A

DIRECTOR OF PUBLIC PROSECUTIONS

v.

ASESELA WAWA

B

[SUPREME COURT, 1971 (Goudie P.J.), 5th, 12th November]

Appellate Jurisdiction

Criminal law—principles of criminal liability—permitting escape of prisoner from lawful custody arrangement permitting prisoner to be at liberty for limited period to interview witnesses—due return of prisoner to custody pursuant to arrangement—intended limitation of period of liberty did not absolve officer permitting it—Penal Code (Cap. 11) ss. 131(c), 424.

C

Criminal law—prison officer—permitting prisoner to be at liberty for agreed limited period—return of prisoner in accordance with agreement—officer not absolved from liability for permitting escape from lawful custody—Penal Code (Cap. 11) ss. 131(c), 424.

D

A prisoner serving a sentence was placed in charge of the respondent, a prison officer, who was to convey him to a Magistrates Court to stand trial on another charge. The respondent permitted the prisoner to go alone to an island to see persons he required as witnesses, on his undertaking (which he fulfilled) to return. On the respondent's trial for wilfully permitting the escape of a prisoner (there was an alternative charge of being an accessory after the fact to escape from lawful custody) the trial magistrate upheld a submission that the respondent had no case to answer.

E

Held : On the facts stated, the respondent had wilfully permitted the escape of the prisoner notwithstanding that it was only for an agreed period of two days.

F

Case referred to :

R. v. Scott [1967] V.R. 276.

Appeal by the Director of Public Prosecutions against an acquittal in the Magistrates Court on a submission of no case to answer.

T. Walker for the appellant.

G

Respondent in person.

The facts sufficiently appear from the judgment.

12th November 1971

GOUDIE J.

H

This is an appeal by the Director of Public Prosecutions from acquittals after submissions of no case to answer on the following charges :

Count 1. Being an officer in the Prisons Service wilfully permitted the escape of a prisoner from lawful custody contrary to Section 131 (c) of the Penal Code.

Count 2. (Alternative to Count 1.) Accessory after the fact to escape from lawful custody contrary to Section 424 of the Penal Code.

The facts as found by the learned trial Magistrate in his ruling were as follows :—

> On 3rd August 1969, the accused was an officer employed by the Prisons Department stationed at Labasa. A prisoner already serving a sentence of imprisonment was required to attend the Taveuni Magistrate's Court on 5th of August 1969 to stand trial on another charge. He was placed in charge of the appellant who was instructed by his superior to take him to Taveuni on 3rd of August 1969 and produce him in the Taveuni Court on 5th of August 1969.
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> The appellant was told that if the prisoner desired to see any witnesses he should be permitted to do so at the lock-up at Taveuni. The prisoner wanted to see certain witnesses who came from another island, Qamea. By mutual arrangement between the appellant and the prisoner, the latter was permitted to go to Qamea alone to see his witnesses on his undertaking to return to Taveuni before the trial on 5th of August. He did in fact go and see his witnesses and returned to Taveuni for the trial on 5th of August.

In his ruling, the Magistrate stated "It is abundantly clear that the only conclusion the Court can arrive at is this, that at the time the prisoner left the custody of the accused, he had no intention to remain back (sic) in Qamea or to be at large for ever. It is, therefore, ruled that there was no escape by the prisoner and it follows that on both counts the prosecution has failed to establish a prima facie case against the accused requiring him to make a defence. He is accordingly acquitted on both counts."

In reaching this conclusion the trial Magistrate relied on a case cited as *R. v. Scott* [1967] V.R. Page 276 (Full Court). I have not had the advantage of reading the report of this case, but the facts were outlined by the trial Magistrate to be as follows :—

> A prisoner serving a sentence was in a working party some distance from the gaol. Later it was discovered that he had disappeared and he was traced to Victoria and thence to Sydney and subsequently arrested and charged with escaping from lawful custody. He gave evidence on oath that he was struck with a piece of timber by another prisoner and lost consciousness and did not become aware of his surroundings until 2 days later when he found himself to be a free man.
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> The trial Judge directed the jury that if they believed the prisoner was in a state of automatism when he left the working party, or even, if it could reasonably be true, the prisoner had a good defence to the charge, and pointed out that the prosecution was required to prove an intent to escape.

In my view there is no sort of analogy between the facts in the case cited and the present case. Quite clearly, if the facts were as the trial Magistrate found, the appellant wilfully permitted the escape of the

prisoner if only for an agreed period of 2 days. There is no rule of law, and it would be contrary to common sense, to hold that an intention to escape could only be proved by establishing that the prisoner intended to escape for all time. The appeal of the Director of Public Prosecutions is therefore upheld. A

The proceedings are remitted to the trial Magistrate with a copy of this judgment for his information and future guidance. In normal circumstances I would direct him to continue with the trial of the appellant after finding a case to answer. However, the learned Director of Public Prosecutions has undertaken to enter a nolle prosequi in this case as he considers there has been such unwarranted delay that it would be unfair to continue the case against the accused, particularly as he has been disciplined departmentally and is no longer a prison warder. No further action is therefore required from the trial Magistrate and the object of this judgment is merely to over-rule the lower court finding, which is wrong in law and might be used as a precedent in another case. B C

Appeal allowed.