A **CHAI AND OTHERS**

v.

REGINAM

B [COURT OF APPEAL, 1964 (Mills-Owens P., Hammett J.A., Knox-Mawer J.A.), 20th October, 23rd November]

Criminal Jurisdiction

Criminal law—accomplice—corroboration—nature of—implication of accused.

C *Criminal law—evidence—statement on oath by accused during committal proceedings—evidence only against maker—Criminal Procedure Code 1961, s.255 (British Solomon Islands).*

Criminal law—practice and procedure—joinder of counts against different accused in one information—conspiracy—Criminal Procedure Code, s.119.

The four appellants were charged jointly with four co-accused with conspiring with the four co-accused and two persons called D Nelson Odu Pio and Frank Dia to procure the making of false entries in books of account of the British Solomons Trading Company. The four appellants were not charged with conspiring together, but each was charged in a separate count of the information with conspiring with the four co-accused, Nelson Odu Pio and Frank Dia. The four co-accused, Nelson Odu Pio and Frank Dia were graders or weighers E of copra and the scheme alleged was one whereby the weight of copra brought for sale was to be fraudulently inflated. The main evidence for the prosecution was that of Nelson Odu Pio and Frank Dia who had earlier pleaded guilty to charges of making false entries; the Chief Justice treated them as accomplices and regarded corroboration of their evidence as essential. The Court of Appeal therefore held itself bound to allow any appeal in relation to which it found F there was no corroboration in point of law.

In the cases of the second and third apellants the only evidence relied upon as corroborative of their guilt was the testimony of a Mr. Taylor that Nelson Odu Pio had pleaded guilty to a charge of falsifying entries relating to copra sold by the second appellant to the British Solomons Trading Company and that Frank Dia had pleaded G guilty to a charge of falsifying entries relating to copra sold to that company by another company of which the third appellant was the copra manager.

In the case of the fourth appellant the evidence relied upon as corroborative was firstly a statement made on oath during the committal proceedings by Newton Pulukera, one of the four co-accused, H in which he implicated the fourth appellant and which was put in evidence at the trial under section 255 of the Criminal Procedure Code. Secondly, evidence by Nelson Odu Pio that the fourth appellant agreed to make him a gift of a bicycle, to be collected from a

store owned by the second appellant, was held to be corroborated by the evidence of one Sale Mabule that he saw a bicycle delivered to Nelson Odu Pio by the wife of the second appellant.

In the case of the first appellant the evidence relied upon as corroboration was (a) an admission made by the appellant in evidence that he had made small gifts to Frank Dia, though he claimed they were for a different purpose and (b) the evidence of one Kitchener Atisi, a copra weigher, who said that this appellant gave him £5 without saying what it was for.

Held: 1. That the evidence of Taylor merely confirmed the confessions of guilt by Nelson Odu Pio and Frank Dia and provided no independent evidence implicating the second and third appellants.

2. (a) The statement by Pulukera was not made at the trial of the appellants and was not admissible against any person other than the maker. Section 255 of the Criminal Procedure Code is concerned only with the mode of proof of a statement made before the examining magistrate.

(b) The evidence of Mabule, though it confirmed that Nelson Odu Pio obtained a bicycle from the store of the second appellant, in no way implicated the fourth appellant.

3. (a) The admission that the first appellant had made some gifts to Frank Dia did not, in the circumstances, establish or even render it probable that he had made the corrupt payments alleged by the latter.

(b) The object of the payment to Alisi was unexplained; even if regarded as dubious in character it could not turn dubiety into certainty in relation to gifts to another person or corroborate the making of those gifts. There was no evidence that the payment was in pursuance of the conspiracy charged and if there had been Alisi would have been a fellow conspirator whose evidence could not corroborate that of Frank Dia.

4. None of the evidence relied upon at the trial as corroboration amounting to corroboration in law, all the appeals must be allowed.

Semble: Section 119 of the British Solomon Islands Criminal Procedure Code appears to authorise the joinder of the counts above described.

