MARIANO SIRAI

v.

REGINAM

[COURT OF APPEAL, 1963 (MacDuff P., Marsack J. A., Hammett J. A.), 3rd, 10th January]

Criminal Jurisdiction

Criminal law—accomplice—corroboration—necessity for strict application of rule as to—Rule 23 Court of Appeal Rules.

Criminal law—practice—care necessary before judge comments on failure of accused to give evidence.

The appellant was convicted of breaking and entering a dwelling-house and of larceny therein on the evidence of an accomplice, the only corroborative evidence being rejected by the judge. While the judge did direct himself in accordance with the law as to corroboration as laid down in *Davies v. D.P.P.* [1954] A.C. 378, the accomplice had remained silent for three years from the date of the crime and the case was one in which the rule needed to be strictly applied. The judge also commented adversely upon the failure of the appellant to give sworn evidence, in a manner which suggested that he regarded this failure as corroboration of the accomplice's evidence.

Conviction quashed.

Canisio v. R. [1956] E.A.C.A. 453 applied.

Cases referred to:

Davies v. D.P.P. [1954] A.C. 378; [1954] 1 All E.R. 507: *R. v. Rhodes* [1899] 1 Q.B.D. 77: *Waugh v. R.* [1950] A.C. 203: *R. v. Jackson* (1953) 37 Cr. App. R. 43; [1953] 1 All E.R. 872.

Appeal against Conviction.

Marquardt-Gray for the appellant.

Palmer for the Crown.

The facts appear from the judgment of the court.

Judgment of the Court [10th January, 1963]—

This is an appeal against a judgment of the High Court of the Western Pacific given on the 8th October, 1962, whereby appellant was found guilty of breaking and entering a dwelling-house of Paruru, British Solomon Islands Protectorate, on the 25th/26th August, 1959, and stealing therefrom property valued at £304. The appeal is also against the sentence of three years' imprisonment, but no grounds of appeal against sentence were set out in the notice of appeal or were urged before us at the hearing.

The formal grounds of appeal were—

(*a*) that the conviction is based upon the unsupported evidence of an accomplice and that this evidence was not true;

(*b*) that the trial Judge disregarded the evidence adduced for the defence.

Mr. Marquardt-Gray stated at the hearing that he could say nothing in support of either ground of appeal, as the learned trial Judge had correctly directed himself as to the law affecting the uncorroborated testimony of an accomplice, and as consideration had in fact been given to the evidence called for the defence. At the hearing of the appeal it was felt by this Court that the formal grounds of appeal, which had been drawn by a layman without the advice of counsel, did not properly set out the objections which could be taken to the judgment. Consequently the Court applied Rule 23 of the Court of Appeal Rules and widened the scope of the argument to include other grounds of objection, which are referred to later in this judgment.

The facts may be set out very briefly. On the night of the 25th/26th August, 1959, the residence of one Iain Gower at Paruru was broken into and a quantity of articles, including one heavy cash safe, removed therefrom. Police investigations into the burglary were fruitless, and no information was obtained as to the persons responsible for a period of almost exactly three years. In August, 1962 police interviewed one Antonio Suurai as to some allegations said to have been made against him by appellant to the effect that he had been guilty of stealing money. Antonio Suurai thereupon told the police that it was appellant who had carried out the burglary at Gower's house three years previously and that he, Antonio Suurai, had at the request of appellant assisted in the commission of the crime. When interviewed by the police on the subject appellant denied the allegation, and continued to deny it throughout. Both appellant and Antonio Suurai were charged with the burglary. At the hearing before the High Court Antonio Suurai pleaded guilty and was sentenced to two years' imprisonment. He then gave evidence against the appellant at the trial before the High Court, in the course of which he gave a circumstantial account as to how the burglary had been planned by appellant and carried out by him with the assistance of the witness. There was no other evidence connecting the appellant with the crime except that of one Selesitino Chele, who said that some time in 1959 appellant had given him £16; and when asked as to who had stolen the "bank" (cash safe) at Paruru appellant said that he and Antonio Suurai had committed the offence. The evidence of Selesitino was, on the face of it, not convincing and it was rejected by the learned trial Judge. In the result the only evidence connecting appellant with the crime was that of a self-confessed accomplice.

In the course of his evidence Antonio Suurai deposed that appellant's brother John Wahioro had received £20 from appellant as part of the proceeds of the burglary. Wahioro was called as a witness for the defence and he denied receiving any money from appellant or having any knowledge that appellant had been involved with Antonio Suurai in any theft of money. He also stated in cross-examination that he had not spoken about the case with appellant since the Preliminary Inquiry.

The learned trial Judge in paragraph 23 of his judgment says of John Wahioro:

> "He was not a helpful witness to the accused. He was hesitant and made a poor showing in the box. He denied receiving the money: but I found him of little assistance and he even denied discussing the matter of this accusation of burglary with his brother the second accused."

It is a little difficult to understand exactly what is meant by the phrase "He was not a helpful witness to the accused". At its face value his evidence would have been most helpful, in throwing considerable doubt on

the testimony of the only witness against appellant, namely the accomplice Antonio Suurai. The trial Judge may have meant that he disbelieved this witness, but he does not say so. In any event he makes, in the course of paragraph 23 of his judgment, a statement which is admittedly incorrect when he says that " witness even denied discussing the matter of the accusation of burglary with appellant ". What the witness does deny is having any conversation with appellant on the subject of that accusation since the date of the Preliminary Inquiry.

