A

DAVID KIO

v.

REGINAM

B [COURT OF APPEAL, 1967 (Mills-Owens P., Gould J.A., Marsack J.A.), 14th, 23rd February]

Criminal Jurisdiction

Criminal law—judgment—omission of statement that accused convicted or found
C *guilty—incurable defect—Criminal Procedure Code Ordinance 1961, ss.149, 150, 150(2).*
Criminal law—practice and procedure—conviction of burglary—entry by night not sufficiently established by evidence—substitution by Court of Appeal of conviction of breaking and entering with intent to commit felony—Penal Code Ordinance 1963, ss.4, 292(a), 294—Court of Appeal Rules (No. 2) 1956, r.36(2).

The appellant was tried on two counts of burglary and larceny relating
D to the 5th August, 1966, and on two similar counts relating to the 8th August, 1966. The trial judge was clearly satisfied of the guilt of the appellant on all counts as he sentenced the appellant to imprisonment on each of them, but in his judgment he omitted to say that he convicted the appellant or found him guilty on the two counts relating to the 5th August 1966.

E *Held* : 1. The requirements of section 150 (2) of the Criminal Procedure Code Ordinance, 1961, include that the judgment must state unequivocally that the accused person is convicted or at least that he is found guilty of the offences concerned.

2. The absence of a conviction is a basic defect and one not curable by the court on appeal.

F Conviction of breaking and entering with intent to commit a felony contrary to section 294 of the Penal Code Ordinance, 1963, substituted by the Court of Appeal for a conviction of burglary, where the evidence fell short of establishing that the entry took place by night, as defined in section 4 of the Ordinance.

Cases referred to : *Joseph v. R.* [1948] A.C.215: *Siru Luluakalo v. R.*
G (1962) 8 F.L.R. 12: *R. v. Rabjohns* [1913] 3 K.B. 171; 9 Cr.App.R. 33: *Confiance v. R.* [1960] E.A. 567: *R. v. Loughlin* (1951) 35 Cr.App.R.69; [1951] W.N. 325.

Appeal from convictions by the High Court of the Western Pacific.

D. Pathik for the appellant.

H *J. R. Reddy* for the respondent.

The facts sufficiently appear from the judgment of the Court.

Judgment of the Court (read by MARSACK J.A.) : [23rd February 1967]—

This is an appeal against conviction before the Chief Justice of the Western Pacific at Honiara on the 7th October 1966 on 4 counts: Burglary and Larceny on 5th August 1966 and Burglary and Larceny on the 8th August 1966. On each of the Burglary charges the appellant was sentenced to three years' imprisonment and on each of the Larceny charges to one year's imprisonment, the sentences to be served concurrently. This appeal is brought against both conviction and sentence.

The grounds set out in the Notice of Appeal were of a general nature and do not require to be set out in detail for the purposes of this judgment. In the course of the hearing three points were raised requiring consideration and decision by this Court.

The first point is whether the appellant was duly convicted on Counts 1 and 2 in respect of charges of Burglary and Larceny on 5th August 1966 from the dwelling of John Salusu.

In the course of his judgment the learned trial Judge deals first with these two charges. He proceeds to summarise the evidence for the prosecution and indicates that he accepts that evidence and disbelieves the account given by the appellant. Immediately before passing to the second two charges the learned trial Judge says:

> "Sometime in the course of the night the thief opened the door of the outer room, secured his escape by sliding the bolt of the door of the inner room and then opened the box, took the things out, took the money from the Passbook and went away. Now entering a room even though it is not locked if the door is shut is a housebreaking. I have no doubt whatever that on the early morning of the 6th of August that is exactly what the Accused did. The evidence is overwhelming."

It is clear that the trial Judge finds the facts upon which he is satisfied that a conviction against the appellant on both charges could properly be entered. It is equally clear that he does not formally convict the appellant.

Under sections 149 and 150 of the Criminal Procedure Code Ordinance 1961 in force in the British Solomon Islands Protectorate provision is made for the manner in which the judgment in every criminal trial shall be pronounced. Section 150 (2) reads:

> "150. (2) In the case of a conviction the judgment shall specify the offence of which, and the section of the law under which, the accused person is convicted, and the punishment to which he is sentenced."