Cases referred to: *R. v. Gunewardine* [1951] 2 All E.R. 290; [1951] 2 K.B. 600: *R. v. Hadwen* [1902] 1 K.B. 882; 86 L.T. 601: *R. v. Ellis* [1961] 2 All E.R. 928; 45 Cr. App. R. 212: *R. v. Patel* (1951) 35 Cr. App. R. 62; [1951] 2 All E.R. 29: *Thompson v. R.* [1918] A.C. 221; 13 Cr. App. R. 61: *Noor Mohamed v. R.* [1949] 1 All E.R. 365; [1949] A.C. 182: *R. v. Coombes* (1961) 45 Cr. App. R. 36; (1960) 125 J.P. 139: *Perkins v. Jeffery* [1915] 2 K.B. 702; 113 L.T. 456: *Harris v. D.P.P.* [1952] 1 All E.R. 1044; [1952] A.C. 694.

Appeals against conviction by the High Court of the Western Pacific at Honiara.

D. F. Jones for the appellants.

A *W. G. Nazareth* for the Crown.

The facts are set out in the judgment of the court.

Judgment of the Court: [23rd November, 1964]—

B The appellants were charged jointly with four co-accused with conspiring with them and with two persons called Nelson Odu Pio and Frank Dia to procure the making of false entries in books of account of the British Solomons Trading Company (the B.S.T. Co.) by employees of that Company. The information contained four counts, and each count charged one or other of the appellants with a separate conspiracy with the four co-accused, Nelson Odu Pio and Frank Dia.
C Although therefore there was no allegation of conspiracy against the appellants *inter se* they were all joined in one information and tried jointly together with their co-accused. Section 119 of the British Solomon Islands Criminal Procedure Code would appear to give authority for that to be done, and no application for separate trials was made. The trial took place at Honiara before the Chief Justice of the Western Pacific, sitting alone. All four appellants and their
D four co-accused were convicted. The appellants were each sentenced to 12 months' imprisonment but released on bail pending appeal. They now appeal against conviction and sentence.

The appellants were copra traders engaged in selling copra to the B.S.T. Co. in its capacity as the authorised agent of a statutory board which alone was authorised to purchase copra. Their co-accused
E were concerned with the grading and weighing of copra. Two of them were graders employed by the Government. The other two were weighers employed by the B.S.T. Co. and in the course of their work they made book entries of the grade and weight of copra brought for sale to the Company and prepared slips or vouchers upon which payment was to be made to the sellers. Nelson Odu Pio and Frank Dia were also weighers employed by the Company and
F similarly concerned with the making of entries upon which payments were to be made for the copra purchased by the Company. The case for the prosecution was that each appellant, the co-accused, Nelson Odu Pio and Frank Dia were parties to a scheme, similar in the case of each appellant, whereby the weight of copra brought for sale to the Company was fraudulently inflated so that the appellant might
G profit dishonestly; the co-operation of the graders and weighers was secured, it was alleged, by means of gifts, in cash and in kind. The main witnesses for the prosecution were Nelson Odu Pio and Frank Dia who gave evidence that they themselves together with the co-accused were fellow conspirators engaged in falsifying such entries. Nelson Odu Pio implicated all the appellants. Frank Dia implicated the 1st, 3rd and 4th appellants. Both Nelson Odu Pio and Frank Dia
H had been convicted in earlier proceedings each on his own plea of guilty to making false entries; in the case of Nelson Odu Pio his plea was to a charge of a false entry relating to copra sold by the 2nd appellant, and in the case of Frank Dia his plea was to a charge of a

false entry relating to copra sold by a limited company by which the 3rd appellant was employed. These two witnesses were properly treated as accomplices at the trial and the learned Chief Justice made it clear that in the case of each appellant he regarded corroboration as essential. It was argued on these appeals that in so doing he took a view of the law unnecessarily favourable to the appellants. We do not accept this contention. In our view the Chief Justice was referring to the weight of the evidence. Even if his remarks were considered to be equivocal we cannot assume that he would have accepted the evidence of either of the accomplices without corroboration. This being so we must regard ourselves, in reviewing the case of each appellant, as bound to allow any of the appeals with respect to which there was no corroboration in point of law.

