from the use of the words "for the purposes of this section" in subsection (2). There are, of course, a variety of circumstances in which evidence is given not before the court or tribunal itself but before another person — for example, before an official referee or a special referee on a reference by the Court, before the registrar or a master on the assessment of damages following an interlocutory judgment, before a special examiner, an examiner of the Court, or on commission. It was therefore necessary for the law to provide that statements made before such persons should be regarded as made before the court or tribunal itself; that, in my view, is what subsection (2) was intended to do. Viewed in that light the words "and to record or authenticate the statement" become intelligible. Those words are not used in section 107 in dealing with affidavits; if section 106(2) extends to affidavits of service the words quoted would be equally necessary in section 107; if they are not necessary in relation to such affidavits why do they appear in section 106(2). If section 106(2) is intended, as I think must be the case without doubt, to extend the ambit of subsection (1), then

* The reference is to Budh Ram v. Reginam unreported.

it is a necessary ingredient of an offence under the section that the person charged should be a "witness or interpreter"; subsection (1) says so. A It would be a misuse of language to refer to a process-server as a witness. His affidavit of service forms no part of the record and has no bearing on the issues to be determined; it forms no part of the testimony in the judicial proceedings. In contrast, the words "and to record or authenticate" are precisely applicable to the case of a commissioner, referee, master, examiner etc. In contrast also, in the case of, e.g. an affidavit of B service, all that it was considered necessary to provide was that the deponent be "lawfully sworn" which is what section 107 does.

Accordingly I uphold the acquittal on the second count. I should mention that the learned Solicitor-General desired, if I was so minded, that the matter of the interpretation of section 106(2) of the Penal Code be referred to the Court of Appeal pursuant to section 30A of the Court of Appeal Ordinance. It is unnecessary to do so in the present circum- C stances. The Crown may always prefer alternative counts under sections 106 and 107 and no doubt a more appropriate occasion will arise for taking the opinion of the Court of Appeal on the point raised on section 106(2).

Appeal against sentence allowed.

Appeal against acquittal dismissed.