Although no particular form of words is required it would appear that the judgment must make it clear that the accused person is convicted, must specify the offence of which he is convicted and state the punishment to which he is sentenced.

At the hearing in the Court below the learned trial Judge made no further reference to Counts 1 and 2 beyond the passage from his judgment already quoted. There was thus no formal finding of guilty and no formal conviction. After judgment had been pronounced the trial Judge heard the appellant in mitigation and heard the prosecution as to

the appellant's previous convictions. He then passed sentences of three years' imprisonment in respect of Count 1 and one year's imprisonment in respect of Count 2.

It can, of course, be inferred that no sentence would be passed in any particular case, unless the trial Judge had previously decided that the accused person was guilty of the offence for which he was sentenced. In the present case it is obvious from the passage quoted from his judgment that the appellant was, in the view of the trial Judge, clearly guilty.

In our view, however, an inferential conviction is not a sufficient compliance with the law. The judgment must state unequivocally that the accused person is convicted, or at least that he is found guilty of the offences concerned. Otherwise there arises the situation referred to by the Lord Chief Justice in *Joseph v. R.* [1948] A.C. 215 at p.220:

> "In the result the appellant has been . . . . . sentenced by a judge who had not convicted him."

The question of what constitutes a conviction was considered by this Court in *Siru Luluakalo v. R.* (1962) 8 F.L.R. 12. In the course of the judgment it is said at p.4:

> "The essence of the matter is that there should be a judgment of the Court pronouncing the accused person guilty, and when that has been done the accused has properly been convicted, whether or not that precise word is used in the judgment."

Other cases were cited to us in the course of the argument tending to show that no precise form of words is necessary to constitute a valid conviction. We do not think these cases have any direct application to the point involved in the present appeal. Here there was no conviction. There was not even a formal finding of guilty on the charges concerned, a finding which might well have amounted to a conviction in accordance with the principle stated in *R. v. Rabjohns* [1913] 3 K.B. 171.

In the case of *Jean Charles Confiance v. R.* [1960] E.A. 567, the Court of Appeal for East Africa had occasion to consider points arising from very similar sections of the Seychelles Criminal Procedure Code, the question being whether certain deficiencies in a judgment were merely curable irregularities or were fatal. In the course of a detailed discussion of the factors involved Gould Ag. V.P., delivering the judgment of the Court, said, at p.571:

> "In our opinion the sections of the various codes now under consideration are intended to lay down what shall be incorporated into a judgment in a criminal case. But it follows from many decisions of this court, some of which are referred to above, that the interpretation placed on the sections is such that non-compliance with at least some of the requirements of the sections is to be regarded as mere irregularity. As, however, it is axiomatic that there must be a judgment in a criminal trial, it also follows that certain requirements must be regarded as basic, as non-compliance with them would result in there being no judgment at all."

and at p.572:

"Having regard to the use of the word in English criminal law and to the sections of the code now being considered we are of opinion that, in a case where a court has decided that an accused person is guilty, the basic elements of the judgment are the conviction and sentence."

Applying these principles to the present case we find that the absence of a conviction is a basic defect and one which is not curable by this Court.

In the result we find that there was no conviction of the appellant on Counts 1 and 2. The sentences of three years' and one year's imprisonment imposed in respect of those counts must be and are hereby quashed. We have given some consideration to the question as to whether a new trial on those charges should be ordered; but in view of our decision in respect of Counts 3 and 4 we are of opinion that the interests of justice do not require the ordering of a new trial.

There remain for consideration the convictions entered on Counts 3 and 4 for breaking and entering the dwelling of Wilfred Benjamin Kiriau on the night of 8th August, 1966, and larceny of 25 lbs. of rice from that house. There are two questions in respect of these charges requiring decision by this Court:

(1) Does the evidence establish a "breaking" within the meaning of the Criminal Procedure Code Ordinance?

(2) Does the evidence establish that the entry was made "by night" as defined in the Penal Code Ordinance 1963?