It is convenient to deal first with the cases of the 2nd and 3rd appellants, Chan Chong and Chow Ah Wing, as respects whom the nature of the evidence relied upon as corroborative of their guilt is practically identical. It consisted simply of statements in evidence at the trial by Mr. Taylor, the manager of the B.S.T. Co., that Nelson Odu Pio had pleaded guilty to a charge of falsifying entries relating to copra sold by the 2nd appellant to the Company, and that Frank Dia had pleaded guilty to a charge of falsifying entries relating to copra sold to the Company by a limited company of which, he said, the 3rd appellant was the copra manager. This evidence was accepted at the trial of the appellants and their co-accused as amply corroborating the evidence of Nelson Odu Pio and Frank Dia. We cannot agree. Accepting that Taylor was an independent witness, even assuming he was in a position to say, of his own knowledge, that the pleas of guilty were in answer to charges relating to copra sold by the 2nd and 3rd appellants respectively, his evidence did nothing to establish or tend to establish, independently, that the offences had in fact been committed and that in fact the 2nd and 3rd appellants were implicated therein. Taylor's evidence merely confirmed the fact of the confessions of guilt. Each case remained one where the evidence consisted solely of an admission by an accomplice of his own guilt. The fact that the admissions were in relation to copra alleged by the charges to be the property of the 2nd and 3rd appellants, respectively, was no evidence against them, and Taylor's statements neither made it evidence against them nor provided any independent evidence implicating them. For these reasons the appeals of the 2nd and 3rd appellants must be allowed.

As to the 4th appellant, Chan Pong, whose case we will now deal with, the alleged corroboration consisted in two separate matters. The first relates to a statement made by Newton Pulukera, one of the four co-accused, in the course of the committal proceedings. After the examination of the witnesses for the prosecution the examining magistrate properly advised the defendants of their right to make a statement, on oath or otherwise. Newton Pulukera elected to make a statement on oath in the course of which he purported to implicate the 4th appellant. The prosecution applied to cross-examine him, but the magistrate ruled that cross-examination was not permissible; he considered the statement, as he said, "immune from cross-examination". On these appeals the Crown concedes that he was wrong in so ruling. The learned Chief Justice held that by virtue of

section 255 of the Criminal Procedure Code the statement had become part of the evidence in the case and that it clearly linked the 4th appellant to the conspiracy. Section 255 provides:

> "The statement or evidence (if any) of the accused person duly recorded by or before the committing Magistrate, and whether signed by the accused person or not, may be given in evidence without further proof thereof, unless it is proved that the Magistrate purporting to sign the statement or evidence did not in fact sign it."

In our view the section does not bear the construction thus placed on it. It is concerned only with the mode of proof at the trial of any statement made by a defendant, sworn or unsworn, before the examining magistrate. To hold otherwise would be to set at naught the right of a defendant to reserve his defence at the committal proceedings, and, further, would be a complete departure from the rule that a statement by one co-defendant implicating another is not evidence against the latter (*vide R. v. Gunewardine* [1951] 2 All E.R. 290), except, that is to say, where it takes the form of evidence given at the trial when it is subject to an absolute right of cross-examination by or on behalf of the co-defendant (*vide R. v. Hadwen* [1902] 1 K.B. 882; *R. v. Ellis* [1961] 2 All E.R. 928). The statement in question was not made at the trial of the appellants and thus was not admissible against anyone except the maker, Newton Pulukera. Whether or not the magistrate intended to exclude cross-examination by the co-defendants as well as by the prosecution is immaterial in the circumstances.

