AILAFO AINU'U v. POLICE

SUPREME COURT. Apia. 1968, 1969. 16, August; 30, October; 16, January. SPRING C.J.

Appeal against convictions - whether provisions of Police Offences Ordinance contrary to Constitution - right against self-incrimination - principles applicable in criminal prosecutions where defendant unrepresented.

The appellant was convicted before the Magistrate on two separate charges of failure to fully and properly account for goods of her employer received and entrusted to her as a trader in the ordinary course of her employment. In the lower Court, she appeared in person to conduct her own defence, and gave evidence. The appeal is against her conviction as being wrong in fact and in law and founded on three grounds:

(1) That section 11(1)(b) of the Police Offences Ordinance 1961 under which she was convicted is contrary to Article 9(5) of the Constitution;

(2) That appearing without legal counsel she was not informed by the Magistrates' Court that her evidence could be used against her and of her right to remain silent;

(3) That the informations under which she was convicted contravened Article 10(1) of the Constitution.

Held: 1. Section 11(1)(b) of the Police Offences Ordinance 1961 does not compel divulgence of self-incriminatory statements under threat of legal sanctions and accordingly not contrary to Article 9(5) of the Constitution.

2. The said section 11(1)(b) is unequivocal, and clearly sets out the obligation imposed upon a trader, namely, to fully and properly account for (in the sense of giving a reckoning) the goods and money of his employer received by and entrusted to such trader in the ordinary course of his employment. The section does not, therefore, contravene Article 10(1) of the Constitution.

3. Where an accused person is appearing on his or her own to defend a criminal charge then such accused should be distinctly told by the Court that he or she has a right to give evidence in his or her defence but that there is no requirement that he or she should be compelled to do so. Further such person should also be advised of the effect of giving evidence and the liability of being cross-examined by the prosecution and lastly the right to call witnesses.

Appeal allowed.

Wray (of the U.S.A. Bar), for the Appellant.
Lockie, Attorney-General, for the Respondent.

Cur. adv. vult.

SPRING C.J.: The Appellant was convicted in the Magistrates' Court, Apia, Western Samoa, on the 29th January 1968 on two charges brought under the provisions of the Police Offences Ordinance 1961 section 11(1)(b).

The informations as laid read as follows - Firstly, Charge No. 2058/67 -

> "That Ailafo Ainu'u of Matautu-tai did on the unknown date between the 8th February and the 8th September 1966 at Sala'ilua fail to fully and properly account for the goods valued at £500.11.1 of her employer namely O.F. Nelson and Company Limited received by and entrusted to her as a trader in the ordinary course of her employment".

Secondly, Charge No. 2059/67 reads -

> "That Ailafo Ainu'u of Matautu-tai did on the unknown date between the 1st August and the 8th September 1966 at Sala'ilua fail to fully and properly account for the goods valued at £564.13.8 of her employer namely O.F. Nelson and Company Limited received by and entrusted to her as a trader in the ordinary course of her employment".

Both informations were heard together. Charge No. 2058/67 relates to what was described as "reserve or wholesale stock" and Charge No. 2059/67 relates to "retail stock".

The hearing commenced on 16th June 1967 and concluded on the 17th January 1968, the Court hearing evidence on nine separate days during this period.

Charge No. 2058/67 was amended on the 21st December 1967 on the application of the prosecution by deleting the words "the unknown date between the 8th February and" and increasing the amount which the appellant was alleged to have failed to account therefor from £500.11.1 to £583.11.1.

Charge No. 2059/67 was amended on the 21st December 1967 on the application of the prosecution by deleting the words "unknown date between the 1st August and the". This latter charge was still further amended on the 17th January 1968 on the application of the Prosecution by amending the amount the appellant was alleged to have failed to account therefor from £564.13.8 to £550.1.8.

The accused appeared in person and was not represented by Counsel. A considerable body of evidence was presented to the Court - the majority of it consisting of stock sheets, statements, manifests, invoices, dockets, reconciliation statements etc. The Magistrate gave a written judgment and convicted the appellant on both charges and fined her the sum of $80 (£40) on each charge in default of payment within one month four months' imprisonment (cumulative). The appellant filed a notice of appeal to the Supreme Court in respect of both convictions alleging that the learned Magistrate's decision was wrong in fact and in law. It was agreed that both appeals be heard together. In support of the appeal Counsel for appellant advanced three major grounds viz.

(I) That the Police Offences Ordinance 1961 section 11(1)(b) (under which the appellant was convicted) was contrary to the written Constitution of Western Samoa viz. Article 9(5).