The law regarding the desirability of corroboration of the evidence of an accomplice is now well established and since *Davies v. D.P.P.* [1954] A.C. 378 must be regarded as having the force of a rule of law. As the Lord Chancellor says at p. 399:

> " In a criminal trial where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury that, although they may convict upon his evidence, it is dangerous to do so unless it is corroborated.
>
> This rule, although a rule of practice, now has the force of a rule of law.
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> Where the judge fails to warn the jury in accordance with this rule, the conviction will be quashed, even if in fact there be ample corroboration of the evidence of the accomplice, unless the appellate court can apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907."

Where a criminal trial is held before a Judge alone then it is his duty to direct himself in the same way as a jury must be directed when the Judge is sitting with a jury. In this present case the trial Judge in the course of his judgment refers to the rule, and to the fact that he is giving consideration to that rule in arriving at his judgment.

It is perhaps difficult to imagine a case where the rule needs to be more strictly applied than it does here. There is no evidence whatever connecting appellant with the crime which was undoubtedly committed, except the statement of the accomplice. That same accomplice, it must be remembered, kept complete silence on the subject for three years. When it was reported that he was accused—according to him, falsely accused—of the theft of money, he immediately implicated appellant in the crime of burglary which he himself admittedly committed three years before. There were grounds, as was conceded by counsel for the Crown, for considering the possibility that the accomplice, in making his allegation against appellant, may have been actuated by malice, a desire to seek revenge for the wrong which he thought had been done to him. It would have been just as easy for Antonio Suurai to make the allegation with regard to any other person who had been in the vicinity three years before. It is conceivable that he could have carried out the burglary by himself, as he was strong enough, which appellant was not, to carry away the cash safe.

We are in entire agreement with the remarks of Bacon, J. A. in *Canisio v. R.* [1956] E.A.C.A. 453 at p. 455:

> " The fact that a Magistrate or Judge is sitting alone or with assessors neither excludes nor modifies the application of those rules. Provided that it is clear that the trial Court has expressly called to mind the necessary warning as to the danger of convicting on the uncorroborated testimony of an accomplice or of accomplices and has approached its decision on that footing, it is lawful to convict on such testimony if it is accepted as the truth beyond any reasonable doubt. We need hardly

add that the danger in question is real and that the need fully and properly to appreciate that danger is no mere legal fiction or formality but a necessary practical safeguard which merits the most careful application in every case."

If the rule merits the most careful application in every case, then there are cases, of which this is one, where the standard of care exercised in applying the rule should be the highest possible. If that standard had been observed by the learned trial Judge in the instant case, we feel that an acquittal would almost necessarily have followed. None the less, we should have hesitated to upset the judgment in the Court below on that ground alone, in view of the care with which the learned trial Judge, in the course of his judgment, directed his mind towards the rule regarding corroboration.

There is, however, another ground upon which we feel that the appeal must succeed. That arises from paragraph 26 of the judgment of the learned trial Judge which reads as follows:—

" I also take into consideration the fact that the second accused did not submit himself to cross-examination, which is of some importance."

In the High Court of the Western Pacific an accused person has three options as to the course to follow at the close of the prosecution. He may give evidence on oath, in which case he is liable to cross-examination; he may make an unsworn statement from the dock, in which case he is not liable to cross-examination; or he may elect to say nothing at all. At the conclusion of the prosecution in this case the Judge properly explained this to appellant, who elected to make an unsworn statement from the dock. This statement was to the same effect as his previous statement to the police, namely that he knew nothing of the matter.

It is clear that the trial Judge had a right to comment on the absence of the accused person from the witness-box, and that the nature and degree of such comment must rest entirely in the discretion of the Judge who tries the case: *R. v. Rhodes* [1899] 1 Q.B.D. 77 at p. 83. But as was said by Lord Oaksey in *Waugh v. R.* [1950] A.C. 203 at p. 211:

" It is true that it is a matter for the judge's discretion whether he shall comment on the fact that a person has not given evidence; but the very fact that the prosecution are not permitted to comment on that fact shows how careful a judge should be in making such comment."

Where the evidence is such as to call upon the accused for an explanation, as, for example, when stolen property is found in his possession, then, as is pointed out by Goddard, L.C.J., in *Jackson* (1953) 37 C.A.R. 43 at p. 50, a comment on the failure of the accused to give the required explanation is perfectly proper. But this is not such a case; and it must be remembered that appellant is an illiterate islander who, acting without the advice of counsel, accepted one of the options offered to him by the trial Judge, namely that of making an unsworn statement from the dock. That statement was entirely consistent with what he had said from the beginning.

Accordingly we think that the trial Judge should have been extremely careful in making any comment on the failure of appellant to give evidence. But what he has done goes considerably beyond making a comment. He states unequivocally that in coming to his conclusions he has taken into consideration the fact that appellant did not submit himself to cross-examination; and that this is a matter of some importance. There is only one possible inference which this Court can draw from paragraph 26 of the judgment: that the Judge accepted the failure of appellant to submit himself

to cross-examination as supporting the view he had formed of the credibility of the evidence of the accomplice Antonio Suurai. It goes a long way towards saying that he accepts appellant's failure to give sworn evidence as corroboration of the testimony of the accomplice. In our view the learned trial Judge was not entitled to draw any such conclusion from the fact that appellant merely accepted the Court's invitation to make a statement from the dock. In these circumstances we are unable to say that the Judge, without the support afforded by his consideration of what he calls the important matter of appellant's failure to submit himself to cross-examination, would necessarily have entered a conviction against appellant.

For these reasons the appeal will be allowed. The conviction is quashed and a judgment and verdict of acquittal will be entered.

Appeal allowed and conviction quashed.

Solicitor for the appellant: *H. A. L. Marquardt-Gray.*

Solicitor-General for the Crown.