IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

Criminal Appeal No. 5 of 1959

Between:

HARI NARAYAN SINGH — Appellant

AND

REGINA — Respondent

Sale of liquor without a licence authorizing sale—s. 48 Liquor Ordinance (Cap. 209)—witness called after close of prosecution case to prove no licence—prior submission of "no case"—onus of proof as to licence—whether purchaser of liquor an accomplice.

Held.—(1) The trial court had a discretion to call a witness after the close of the prosecution case.

(2) The discretion was exercised judicially and could be exercised after a submission that there was no case to answer.

(3) The onus of proof that he had a licence authorizing him to sell the liquor was on the accused.

(4) An innocent purchaser of liquor from a person who has no licence to sell is not an accomplice in the offence of selling.

(5) *Ellis Work ats Police,* 3 F.L.R., 264 should not be followed.

Appeal dismissed.

Cases cited:—

Ellis Work ats Police, 3. F.L.R., 264 ; *Davies v. D.P.P.,* (1954) 1 All E.R., 507 ; *Bechu ats Police,* 3 F.L.R., 374 ; *Jenks v. Turpin* (1884) 13 Q.B.D., 505 ; *Ah Ben ats Police,* 3 F.L.R., 272 ; *R. v. Mulji Bhanji,* 14 E.A.C.A., 108 ; *Chang Wah Bew ats Police,* 3 F.L.R., 267 ; *R. v. Mohammed Sharif Dossa,* 13 E.A.C.A., 100 ; *R. v. Oliver,* (1943) 2 All E.R., 800 ; *Kariuki v. Reginam,* 21 E.A.C.A., 203 ; *re Dora Harris,* 20 Cr. App. R. 86 ; *R. v. Day,* (1940) 1 All E.R., 402 ; *Middleton v. Rowlett,* (1954) 2 All E.R., 277 ; *re John McKenna,* (1956) 40 Cr. App. R., 65.

S. M. Koya for the appellant.

J. F. W. Judge, Crown Counsel, for the respondent.

LOWE, C.J. [29th January, 1959]—

The appellant was convicted of the offence of selling liquor without a licence contrary to section 48 of the Liquor Ordinance, Cap. 209. The evidence disclosed that one Jolame Jale went to the service station of the appellant and there purchased one dozen cans of beer at a cost of 2/6 per can. He went subsequently to the station but, as he said, he was then "caught by the Police". He told the Police of his first purchase and action was taken against the appellant. It was disclosed in evidence at the trial that, over a period, the appellant had bought considerable quantities of beer and other intoxicating liquor from various sources and much was found on the premises.

After the prosecution's case had closed, Mr. Koya for the appellant argued that there was no case to answer as the prosecution had not proved that the appellant had no licence to sell the liquor. The trial court thought that it could take judicial notice of the fact that no licence had been issued to the appellant, as the Magistrate was himself the licensing authority. No such judicial notice could have been taken for various reasons, and particularly as, in normal circumstances, affirmative evidence would be needed to identify the licensee with the person accused who would require an opportunity to cross-examine. In any event, the learned Magistrate decided that a witness could be called to prove that no licence was, in fact, issued to the appellant authorizing the sale of intoxicating liquor by him, and this was done. Although the learned Magistrate said that the prosecution may call a witness to prove that there was no such licence, it seems to be apparent that he was called either by or at the instigation of the court itself.

The appellant elected to give no evidence and his conviction followed.

The main grounds of appeal are as follows:—

(a) That the witness Jolame Jale was an accomplice within the meaning of the word defined in *Davies v. Director of Public Prosecutions* (1954) 1 All E. R., 507 and your petitioner submits that the learned Magistrate erred in law in acting on his uncorroborated testimony and without expressly warning himself that it was dangerous to convict your petitioner on such evidence. Consequently there has been a substantial miscarriage of justice.

(b) That inasmuch as there was no evidence adduced by the prosecution before the close of its case to show that your petitioner did not hold a licence to sell liquor, the learned Magistrate erred in law in ruling that there was a case to answer. Your petitioner submits that in accordance with the decision of *Police v. Ah Ben* reported in 3 Fiji Law Reports at page 272 such evidence was essential as part of prosecution's case and the learned Magistrate ought to have acquitted your petitioner in accordance with section 200 of the Criminal Procedure Code, Cap. 9.

(c) That the learned Magistrate erred in law in calling Constable Jagnandan to give evidence after the close of the prosecution's case and after the submission of the defence Counsel to show that your petitioner did not hold a licence to sell liquor.

Learned Counsel for the appellant argued that as there was no corroboration of the evidence of Jolame Jale (as, he considered, would normally be required in the circumstances) the conviction was unsound and should be quashed.