(II) That the accused appearing on her own behalf and without counsel was not at any point informed by the Court that her statements in evidence could be used against her and that her right to remain silent would not be prejudicial to her case.

(III) That the informations as laid contravened the provisions of Article 10(1) of the written Constitution of Western Samoa in that she was convicted of an offence other than an offence defined by law.

Before dealing with the various grounds of appeal, it would be as

well if I trace the history of this particular piece of legislation, viz. section 11(1)(b) of Police Offences Ordinance 1961. The Police Offences Ordinance 1922 enacted (inter alia) in section 45, the following -

"45. (b) Every person commits an offence and is liable to a fine not exceeding £50, or to imprisonment for a term not exceeding six months who being the manager or in charge of a trading station in Samoa under an agreement in writing as hereafter mentioned fails at any time to fully and properly account for the goods and money of his employer received by and entrusted to such person aforesaid unless it appears to the Court that the deficiency or shortage has been caused by an Act of God or the King's enemies or by accidental fire or other inevitable accident or by robbery or theft or other cause not attributable to the negligence or default of such person aforesaid.

46. No person shall be liable to a prosecution under clause 45 hereof unless the agreement for his employment shall be in writing executed by him in the presence of a Commissioner of the High Court or a Solicitor of the Supreme Court of New Zealand and unless such agreement shall have written or endorsed thereon at the time of such execution clauses 45 and 46 hereof, and unless such Commissioner or Solicitor shall certify after his signature that the said clauses 45 and 46 have been written or endorsed on the said agreement before the execution thereof and that the said agreement and clauses have been read over to the said person before the execution thereof and that he thoroughly understood the same".

It will be noted that a condition precedent to liability for prosecution under section 45 of the 1922 Ordinance was the existence of a written agreement between the trader and the employer.

It is also interesting to note the proviso to section 45(b) commencing at the word "unless". This 1922 Ordinance was repealed by the General Laws Ordinance 1931 (No. 3) (as amended by Law Reform Ordinance 1948 No. 6) and section 12 substituted therefor - which reads as follows:

"12. (1) In this section, -

"Trader" means the manager or person in charge of a trading station in Samoa employed as such by the owner thereof under a written agreement;

/"Written agreement" means an agreement of service in writing having endorsed thereon prior to the execution thereof by any party thereto the provisions of this section, and made between the owner of a trading station and a trader and executed by the owner in the presence of any witness sui juris by the trader in the presence of a Judge or Commissioner of the High Court, a Solicitor of the Supreme Court of New Zealand or a legal agent and the witness attesting the signature of the trader shall certify thereon that at the time of signing the same the trader appeared fully to understand the meaning and effect of such agreement. Such agreement shall be in duplicate one for each party and shall be accompanied by a translation of the same in the Samoan language/.

/Definition substituted by section 8, 1948, No. 6./

(2) Every trader commits an offence and is liable to a fine of fifty pounds or to imprisonment for six months who, -

(a) Gives out goods or money belonging to his employers on credit without the written authority of his employer;

(b) Fails at any time to fully and properly account for the goods and money of his employer received by and entrusted to such trader in the ordinary course of his employment.

(3) Nothing in this section shall affect the liability of any trader to be prosecuted and convicted for theft but no trader shall be convicted twice in respect of the same offence".

In 1961 the Police Offences Ordinance repealed the General Laws Ordinance 1931 as amended and the present section 11 reads as follows:

"11. Liabilities of traders -

(1) Every trader commits an offence and is liable to imprisonment for a term not exceeding six months or to a fine of fifty pounds who -

(a) Gives out goods or money belonging to his employer on credit without the written authority of his employer;

(b) Fails at any time fully and properly to account for the goods and money of his employer received by and entrusted to such trader in the ordinary course of his employment.

(2) Nothing in this section shall affect the liability of any trader to be prosecuted for theft.

(3) "Trader" means the manager or person in charge of a trading station in Western Samoa employed as such by the owner thereof".

The definition of "Trader" was altered in the 1961 Ordinance and the requirement of a written agreement between the trader and the employer done away with. In the instant case there was no written agreement between the appellant and her employer O.F. Nelson & Company Ltd. Further, the proviso in section 45(b) commencing at the word "unless" was not carried forward in to the 1961 Ordinance.

