A

SALIK RAM alias KUNNU

v.

REGINAM

B

[COURT OF APPEAL, 1969 (Gould V.P., Hutchison J.A., Marsack J.A.), 21st October, 7th November]

Criminal Jurisdiction

Criminal law—accomplice—evidence amply corroborated—whether judgment of magistrate adequate—Court of Appeal Ordinance (Cap. 8) s.22(1).

Criminal law—evidence and proof—evidence of accomplice—duty of court to decide on credibility—decision to be arrived at in light of whole of evidence.

Criminal law—evidence and proof—defence of alibi—credibility of accused and witnesses—relevant to take into consideration failure by accused to inform police at earlier stage of existence of supporting witnesses.

C

D

The passage in the judgment of the Judicial Committee of the Privy Council in *Chiu Nang Hong v. Public Prosecutor* (post) indicating that where a conviction by a judge sitting alone has been on the uncorroborated evidence of an accomplice, the conviction should not stand unless the judge has made it clear that he had the risk of so convicting in his mind, but nevertheless was convinced by the evidence, even though uncorroborated, of the guilt of the accused person, has no real application to a case where the evidence of the accomplice has been amply corroborated.

E

Before relying upon the evidence of an accomplice a court must satisfy itself of his credibility but in so doing it will have regard to the whole of the evidence including that of a corroborative witness if there is one.

F

Where an accused person puts forward an alibi, a court, in considering the question of the credibility of the accused and his witnesses, is entitled to take into consideration the fact that the accused did not inform the police that he had such witnesses available.

Cases referred to: *Chiu Nang Hong v. Public Prosecutor* [1964] 1 W.L.R.1297: *R. v. Ndaria* (1945) 12 E.A.C.A.84: *Uganda v. Khimchand Kalidas Shah* [1966] E.A.30: *Hari Chand v. The Queen* (Appeal No. 20 of 1963 — unreported): *Woolmington v. Director of Public Prosecutions* [1935] A.C.462; 25 Cr.App.R.72.

G

Appeal against a judgment of the Supreme Court dismissing an appeal from the Magistrate's Court against a conviction of larceny.

S. M. Koya for the appellant.

G. N. Mishra for the respondent.

H

The facts sufficiently appear from the judgment of the court.

Judgment of the Court (read by HUTCHISON J.A.):

[7th November 1969]—

The appellant was convicted by the Magistrate's Court of the First Class at Nadi of the offence of larceny, the particulars of the charge alleging that he stole a quantity of telephone copper wire, the property of the Government of Fiji. He appealed to the Supreme Court against this conviction on a number of grounds but his appeal was dismissed by Mr. Justice I. R. Thompson, Acting P.J. He has now appealed to this Court on a somewhat lesser number of grounds. These are set out in his notice of appeal as follows :—

"(a) *THAT* the Supreme Court erred in not holding that despite the fact that the Learned Trial Magistrate was a legally and professionally qualified person he had as a matter of law erred in acting on the evidence of the accomplice *MALAKAI LAVETIA* without expressing the danger of acting upon it without corroborative evidence. Consequently there has been a substantial miscarriage of justice.

(b) *THAT* the Supreme Court erred in not holding that there was no evidence to show that the wire identified by the Prosecution Witness Mr. Dunn was that produced at the trial as Exhibit "A" and that it related to the subject matter of the charge.

(c) *THAT* the Supreme Court erred in not holding that the Learned Trial Magistrate misdirected himself in law in not directing himself that the onus of disproving the defence of alibi was on the Prosecution and in not holding that the Learned Trial Magistrate ought to have directed specifically on this question. Consequently there has been a substantial miscarriage of justice.

(d) *THAT* the Supreme Court erred in not holding that the Learned Trial Magistrate in his judgment gave undue importance to Appellant's failure to inform the police as to the information possessed by the witnesses called in support of the defence of alibi raised by the Appellant. Consequently there has been a substantial miscarriage of justice."

Immediately prior to the hearing of the appeal counsel for the appellant asked leave to amend by adding the following further grounds of appeal:—

"(aa) *THAT* the Supreme Court erred in :—

(i) not holding that the Learned Trial Magistrate ought not to have accepted the evidence of the accomplice *MALAKAI* LAVETIA.

(ii) not holding that the Learned Trial Magistrate was wrong in treating the said *MALAKAI LAVETIA's* evidence as divisible for the purpose of trial,

(iii) not holding that the Learned Trial Magistrate ought not to have accepted the evidence of the special constable *LIVAI RATOGITO.*"

Counsel for respondent having no objection so long as these grounds were argued purely on the law, the Court allowed the amendment. It is, of course, the position that under section 22(1) of the Court of Appeal Ordinance the appeal on any ground in this type of case must be one which involves a question of law only.

The facts are fully set out in the judgments of the learned trial Magistrate and of the learned Judge in the Supreme Court and it is unnecessary to repeat them. It is, however, convenient for an understanding of the grounds of appeal to state them in a skeleton form. On the 16th of September, 1968, certain lengths of telephone wire were cut on the roadside near Nadi. A Special Constable Livai Ratogito, according to his evidence, came upon appellant sitting there in his truck and one Malakai Lavetia rolling up the wire. While the Special Constable was a little way away from the truck the truck made off with the appellant and Malakai in it. Malakai was later convicted of the theft of the wire. When the charge against the accused was gone into, the prosecution called Malakai, whose evidence incriminated appellant, and Special Constable Livai, whose evidence was strongly corroborative of that of Malakai. Appellant denied any connection with the theft. He gave evidence and called witnesses to the effect that he was at his house, and his truck was there too, over the time at which the alleged theft occurred.