Secondly, certain evidence relating to the alleged gift of a bicycle to Nelson Odu Pio was relied upon as corroborating him. Nelson Odu Pio stated in evidence that the 4th appellant agreed to make him a gift of a bicycle and arranged that he should collect it from a store owned by the 2nd appellant. The alleged corroboration consisted of the evidence at the trial of one Sale Mabule who said that he was present when Nelson Odu Pio collected a bicycle from the wife of the 2nd appellant at the store, that no money was passed, and that he, Sale Mabule, took custody of the bicycle on Nelson's behalf. The evidence of Sale Mabule was accepted by the learned Chief Justice as indicating that there was something to conceal in this alleged transaction, and thus it was corroborative of Nelson's evidence. Clearly the evidence of Sale Mabule in no way implicated the 4th appellant. Although confirming that Nelson Odu Pio obtained a bicycle from the store of the 2nd appellant, Chan Chong, at the hands apparently of his wife, Mrs. Chan Chong, it shewed no connexion whatsoever on the part of Chan Pong, the 4th appellant, with the transaction. For these reasons the appeal of the 4th appellant must be allowed.

In the case of the 1st appellant the material accepted as corroboration of the accomplice evidence was, first, the admission of the appellant in evidence at the trial that he had on occasion made gifts to Frank Dia, although small in amount, and, as the appellant said, for a different purpose, namely to ensure that his copra was graded

and weighed expeditiously; and, secondly, the evidence of one Kitchener Atisi who said that he was employed as a weigher for a short period and that on one occasion the appellant gave him £5 but without saying what it was for, and without him, Kitchener, enquiring what it was for. The Chief Justice accepted Kitchener's evidence and referred to it as unchallenged. No doubt what was meant was that Kitchener was not directly challenged in cross-examination to the effect that his evidence was untrue, because the appellant when he came to give evidence denied the allegation. We cannot accept either of these pieces of evidence, separately or in combination, as being corroborative of the 1st appellant's guilt. The admission by him that he had made some gifts to Frank Dia did not, in our view, establish that he had made the corrupt payments alleged by the latter, or even render it probable that he had done so. It was not a case where the crime had been independently established and corroboration was required for the purpose only of implicating the appellant. Far from admitting the crime the appellant was denying it; he was disputing both the nature of the gifts and their purpose. Although his admissions shewed the appellant to be a copra trader associated with the copra weigher, who had made allegations against him, to the extent of their being on terms which admitted of the giving of small presents by one who might be said to stand to gain thereby, the admissions stopped short of providing additional proof of corruption in the sense charged. Each case must depend on its own facts. Obviously there may be cases where the particular circumstances lead irresistibly to the conclusion that gifts were made corruptly, and in the context in which corruption is alleged. Here we are unable to accept the appellants' admissions as tending to prove the corruption alleged. The admissions were not related to the gifts alleged nor to the purpose alleged, and in so far as they might be considered to prove a dubious association they shewed no more than a propensity to make dubious payments, to put it at the highest.

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With regard to the alleged payment of £5 to Kitchener Atisi his evidence was accepted at the trial in preference to that of the appellant and it was held that as a payment by a copra dealer to a copra weigher 'it was a corrupt payment in whatever light it was regarded'. The learned Chief Justice considered the evidence to be admissible on the authority of *R. v. Patel* (1951) 35 Cr. App. R. 62. That case was concerned with the placing of orders for controlled goods on the pretence that they were for export with a view to avoiding purchase tax. The defendant denied knowledge of the nature of the goods and of the purpose of the transactions. The evidence in question was that he himself had placed a large order for similar goods for the purpose of export. The evidence was held relevant to the issue raised by his defence, namely as tending to prove that his explanation was not to be accepted. This decision does not appear to us to have any direct bearing on the case of the 1st appellant. It would appear that it was accepted, on the trial of the appellants, as an authority rendering the evidence of Kitchener admissible as proving a previous similar act, necessarily corrupt in character, and tending therefore to prove that whatever gifts were made to Frank Dia were likewise corrupt. But the judgment in Patel's case clearly shows that the Court did not regard the evidence in question as admissible