I will now deal with the grounds of appeal advanced by the appellant separately. I take the first ground - viz. that the Police Offences Ordinance 1961 section 11(1)(b) is contrary to the written Constitution of Western Samoa Article 9(5). The appellant submits that the said section 11(1)(b) of the said Ordinance is unconstitutional and void being in violation of Article 9(5) of the Constitution of the Independent State of Western Samoa.

It is true that the said Constitution is the Supreme law of Western Samoa - Article 2 of the Constitution reads -

"2. (1) This Constitution shall be the Supreme law of Western Samoa.

(2) Any existing law and any law passed after the date of coming into force of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void".

Article 9(5) of the Constitution reads -

> (5) No person accused of any offence shall be compelled to be a witness against himself".

It is necessary to consider whether the said section 11(1)(b) is in conflict with the provisions of the Constitution. If it is held to be in conflict then of course the said provisions of the Police Offences Ordinance 1961 which offend against the Constitution would be void.

The appellant quoted at length numerous decisions of the Supreme Court of the United States of America and also other cases decided by other American Courts. The Attorney-General claimed that the decisions of the American Courts have no legal effect or consequence so far as the Courts of Western Samoa are concerned as the definition of "Law" in Article 111 of the Constitution does not include the Law of the United States of America. In my view, however, whilst the definition of "Law" in the Constitution does not refer to the law of the United States of America the decisions of the Courts of that country particularly on constitutional matters, are entitled to the highest respect. They are not of course binding in any way upon this Court as the learned Authors in Halsbury's Laws of England (3rd Edition) Vol. 22 at p. 804 note (f) say (in relation to English Courts) - "The decisions of the Courts of the United States of America are not authorities at all in English Courts but they may be useful as guides to the Court before which they are cited as to what its decision ought to be". I have therefore considered the American authorities submitted by Counsel for the appellant in support of his argument on this ground.

In my view the section 11(1)(b) of the said Police Offences Ordinance 1961 imposes an obligation on persons who are traders (within the meaning ascribed to this word in the said section) at any time to fully and properly account for the goods and the money of his employer received by and entrusted to such trader in the ordinary course of his employment.

"Account for" means in my view - a reckoning of goods and money received: see R. v. Walker /1946/ N.Z.L.R. 512 at p. 519 where Sir Michael Myers C.J. says -

> "An account is a reckoning of money received and paid; a reckoning as to money, a statement of moneys received and expended with calculation of the balance; a detailed statement of money due; the rendering of a reckoning; a particular statement of the administration of money in trusts".

The section does not in my view, merely mean "to explain" in the sense advanced by Counsel for appellant at p. 3 of his written brief nor do I agree with the learned Magistrate's interpretation of the words "account for" as set forth in his written judgment as meaning no more than "to explain". In interpreting the Statute I am guided by the accepted rules of construction.

Maxwell on The Interpretation of Statutes 9th Edn. at p. 1 says:

> "A Statute is the will of the Legislature and the fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded "according to the intent of them that made it". If the words of the statute are in themselves precise and unambiguous no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the Legislature".

It is the province of the Courts to construe the Statutes which the Legislative has enacted and I quote from Halsbury's Laws of England 3rd Edn. Vol. 36 p. 387-8.

> "The dominant purpose in construing a statute is to ascertain the intention of the Legislative as so expressed. This intention, and therefore the meaning of the Statute is

primarily to be sought in the words used in the Statute itself which must if they are plain and unambiguous be applied as they stand however strongly it may be suspected that the result does not represent the real intention of Parliament".

Further the Courts do not look at Parliamentary debates to ascertain the intention of Parliament as Lord Reid said in the House of Lords in Beswick v. Beswick /1967/ A.E.R. p. 1197 at p. 1202 -

"In construing any Act of Parliament we are seeking the intention of Parliament and it is quite true that we must deduce that intention from the words of the Act. If the words of the Act are only capable of one meaning we must give them that meaning no matter how they got there. If, however, they are capable of having more than one meaning we are, in my view, well entitled to see how they got there. For purely practical reasons we do not permit debates in either House to be cited: it would add greatly to the time and expense involved in preparing cases involving the construction of a statute if counsel were expected to read all the debates in Hansard, and it would often be impracticable for counsel to get access to at least the older reports of debates in select committees of the House of Commons, moreover, in a very large proportion of cases such a search, even if practicable, would throw no light on the question before the Court".

This Statute imposes a positive duty on the trader to fully and properly account for the goods and money so entrusted to him as above set forth and makes a failure to perform the duty an offence. The object of the Legislative in my view was to secure as far as possible the proper mercantile conduct on the part of traders - who enter into business and are entrusted with the goods (and money)of their employers.