Counsel's main contention was that urged on Ground (a), along with which he argued Ground (aa) (i) and (ii). His primary submission under this head was twofold, first, that, when a case is heard by a Judge or Magistrate sitting alone, he must show by his judgment that he has directed himself, as one would direct a jury, that it is dangerous to convict on the uncorroborated evidence of an accomplice, and, secondly, that before turning to consider whether there is corroboration of the accomplice's evidence, the Judge or Magistrate must decide whether the accomplice is worthy of belief.

He relied, on the first branch of this argument, on the reasons given by the Judicial Committee for allowing the appeal in *Chiu Nang Hong v. Public Prosecutor* [1964] 1 W.L.R. 1279. In that case, there was no corroboration whatsoever of the complainant's evidence in a sexual case, and, while the circumstances were consistent with the case for the prosecution, they were consistent also with the case for the accused person. The judge had in fact said "I could not but come to the conclusion that she" (the complainant) "was speaking the truth, and that in all material circumstances her evidence was corroborated by the facts". In the view of their Lordships, the trial Judge was finding corroboration where there was none; and there was thus a miscarriage of justice. Then we come to the passage relied on by counsel (at p.1285) :—

> "Their Lordships would add that even had this been a case where the judge had in mind the risk of convicting without corroboration, but nevertheless decided to do so because he was convinced of the truth of the complainant's evidence, nevertheless they do not think that the conviction could have been left to stand. For in such a case a judge, sitting alone, should, in their Lordships' view, make it clear that he has the risk in question in his mind, but nevertheless is convinced by the evidence, even though uncorroborated, that the case against the accused is established beyond any reasonable doubt. No particular form of words is necessary for this purpose: what is necessary is that the judge's mind upon the matter should be clearly revealed."

We do not think that that helps appellant. In this case there was ample corroboration in the evidence of Special Constable Livai; and the passage has no real application to such a case. In any event, the learned trial Magistrate, in our opinion, made it quite reasonably clear that he was aware of the danger of relying on the uncorroborated evidence of an accomplice when, at the commencement of his judgment, he said :—

> "... the bulk of the evidence against the accused is contained in the evidence of one Malakai, an undoubted accomplice, and the evidence of Special Constable Livai."

We reject Mr. Koya's submission on the second branch of this argument in the form in which it was put. He replied on *Rex v. Ndaria and Ors.* (1945) 12 E.A.C.A. 84 and *Uganda v. Khimchand Kalidas Shah and Ors.* [1966] E.A. 30. It is, of course, a fact that the tribunal has to satisfy itself of the credibility of the accomplice and besides that, see what corroboration there is; but there is nothing, in our opinion, in those judgments to require the tribunal to satisfy itself of the credibility of the accomplice without regard to the other evidence, which will include the evidence of the corroborative witness if there is one. The passage relied on by counsel in the judgment in the earlier of these cases commences :—

> "If the Court, after hearing all the evidence, feels that it cannot believe the accomplice, it must reject his evidence."

That we adopt; but the important point of that for present purposes is that the decision on the credibility of the accomplice is to be arrived at "after hearing all the evidence". And in the later of these cases, the judgment says :—

> "Of course, quite apart from any question of corroboration, a court should never accept or reject the testimony of any witness or indeed any piece of evidence until it has heard and evaluated all the evidence in the case. At the conclusion of a case, the court weighs all the evidence and decides what to accept and what to reject. When it accepts the evidence of an accomplice, it then, save as aforesaid, looks at the other evidence which it has accepted to see if it affords corroboration of the evidence of the accomplice."

In truth, the whole process is normally gone through at the same time. In our opinion, the headnote (iii) to that report on this point is misleading.

In his argument on this ground counsel also pointed to certain aspects of Malakai's evidence, which he contended should have resulted in a refusal to accept it, in particular where the learned trial Magistrate rejected one part of Malakai's evidence, saying :—

> "I consider that the witness Malakai is attempting to cover up for two Indian men who were assisting him and the accused on that night and not being truthful."

We do not think that there is any reason why the Magistrate should not have accepted the main part of Malakai's evidence even though he disbelieved him on that one particular point. An argument similar to that put forward here was rejected by this Court in *Hari Chand v. The Queen* (appeal No. 20 of 1963 — unreported). In any event, this is a question of credibility and not a question of law open to appellant in this Court.

In our view there is nothing in Ground (b). We think that the learned Judge in the Supreme Court was correct in holding that the wire was sufficiently identified for the reasons given by him. A

On Ground (c) it is, of course, the law that once evidence is tendered of an alibi, the burden of disproving the alibi rests on the Crown. This is but one application of the golden rule in *Woolmington v. D.P.P.* [1935] A.C. 462, 481. We do not see any reason to believe that the learned Magistrate placed the burden of proof on this aspect of the case on appellant. Mr. Koya said that, when he made reference to the fact that appellant and his witnesses did not inform the police that these witnesses would say that he was at home all the night in question, he was by implication putting the onus of proof on the appellant. We do not think that he was; what he was considering when he did that was the credibility of appellant and his witnesses; what he was saying was to the effect that it was odd that appellant, if he had witnesses of truth for the fact that he was at home during the whole evening, did not let the police know. B C

Ground (d) is linked with Ground (c). It must always be a nice question whether a person's not early informing the police of evidence which is available to him and which he ultimately brings forward at his trial tends to affect the credibility of that evidence. It may in some cases, in others it may not. The point must be looked at in the light of all the facts of each individual case. Here the learned trial Magistrate found he was justified in taking the view that it did affect the credibility of the evidence; and we do not think that we can say that he was wrong. In any event again, this does not raise a question of law open to appellant in this Court. D

The remaining Ground (aa) (iii) raises simply a question of credibility, which again is not open to appellant in this Court. E

The appeal is therefore dismissed.

Appeal dismissed.