He called in aid the case of *Ellis Work ats Police,* 3 F.L.R., 264. The facts in that case are almost the same as the facts in the instant case. With respect, I do not consider that that case was correctly decided and it should not, in the future, be followed. The learned Appellate Judge found that there was no corroboration in the case but, in fact, the brief report seems to indicate that there was. He found also that the mere fact of the purchase of beer from the appellant made the purchaser an accomplice. This, of course, is not so because the purchaser was not participating in the commission of the offence of selling liquor without a licence with which that appellant was charged ; he was, perhaps, unwittingly assisting that appellant in the commission of the offence by buying beer from him. Counsel referred also to the well known case of *Davies v. The Director of Public Prosecutions,*

(1954) 1 All E.R., 507. In that case it was held that in a criminal trial, where a person who was an accomplice gave evidence on behalf of the prosecution, it was the duty of the Judge to warn the jury that, although they might convict on his evidence, it was dangerous to do so unless it was corroborated, and where the Judge failed to do so the conviction would be quashed, even if, in fact, there was ample corroboration of the evidence of the accomplice, unless there had been no injustice to the accused person. Counsel overlooked the fact that the judgment went on:

> " A person called as a witness for the prosecution was to be treated as an accomplice if he was *particeps criminis* in respect of the actual crime charged in the case of a felony."

In the case of *Bechu ats Police,* 3 F.L.R., 374, the question was whether or not corroboration of the evidence given by a certain witness was necessary. It was held that that witness " was not assisting the appellant in conducting the business of the supply of liquor (which was the basis of the charge) and hence appeared to come within the rule in *Jenks v. Turpin,* (1884) 13 Q.B.D., 505, and thus would not require corroboration." Jenks' case, which is of interest to those who find themselves concerned with offences relating to gambling or common gaming houses, decided that persons playing an unlawful game in a club, were not assisting in the conduct of the establishment even although by so playing they might have subscribed to the profits of the common gaming house.

In the instant case, which—of course—is not a felony, the same principle applies and it must be shown that the witness whose evidence is complained of was in fact *particeps criminis* in respect of the actual offence charged against the appellant. The witness Jolame Jale might have committed some different offence but he certainly was not guilty of an offence insofar as selling liquor without a licence was concerned as the element of *mens rea* was not present.

The case of *Ah Ben ats Police* 3 F.L.R., 272 was cited to show that it was the duty of the prosecution to call evidence that the appellant was not the holder of a licence in order to establish a *prima facie* offence. The decision in that case was based on law which has no present application in the Colony and does not assist the appellant.

As to the contention that the witness Jolame Jale was an acomplice, persuasive authority to the contrary exists in *R. v. Mulji Bhanji,* 14 E.A.C.A., 108. In that case it was held that to render a person an accomplice it was necessary to show that he was guilty of the offence charged. It was a case of selling sugar at an excessive price over and above the price fixed by law. The witness had merely bought sugar and was not concerned with the sale of it and was held, therefore, not to be an accomplice. In *R. v. Mohammed Sharif Dossa,* 13 E.A.C.A., 100, it was held also that the purchaser of a price regulated article at a price in excess of the fixed price was not an accomplice in the seller's offence of selling above the controlled price although he might have been guilty of some other offence viz., purchasing at a price above the controlled price.

In the case of *Chang Wah Bew, ats Police,* 3 F.L.R., 267, the record disclosed that the presiding Magistrate had called a witness, after the close of the case for the prosecution, in order to prove that the accused had no licence to sell liquor. It was held on appeal that the Magistrate was entitled to call the witness and had exercised his discretion judicially. So it was in the instant case.

In my opinion, it was not necessary for evidence to have been given at the instance of the court or the prosecution regarding the fact that the appellant had no licence to sell intoxicating liquor. In *R. v. Oliver*, (1943) 2 All E.R., 800, it was held that:

> " Whether the appellant had a licence was a fact peculiarly within his own knowledge and proof of the fact that he had a licence lay upon him."

This case has been cited with approval on many occasions and the law is well established. Generally speaking, the burden of proof lies upon the prosecution, but there are some facts so peculiarly within the knowledge of the accused that the prosecution is not required to give even *prima facie* evidence on the point.