Counsel for appellant claimed that the section under review "directs that an explanation be forthcoming or criminal sanctions will be imposed".

He says further at p. 11 of the written brief -

"The information required by the statute here under review is slightly different. It asks for information only in the circumstance that goods are missing. It is obvious that a criminal prosecution would not be brought under this statute if an innocent explanation were possible or that a mistake was made in accounting or that a storm had destroyed an indeterminate quantity of goods.

"This statute operates to extort information under circumstances of certain suspicion that particular goods have been disposed in a criminal manner. Such coerced information is more than a probable link to a criminal conviction. It is information required under circumstances where there is no other reasonable explanation but that a crime has occurred".

Counsel for appellant submits that on the basis of his interpretation of the section it is contrary to Article 9(5) of the Written Constitution of Western Samoa (Supra).

In my view Article 9(5) of the Constitution simply means that an accused person cannot be forced or requested to give evidence when accused of an offence if he does not wish to do so or if he is likely to be incriminated. This has long been the law in England and in other countries where the British system of Justice is used. In Halsbury's Laws of England 3rd Edn. Vol. 10 p. 481 it is stated -

"Every defendant is now by statute a competent witness for the defence at every stage of criminal proceedings either on his own behalf or on behalf of any person who is tried with him,

but he cannot be called as a witness except upon his own application".

The formal written Constitution of Western Samoa is a charter setting forth the basic human rights of the individual and came into force when this country attained its Independence on 1st January 1962.

Article 9(5) of the Constitution in my view expressed in written form the principle of the Criminal law that has long existed in this country. The Samoa Act 1921 section 251 (now repealed) states (inter alia) -

> "(1) Every person charged with an offence shall be competent but except where the contrary is expressly provided by any Act not a compellable witness upon his trial for that offence".

This section has been repeated in the Evidence Ordinance 1961 section 15 (1).

The charges brought against the accused are criminal charges and the prosecution is obliged to prove every fact or circumstance stated in the information which is material and necessary to constitute the offence charged. The general rule is that, apart from any provisions to the contrary, the burden of proof of guilt lies on the prosecution and it is not for the defence to prove innocence. See Woolmington v. Director of Public Prosecutions (1935) A.C.C. p. 481 - 482. The Statute does not in my view "direct that an explanation be forthcoming or criminal sanctions will be imposed". The accused person at the close of the prosecution case can maintain silence as it is a fundamental principle of the criminal law of this country that no accused person is compelled to give evidende and thus expose himself while under oath to cross-examination by the Prosecution or to questions from the Court.

It appears to me that confusion has arisen over the question of burden of proof. Counsel for the appellant claims that it was for the defendant to exculpate herself once the prosecution had shown a shortage in the stocks of the trader. He claims that the onus of proof shifts to the Defendant and therefore the Statute offends against the Constitution. With this submission I do not agree. I refer to R. v. Putland & Sorrell (1946) 1 A.E.R. p. 85 where the defendants were charged with having conspired to acquire and having acquired rationed goods without surrendering the appropriate number of coupons. In his summing up the trial Judge directed the Jury that in a case of this kind a defendant alone might know whether coupons had been surrendered or not. The prosecution contended that the onus of proving that he had surrendered the appropriate coupons was on the defendant because that was a fact peculiarly within his knowledge. The Court of Criminal Appeal held at p. 87 -

> "The view we take of the onus of proof in such a case is this: we are not prepared to hold that the prosecution is bound to prove by evidence that in fact there was no surrender of coupons, because in many cases that would be quite impossible. But we do think that the prosecution, in making a charge against persons of having contravened this Order, must give some prima facie evidence to the jury upon which the jury would be entitled as reasonable people to find as a fact that there was no surrender of coupons. When the prosecution has done that, there is, in our opinion, not a change in the onus of proof, but there is a case against the defendants upon which the jury may convict them, unless they can upset the prima facie case which has been made against them. We are very far from saying that that means that the defendant must prove in the first instance anything at all".

The accused in the course of the prosecution case is entitled to cross-examine the prosecution witnesses and may well raise doubts in the

mind of the Court as to the validity of the prosecution's evidence at the close of the prosecution's case.

In my view in considering the Statute and having regard to the principle of the Criminal law there was no onus on the appellant to prove her innocence. The learned Magistrate at p. 11 of his written judgment says -

> "Mr Wilson said in evidence he had spent a lot of time with the defendant trying to explain these results but she could not show him he was wrong. He could not see where any mistake had been made in his records. It therefore appeared to me that the prosecution showed that there was something to be accounted for by the defendant".