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on the basis of proof of a systematic course of conduct indicating guilty knowledge or intent under the authority of the decision in *Thompson v. R.* [1918] A.C. 221 (which had been referred to on this point in argument). We do not agree with the view that the gift to Kitchener Atisi was inevitably to be regarded as a corrupt payment. Even if the evidence of Kitchener were true the object of the payment remained wholly unexplained. In fact the payment was denied by the appellant. In effect a conclusion was drawn against the appellant, in unrelated proceedings, both upon disputed evidence as to the fact and upon inadequate material as to the intent. Evidence of a previous offence is admissible if relevant to rebut a defence of innocent intent as to the present charge (*Noor Mohamed v. R.* [1949] 1 All E.R. 365, 370), provided the previous offence is of a similar character and sufficiently proximate in time (R. v. Coombes (1961) 45 Cr. App. R. 36; *Perkins v. Jeffery* [1915] 2 K.B. 702). *Prima facie,* therefore, proof of a previous corrupt payment to Kitchener would have been admissible to rebut a defence that the admitted gifts to Frank Dia were not corrupt in the sense charged, had those admitted gifts formed the basis of the charge. But apart from the rule of law there is an overriding rule of judicial practice that the essentials of justice must be set above the technical rule where the probable effect of the similar fact evidence would be out of proportion to its evidential value (*Harris v. D.P.P.* [1952] 1 All E.R. 1044). Thus in *R. v. Coombes* (supra), where the offence charged was indecent assault and the defence was that the act was accidental and innocent of indecent intent, it was held on appeal that evidence of a previous conviction of indecent assault was inadmissible as being so highly prejudicial to the defendant as far to exceed its probative value. On this ground alone, in our view, the evidence as to the alleged gift to Kitchener might well be rejected. But the appellant's case is stronger. Accepting that the admitted gifts to Frank Dia were dubious in character, how could evidence of a prior gift to another person, equally dubious, turn dubiety into certainty, in particular, certainty in reference to the gifts charged and their alleged purpose. Moreover, the case for the prosecution rested not upon the admitted gifts but upon other gifts alleged by the accomplice, Frank Dia, but denied by the appellant. How then could the transaction with Kitchener, even if accepted as true, corroborate the making of those gifts? Clearly, in our view, the evidence as to the alleged transaction with Kitchener had no relevance as similar fact evidence. On the appeal Counsel for the Crown suggested that possibly the evidence as to the alleged gift to Kitchener was admissible as part of the *res gestae,* that is to say as an act connected with the matter under inquiry. The basis of this submission, as we understand it, was that conspiracy is in the nature of a comprehensive offence consisting of a series of acts or events; as it was contended, there was evidence of a widespread conspiracy between traders, graders and weighers and, therefore, any evidence tending to show a payment by a trader to a weigher was admissible as part of the *res gestae,* as an act done in furtherance of the conspiracy. No authority was cited in support of this argument and we do not find it of assistance in the circumstances of this case. Kitchener was not specified by name in the information as a party to the conspiracy.

He could, of course, have been one of the 'other persons unknown', having been employed as a weigher at the material time. But he gave no evidence of the purpose of the alleged payment to him by the appellant. He went to obtain it, he said, in consequence of something said to him by some unnamed person. There was no evidence A as to what was said to him by that person. Clearly there was no evidence, even if the payment was proved to be a corrupt payment, whether it was a payment connected with the conspiracy alleged or one totally unconnected therewith. The evidence of the alleged conspiracy remained accomplice evidence, upon which alone the B Court had said it would not convict. Moreover, if the payment to Kitchener had been a corrupt payment to him as a fellow-conspirator he also would have been an accomplice and his evidence could not therefore have corroborated the evidence of Frank Dia.

For these reasons the appeal of the 1st appellant must also be allowed.

Appeals allowed.