A

MISAELI TIKO

v.

REGINAM

B [SUPREME COURT, 1964 (Hammett P.J.) 7th, 21st August]

Appellate Jurisdiction

Criminal law—evidence—accused not giving evidence—circumstances peculiarly within knowledge of accused—principle cannot be relied upon to fill lacuna in case for prosecution—Rhinoceros Beetle Regulations (Cap. 151) regs. 12(1), 18—
C *Rhinoceros Beetle (Amendment) Regulations 1962, reg.7.*

The appellant was the captain of the vessel "Yacomai" and was charged under the Rhinoceros Beetle Regulations with leaving Kaba, an unscheduled port in an infected area, for a clean area without the necessary certificate. Though he had made a remark at Kaba that he was going to Nairai, which is in a clean area, there was no evidence
D that the appellant had actually done so before arriving at Levuka.

Held: 1. The circumstantial evidence was open to other logical and reasonable hypotheses than that the appellant had called at a clean area before arriving at Levuka.

2. The failure of the appellant to give evidence before the magis-
E trate coupled with the fact that his whereabouts between his departure from Kaba and his arrival at Levuka was peculiarly within his own knowledge, could not be relied upon to fill the lacuna in the case for the prosecution.

Appeal against conviction by a Magistrate's Court.

F *R. A. Kearsley* for the appellant.

B. A. Palmer for the Crown.

The facts sufficiently appear from the judgment.

HAMMETT P.J. [21st August, 1964]—

G The appellant was charged with the following offence before the Magistrate's Court of the First Class sitting at Nausori:

"

Statement of Offence

LEAVING AN UNSCHEDULED PORT FROM AN INFECTED AREA TO CLEAN AREA WITHOUT BEING POSSESSION
H OF A CERTIFICATE SIGNED BY AN INSPECTOR: Contrary to Regulation 12(1) of Rhinoceros Beetle (Amendment) Regulations 1962 and Section 18 of the Noxious Weed and Disease of Plants (Rhinoceros Beetles) Regulations, Cap. 151.

Particulars of Offence

MISAELI TIKO, on the 21st day of January, 1964, at Kaba, Nausori in the Central Division, being the Captain of a vessel namely: Yacomai when voyaging from an infected area to a clean area, left an unscheduled port namely: Kaba without being in possession of a certificate signed by an inspector."

Despite the obvious defects in both the words in which the offence was set out in the statement of offence and the references to those sections of the law said to have been contravened, and the lack of sufficient detail in the particulars of offence stating the clean area to which the appellant was alleged to have gone, to which counsel for the appellant nevertheless raised no objection, the appellant was convicted and fined £20 and ordered to pay £10 costs.

He appeals against this conviction on three grounds, namely:

"1. That the conviction is unreasonable and cannot be supported by the evidence.

2. That there was no or insufficient evidence that your petitioner voyaged to a clean area after leaving Kaba and before obtaining a certificate at Levuka, Ovalau.

3. That the learned trial Magistrate erred in law in placing the onus of adducing evidence as to where he had voyaged after leaving Kaba upon your petitioner."

The Court below held that the facts established by the witnesses for the prosecution were as follows.

The appellant is the captain of the 'Yacomai', a vessel which on 20th January, 1964, called at Kaba, a coastal village and not a scheduled port under the Regulations which is in an "infected" area. The next day the vessel sailed. There is no evidence when he did so but some time after 21st January the 'Yacomai' arrived at Levuka, which is a scheduled port in an infected area. On 28th January at Levuka the appellant asked for and was given a certificate, under the Rhinoceros Beetle Regulations, on his statement that he was going to Gau, which is within a clean area.

There is no evidence of where the appellant was between 21st January and the unknown date that he arrived at Levuka. The only evidence to support the allegation that on 21st January the appellant went to a "clean" area, is a remark he made at Kaba the previous night that he was going to Nairai, which is in a clean area. It is as easy to get to Nairai from Levuka as it is from Kaba. There is no evidence to prove that the appellant went to Nairai after he left Kaba or where he went or what route he took before he arrived at Levuka.

The conviction in this case is therefore based on circumstantial evidence. It is physically possible and logically probable that after the appellant left Kaba, he did, as he had stated his intention of doing, sail to Nairai before going on to Levuka. Before a conviction may be based on circumstantial evidence however, the Court must not merely be satisfied that the guilt of the accused is one inference that may be logically inferred on the evidence. It must be satisfied beyond reasonable doubt that the facts are capable of no other logical and possible hypothesis save that of the guilt of the accused.

There was no evidence of the date of the arrival of the appellant on the 'Yacomai' at Levuka. It is physically possible and reasonably logical that the appellant may have gone direct to Levuka from Kaba or that he may have called at another port in an infected area before reaching Levuka. It cannot be said that the one and only logical and reasonable hypothesis is that the appellant must have sailed the 'Yacomai' to Nairai after leaving Kaba and before he reached Levuka.

In the Court below the learned trial Magistrate considered this lacuna in the case for the prosecution had been filled by the failure of the appellant to give evidence coupled with the fact that his whereabouts between 21st January and 28th January, 1964, was a fact peculiarly within his own knowledge. The Crown concedes that this principle cannot be called in aid by the prosecution in these circumstances. It was for the Crown to prove either by direct or circumstantial evidence positively that the appellant sailed the 'Yacomai' to a clean area in this period. There was no direct evidence on the matter and the only circumstantial evidence before the Court was open to other logical and reasonable hypotheses than that the appellant had in fact called at Nairai or some other clean area before he reached Levuka.

In my opinion the evidence for the prosecution in this case fell short of that high degree of proof that is necessary to sustain a conviction on a criminal charge, and the case against the appellant was not proved beyond reasonable doubt. In these circumstances the appeal must be allowed and the conviction and sentence quashed.

Appeal allowed.