In my view no such onus of proof fell upon the appellant as a matter of law. This was a criminal prosecution and the charges were required to be proved beyond reasonable doubt in all their elements either by proved facts or justifiable inferences drawn from those facts. Whether the accused voluntarily wished to give evidence is entirely a different matter and I will have more to say about this later in this judgment.

It has been laid down by the Judicial Committee of the Privy Council in Attygalle v. The King /1936/ A.C. 38 and Seneviratne v. The King /1936/ 3 A.E.R. 36 that no burden is cast upon an accused person of proving that no crime has been committed. See also Hall v. Dunlop /1959/ N.Z.L.R. p. 1031.

I have read the decisions of the American Courts interpreting the Fifth Amendment of the United States Constitution but I am not prepared to interpret Article 9(5) of the Constitution of Western Samoa in the manner urged upon the Court by Counsel for the Appellant. I do not agree with Counsel for the Appellant's submission that the said section 11(1)(b) compels divulgence of self-incriminatory statements under threat of legal sanctions. I have duly considered the argument of Counsel for the Appellant and the argument advanced in reply by the Attorney-General and I have come to the conclusion that the said section 11(1)(b) is not contrary to the Constitution of Western Samoa. I now pass to consider the third ground advanced by Counsel for the Appellant that the informations as laid contravene the provisions of Article 10(1) of the Constitution in that the Appellant was convicted of an offence other than an offence defined by law.

The said section 11(1)(b) in my view clearly sets out the obligation imposed upon a trader viz. to fully and properly account for (in the sense of giving a reckoning) for the goods and money of his employer received by and entrusted to such trader in the ordinary course of his employment. It may well be that the said section is a harsh one but that is not a matter with which I should concern myself. The Legislative in its wisdom has seen fit to pass such an enactment to protect no doubt the commercial firms.

In my view the wording of the said section 11(1)(b) is clear and unequivocal and I conclude therefore that the said section does not contravene Article 10(1) of the Constitution.

I now pass to a consideration of the last ground advanced by Counsel for the Appellant viz. that the accused appearing on her own behalf and without counsel was not at any point informed by the Court that her statements in evidence could be used against her and that her right to remain silent would not be prejudicial to her case.

Counsel for the Appellant claimed that the accused was not at any stage of the trial advised of her rights under Article 9(5) of the Constitution and that as she was conducting her own defence without the aid of counsel that the learned Magistrate should have advised the accused of her rights.

The Attorney-General claimed that there was no such obligation

imposed on a Court in Western Samoa to advise an accused person appearing without consel to defend a criminal charge (a) of her right to remain silent or (b) the effect of giving evidence and (c) the liability of being cross-examined by the prosecution should she elect to give evidence.

There is not I agree in Western Samoa any statutory provisions requiring the Courts to give such advice or warning but I take the view that where an accused person is appearing on his or her own to defend a criminal charge then such accused should be distinctly told by the Court that he or she has a right to give evidence in his or her defence but that there is no requirement that he or she should be compelled to do so. Further such person should also be advised of the effect of giving evidence and the liability of being cross-examined by the prosecution and lastly the right to call witnesses - vide Halsbury's Laws of England, 3rd Edition Vol. 10 p. 482 also R. v. Graham /1922/ 17 Cr. App. Reports, 40, and R. v. Villars /1927/ 20 Cr. App. R. 150.

It appears that in this case no such warning as above was given by the learned Magistrate to the accused. The question I have to decide is whether the failure to give such warning has resulted in an injustice to the accused sufficient to warrant this Court allowing the appeals.

To answer this question adequately it is necessary to consider whether the accused suffered an injustice in any way through giving evidence and also to consider the whole course of the trial.

In my view the evidence was complex, involved and dealt separately with alleged shortages of "retail" stock on the one hand and alleged shortages of "wholesale" stock on the other hand.

It was desirable in my view for the learned Magistrate to have heard the charges separately.