"Breaking" is defined in section 290 of the Penal Code, the relevant portion of which reads as follows:

"290. A person who breaks any part, whether external or internal, of a building, or opens by unlocking, pulling, pushing, lifting or any other means whatever, any door, window, shutter, cellar flap or other thing intended to close or cover an opening in a building, or an opening giving passage from one part of a building to another, is deemed to break the building."

The evidence of Wilfred Benjamin Kiriau was to the effect that he was the last to go to bed at his home on the 7th August. He says:

"I tidied up for the night and I closed the store room door. I did not lock it. I looked round and saw that all was in order. My household sack of rice was there in its usual place. My bicycle torch lamp I left on the verandah wall. That was not shut in. There is only the one door into the storeroom, which opens from the verandah. I went to bed. I was not disturbed that night. The children got up first next morning and then I got up. I found storeroom door open. I took no notice. I thought that the children might have gone in. At lunchtime I discovered the sack of rice was missing. I also could not find my torch. I reported this to the police."

The sack of rice, which was identified because of the particular markings on it, was found two days later at the house of the appellant's brother; and, on evidence which was accepted by the Court, the sack had been brought by the appellant to his brother's house on the morning of the 8th August.

In the course of his judgment the learned trial Judge points out that entering a room even though the door is not locked, if it is shut, is housebreaking. The evidence shows that the door was closed when the owner retired at night. It was the only door to the storeroom and in our view it is a proper inference that it must have been opened to enable the sack of rice to be taken away through it. The Court cannot be asked to act on a fanciful hypothesis, such as that the door to a storeroom may have blown open during the night and remained open while a person made an entry into the storeroom and abstracted a sack of rice. If the door had to be opened by any means whatever, then there was a breaking as defined in the Penal Code. In our opinion there was justification for the finding of fact by the learned trial Judge that there had been a breaking within the meaning of section 290 of the Penal Code. The fact that the appellant was found in possession of the stolen rice shortly after the breaking is also most relevant in determining the question whether he has been properly convicted of breaking and entering. As was said by the Lord Chief Justice in the Court of Criminal Appeal in *James Loughlin* (1951) 35 Cr.App.R. 69 at p.71:

> "It is perfectly good evidence of the prisoner being the housebreaker that he is found in possession of property stolen from a house quite soon after the breaking."

The second question relates to proof of the allegation that the entry was made by night. In section 4 of the Penal Code "night" is thus defined:

> " "night" or "night-time" means the interval between half-past six o'clock in the evening and half-past six o'clock in the morning."

The evidence as to the hour at which the entry was effected is extremely vague. With a little more care in the preliminary inquiries and the presentation of the case by the prosecution, it is possible that the time of entry might have been established with a greater degree of accuracy. As it is, the evidence shows merely that the sack of rice had been in its place in the storeroom when Sub-Inspector Kiriau went to bed on the 7th August and was no longer there at lunchtime on the 8th August. It is, no doubt, improbable that the rice should have been stolen from the storeroom at a time when the members of the household, or some of them, were about. But the prosecution has called no evidence to say at what hour the family started to move about the house. There is no evidence to show whether on the date in question it was light or still dark at half-past six, when night officially ends for the purposes of the Ordinance. In these circumstances we are compelled to hold that though an entry after six-thirty was unlikely it was not impossible. In other words it has not been proved beyond reasonable doubt that the entry took place by night, as defined in the Code.

Accordingly we quash the conviction for Burglary under section 292 (a) of the Penal Code and the sentence of three years' imprisonment based upon such conviction. In its place, exercising our powers under section 36 (2) of the Court of Appeal Rules (No. 2) 1956, we substitute a conviction under section 294 of the Penal Code for breaking and entering the dwelling-house of Wilfred Benjamin Kiriau on 8th August 1966 with intent to commit a felony therein. Upon this conviction we pass sentence of three years' imprisonment.

The appeal against the conviction for Larceny on the same date, and against sentence of twelve months' imprisonment to be served concurrently with the sentence on the major charge, is dismissed. A

Appeal allowed in part.