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BOYD

v.

REGINAM

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[COURT OF APPEAL, 1967 (Gould V.P., Adams J.A., Marsack J.A.), 1st, 4th, 8th December]

Criminal Jurisdiction

Criminal law—evidence and proof—whether witness accomplice—evidence giving rise to suspicion—magistrate's finding to contrary—Court of Appeal Ordinance (Cap. 3) s.17A—Criminal Procedure Code (Cap. 9) s.325.

C

At the appellant's trial for the offence of larceny by a servant of one hundred bags of copra a witness, Kalika Prasad, gave evidence that the bags were loaded onto his launch at Levuka on the instructions of the appellant and that the appellant asked him to sell the copra in Kalika Prasad's own name and to account for the proceeds to the appellant. There were aspects of Kalika Prasad's evidence which gave rise to the suspicion that he might have been an accomplice but the magistrate held that he was not, and accepted his evidence as true. On appeal to the Supreme Court the judge considered that the evidence of Kalika Prasad should have been treated with prudence but upheld the conviction. There was other evidence, which was accepted, that the copra had been loaded onto the launch on the instructions of the appellant.

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Held: 1. The possible objections to acting upon the evidence of Kalika Prasad must inevitably have been in the minds of the judge and magistrate in the courts below.

2. In neither court could it be said that the appellant had been convicted upon what would necessarily be regarded in law as the uncorroborated evidence of an accomplice.

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3. There was therefore no reason in law for disturbing the judgment of the Supreme Court dismissing the appeal.

Case referred to: *Chiu Nang Hong v. Public Prosecutor* [1964] 1 W.L.R. 1279.

Appeal from the Supreme Court in criminal appellate jurisdiction on conviction of larceny by a servant. Reported only on questions in relation to evidence of a possible accomplice.

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H. A. L. Marquardt-Gray for the appellant.

J. R. Reddy for the respondent.

Judgment of the Court (read by MARSACK J.A.): [8th December, 1967]—

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This is an appeal against a judgment of the Supreme Court dismissing an appeal from a decision of the Magistrate's Court given at Levuka on 4th April, 1967, convicting the appellant of the offence of larceny by a servant. The jurisdiction of this Court on such an appeal is limited to questions of law: Court of Appeal Ordinance Sec. 17A.

The allegation against the appellant was that he, being Manager of the Levuka branch of UNO Limited, unlawfully caused 100 sacks of the Company's copra to be removed from its Levuka warehouse and attempted to dispose of this copra for his own benefit. A

Three grounds of appeal were set out in the Notice of Appeal. At the hearing before this Court a fourth ground was added by leave. This ground was based upon a submission that there was an irregularity in the appointment of the learned trial Magistrate, who had accordingly acted without jurisdiction. Later in the hearing this ground was abandoned and the appeal falls to be determined on the grounds put forward in the Notice. B

These are stated in the following terms:—

(1) THAT the learned trial Magistrate erred in law in that he accepted hearsay evidence as evidence of proof of ownership and loss.

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(2) THAT the learned trial Magistrate accepted the evidence of one KALIKA PRASAD, who was an accomplice, without the said evidence being corroborated and without having warned himself of the danger of convicting on the uncorroborated testimony evidence of an accomplice.

(3) THAT the learned Appeal Judge erred in law when he applied the proviso contained in section 325(1) he having held that the learned trial Magistrate had admitted hearsay evidence and had failed to warn himself of the danger of convicting upon the uncorroborated evidence of an accomplice. D

In his submissions on the first ground counsel for the appellant urged that proof of ownership of the 100 sacks of copra in question depended entirely upon hearsay evidence; that the learned Judge in the Court below held this evidence to be hearsay; and that the learned Judge erred in law in applying the proviso to section 325 of the Criminal Procedure Code when he held that no miscarriage of justice was occasioned by the wrongful admission of the hearsay evidence. E

The evidence to which exception was taken on this ground was that of Tom Luey, Managing Director of UNO Limited, as to the quantity of copra missing from the Company's shed at Levuka. A check was made of the copra in stock and the figure there obtained compared with the Company's records. The shortage disclosed by the check could not be confirmed from the personal knowledge of the witness, but to some extent depended on entries in books made by others. Moreover, the witness was not present the whole of the time the check was being carried out. F

There might well be force in counsel's argument on this ground if the proof of the ownership of the copra in question entirely or substantially depended upon the evidence held to be hearsay. But that is not the case here. There is clear evidence that the 100 sacks of copra were taken from the copra shed of UNO Limited at Levuka and loaded into the ship *Tui Morris*. There are only three licensed copra buyers at Levuka, UNO being one; there is no suggestion that the copra in question belonged to either of the other licensed firms. No claim to the copra in question was made by the appellant or by any other person or firm. There was, in our opinion, ample evidence justifying a finding that the copra was the property of UNO Limited. The evidence which is objected to as hearsay was not, in our view, necessary to establish one of the facts essential to the G H

conviction of the appellant of the offence charged. Accordingly the admission of this evidence is not a ground for setting aside the conviction, A and the first ground of appeal fails.

On the second ground the onus lies on the appellant to satisfy this Court that on the facts found in the Magistrate's Court and the Supreme Court the witness Kalika Prasad should, as a matter of law, have been held to be an accomplice; from which it would follow that the learned Magistrate should not have accepted his evidence without directing himself as to B the danger of doing so: *Chiu Nang Hong v. Public Prosecutor* [1964] 1 W.L.R. 1278. It is certainly true that the actions of Kalika Prasad give rise to some suspicion that he may have been what is in law regarded as an accomplice. One example of this is his own evidence that at the request of the appellant he made out the manifest indicating that the copra in question came from another port, Wainunu, and not Levuka. It is, however, not for this Court on an appeal confined to questions of law to reverse C a finding of the Court below when there is evidence to support that finding. In the Magistrate's Court it was held that he was not an accomplice; and the learned Magistrate in the course of his judgment says:

> "I accept as true Kalika's evidence (of which there is corroboration) of his meeting with the accused on the night of the 7th December, after the copra had been put on board his vessel, and as to the accused's instructions to him to sell the copra and pay the proceeds D to the accused."

The learned Judge on appeal considered that the evidence of Kalika Prasad should have been treated with great circumspection; but he pointed out that his evidence to the effect that the 100 sacks of copra were loaded into the *Tui Morris* on the instructions of the appellant merely duplicated the evidence of the witness Newton, whose testimony was specifically E accepted in the Court below. It is abundantly clear that both at the trial and on the appeal the Court was invited to hold that Kalika Prasad had been an accomplice, and that his evidence should not be accepted without material corroboration. The possible objections to acting on the evidence of Kalika Prasad must inevitably have been in the minds of both Judge and Magistrate when that evidence was being considered by the Court. It is also clear that in neither Court could it be said that the appellant was F convicted upon what would necessarily be regarded in law as the uncorroborated evidence of an accomplice.

In the result this Court can see no reason in law for disturbing the judgment of the learned Judge in the Court below on the second ground of appeal.

The third ground was substantially argued in the course of counsel's G submissions on grounds 1 and 2 and does not require any further consideration beyond what has already been given to it in the course of this judgment. In any event the appeal from the Supreme Court to this Court must be one on point of law only. To succeed on this ground it would accordingly be necessary for appellant to show that the learned Judge's finding that no miscarriage of justice had taken place by the admission of the evidence was wrong in law. We can find nothing in the submissions H made on behalf of the appellant which would impel us to come to this conclusion.

For these reasons the appeal is dismissed.

Appeal dismissed.