Two or more informations should not be heard together, even with the consent of the accused (and in this case it is not clear from the record whether the accused did so agree) unless the contentious evidence is identical in all cases so that there is a complete assurance that evidence applicable only to one charge is not consciously or unconsciously adopted in support of another charge Monika v. Police /1918/ N.Z.L.R. 300. The learned Magistrate at p. 7 of the written judgment states -

> "In her own evidence the defendant without notice produced a statement of account which showed it was claimed that there was a refund of cash owing to her and not a shortage. The prosecutor cross-examined and was able to obtain a number of admissions from the defendant on amounts and items which should not have been included including some significant arithmetic errors. As a result of this cross-examination it was clear that a reconciliation was necessary to evaluate the effect of the cross-examination and also to appreciate the worth of the defendant's statement. For this reason the prosecutor applied to recall Mr Wilson to produce at the next hearing a reconciliation statement showing the effect of the cross-examination. To this I agreed as this is no different than had an order for accounts been made by the Court in the first instance".

In my view the learned Magistrate was in error in allowing the prosecution to call another witness after the defence was closed. This was a criminal prosecution brought against the appellant. Further I cannot understand the learned Magistrate's remarks that "this is no different than had an order for accounts been made by the Court in the first instance". How this would be achieved in a criminal prosecution I am at loss to know. Further it was for the learned Magistrate to evaluate the worth of the Defendant's evidence not for the prosecution to call a witness to express an opinion as to the "worth of the Defendant's statement".

See R. v. Day /1940/ 1 All England Reports p. 402 at p. 404 - "The law has been laid down and expounded in R. v. Harris (2), where it is said,

at p. 594:

"But it is obvious that injustice may be done to an accused person unless some limitation is put upon the exercise of that right, and for the purpose of this case, we adopt the rule laid down by Tindal, C.J., in R. v. Frost (3) where Tindal, C.J., said: 'There is no doubt that the general rule is that where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fail by the evidence they have given. They must close their case before the defence begins; but if any matter arises ex improviso, which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter so arose ex improviso may not be answered by contrary evidence on the part of the Crown'. That rule applies only to a witness called by the Crown and on behalf of the Crown, but we think that the rule should also apply to a case where a witness is called in a criminal trial by the judge after the case for the defence is closed.

Counsel for the prosecution sought to say that the rule relied upon for the appellant was confined to cases in which the fresh evidence was being called by the judge, but that passage answers that contention and makes the rule apply to evidence called on behalf of the Crown and by the Judge.

The Judge continued, at p. 595:

and that the practice should be limited to a case where a matter arises ex improviso, which no human ingenuity can foresee, on the part of a prisoner, otherwise injustice would ensue.

In other words, the principle is to be applied whether the witness is called by the court or by the Crown. Now that case has been followed and that principle applied twice in this court. It was applied in the case of R. v. McMahon (4), and that passage to which I have referred was there again quoted by Lord Heward, L.C.J., who gave the judgment in that case, and after quoting that passage, and immediately after the words .... but in order that injustice should not be done to an accused person, a Judge should not call a witness in a criminal trial after the case for the defence is closed except 'in a case where a matter arises ex improviso, which no human ingenuity can foresee, on the part of the prisoner, otherwise injustice would ensue'."

I also note that the learned Magistrate in his written judgment at p. 2 stated that one of the informations (No. 2058/67) was amended by increasing the charge by £83 "as a result of a final check by the prosecution on the company's records prior to the hearing". A perusal of the said information shows however that the amendment was not asked by the prosecution or made by the Court until the 21st December 1967 some 6 months after the trial began. I have also considered the matters raised by Counsel for the appellant at p. 12 of his written brief and find that the learned Magistrate in convicting the appellant relied in part on the evidence and admissions made by the accused when she gave evidence before him. The question I have to decide now is whether this appeal should be allowed having regard to all the above matters. In R. v. Graham (1922) Cr. App. R. p. 40 Lord Chief Justice Hewitt said at p. 41 -

"In John Warren, 73 J.P. 359; 25 T.D.R. 633; 2 Cr. App. R. 194: 1909, Channell J., in delivering the judgment of this Court, said: 'The prisoner had not been told he had a right to give evidence. He ought to have been so told, though I am not sure we should have quashed the conviction on that ground alone'. In the present case, appellant was not told that he might give evidence himself or call witnesses on his behalf. It is not enough that in a

previous case he was so told, if he was not in this case. The trial was not satisfactory, and the conviction must be quashed".

I have endeavoured to give earnest consideration to this matter and I have come to the conclusion for the reasons given and the fact that the trial was not satisfactory that I should allow the appeals. The next matter I have to decide is whether or not I should send this matter back to the learned Magistrate for the informations to be reheard. After giving the matter the best consideration I can and having regard to the expense in which the accused has already been involved I have decided to quash the convictions and accordingly both appeals are allowed. I make no order as to costs.