There is no doubt that the prosecution might have known, or have been able to ascertain, whether or not a licence had been issued to the appellant in the instant case, prior to the commencement of the trial, but the appellant would be the first one to know whether or not he had such a licence. The allegation had been made in the charge that no licence had ever been issued to him and it was for the appellant to rebut that allegation. He did not do so and so the only possible inference was that he had no licence and was selling liquor in contravention of section 48 of the Liquor Ordinance. *R. v. Oliver* was followed in *Kariuki Kamau and Others v. Reginam*, 21 E.A.C.A., 203. In that case the charge was of being in unlawful possession of a firearm contrary to certain emergency regulations without lawful authority. Proof was given of the possession of a firearm and it was held that the onus was then upon the appellant to prove that he had lawful authority or excuse for such possession.

In any event it could be argued that section 94 of the Ordinance makes the necessary provision regarding the onus of proof. It is as follows:—

> " Any exception, exemption, proviso, excuse, or qualification whether it does or does not accompany in the same section the description of the offence in this Ordinance, may be proved by the defendant, but need not be specified or negatived in the charge or complaint, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the complainant."

Section 48, under which the appellant was charged, in its relevant portion, provides that:

> " Every person who sells any liquor without holding a licence authorizing the sale thereof, shall for the first offence, be liable to a fine not exceeding fifty pounds or to imprisonment for a period not exceeding six months, or both such fine and imprisonment. . . ."

The appellant would, of course, be exempted from the provisions of that section if he held a licence authorizing him to sell intoxicating liquor. Section 94 permits him to show that he held a licence at the material time and shows that the complainant need not bring any such proof.

The cases of *Dora Harris*, 20 Cr. App. R., 86 ; and *R. v. Day*, (1940) 1 All E.R., 402, were also cited. Both of those cases, however, refer to the calling of witnesses on behalf of the prosecution after the close of the case for the defence and not at the same stage as in the instant case. The law in the former respect is well established and although the trial Judge has a discretion to call a witness even after the close of the defence, if it is in the interests of justice to do so, it should only be done, or the prosecution should only be allowed to call a witness in such circumstances, if some matter has arisen, within the defence, *ex improviso*. Neither of the cases cited has any application in the instant case.

In *Middleton v. Rowlett,* (1954) 2 All E.R., 277, it was shown that at the close of the case for the prosecution, Counsel for the accused submitted that there was no case to answer. The prosecutor contended that the Justices were bound to allow the case for the prosecution to be re-opened so that evidence of identity might be tendered but the Justices refused to allow it. The fact that the accused in that case was the driver of a car which was alleged to have been driven dangerously, was held to be a matter of substance, also that the Justices had a discretion in the matter and as, in the circumstances, they were not bound to exercise it in favour of the prosecution, the court could not interfere. A similar position arose here and the learned Magistrate, I consider, exercised his discretion properly. The head-note in the case of *John McKenna,* (1956) 40 Cr. App. R., 65, states:

> "A judge has complete discretion whether a witness who has given evidence shall be recalled after the prosecution had closed their case and a submission that there is no case to go to the jury has been made by the defence. The Court of Criminal Appeal will not interfere with the exercise of such discretion unless it appears that thereby an injustice has resulted."

That case cited with approval *R. v. Sullivan,* 16 Cr. App. R., 121. There is, of course, no difference in the application of that principle whether a witness is called for the first time or is recalled. The learned Magistrate in the instant case was aware of those last two cases and applied his mind to them. He was correctly exercising his judicial discretion in accordance with the law and I am satisfied that there could have been no injustice to the appellant.

It is clear, therefore, that the witness Jolame Jale was not an accomplice and, even though no corroboration of his evidence was required, there was in fact some, and possibly sufficient, corroboration because he had bought liquor from the appellant, had reported that fact to the Police and they had found liquor in fairly excessive quantities in the petrol station of the unlicensed appellant. This latter fact tended to connect the appellant with the offence charged. There is some variation as to the date on which the witness purchased the liquor, as was urged on the appellant's behalf, but it cannot be denied that he did, in fact, purchase some liquor and any variation in evidence as to the date which might tend to show that the date set out in the charge was wrong is a matter which is of no prejudice to the appellant and cannot be permitted to affect the general issue. The authority of the court to call a witness at any stage of the trial is, of course, specifically enacted in section 136 of the Criminal Procedure Code but it must appear to the court that it is essential to a just decision of the case to call such witness. I need only mention further that it was argued also that the provisions of section 200 of the Criminal Procedure Code prevent the calling of a witness because it provides that if no case has been made out against an accused, the court is bound to dismiss the case and acquit the accused. Counsel argued that when he submitted "no case" the learned Magistrate should have followed section 200 as the prosecution case had closed. Counsel has misinterpreted the section. It does not refer to the close of the case for the prosecution but to the close of the evidence in support of the charge. That evidence of course includes any evidence which might properly have been called by the court. In any event when Counsel made his submission to the learned Magistrate, there was a case to answer.

The appeal fails and is dismissed.