P.C. Appeal No. 36 of 1948.

In the Privy Council.

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL

(GOLD COAST SESSION.)

BETWEEN

EMMANUEL BOATENG — *Appellant*

AND

THE KING — *Respondent.*

Case for the Appellant

IN FORMA PAUPERIS.

RECORD.

1. This is an appeal by special leave from a judgment of the West African Court of Appeal dated the 21st day of November, 1947, upholding the conviction and sentence of two years' rigorous imprisonment on each of two counts namely (i) of conspiracy to receive dishonestly stolen goods under Sections 49 and 284 (1) of the Criminal Code (Gold Coast) and (ii) of dishonestly receiving under Section 284 (1) of the said Code, passed at the Assizes of the Supreme Court at Accra on the 9th day of July 1947. p. 81. p. 73, l. 29. p. 74, l. 19.

2. The main questions for the consideration of the Board will be :—

(i) Whether the conviction can stand in view of the fact that the learned Trial Judge treated the Assessors as a jury, and passed judgment on their verdict without giving reasons, and

(ii) Whether the judgment of the Court of Appeal can stand in that the learned Judges sought to uphold the conviction solely on evidence and what was held by them to be incriminating conduct of the Appellant at the police station during the police enquiry.

3. Section 286 of the Criminal Procedure Code (Gold Coast) enacts :—

"286. (1) When in a case tried with Assessors, the case on both sides is closed, the Judge may sum up the evidence for the prosecution and the defence, and shall then require each of the Assessors to state his opinion orally, and shall record such opinion.

(2) The judge shall then give judgment, but in doing so shall not be bound to conform with the opinion of the Assessors.

(3) If the accused person is convicted the Judge shall pass sentence on him according to law."

It is submitted that every judgment must contain a clear statement of the points for determination, the decision thereon, and the reasons for the decision.

4. In this case four persons (1) Salifu Moshie, (2) Yaro Deman, (3) Francis Okwuidegbe and (4) the Appellant Emmanuel Yaw Boateng were charged with offences arising from a theft of Government stores of Khaki cloth.

Throughout the record these accused persons are described as 1st, 2nd, 3rd and 4th accused.

5. The alleged facts of the case are that on some date between the 17th February 1947 and the end of March 1947 the Base Ordnance Depot at Takoradi of which the 1st accused was the head watchman was broken into, and 1,360 yards of khaki drill were stolen. The loss was reported on or about the 1st April 1947 and investigation showed that the cloth had been brought by boat to Nkompo and thence by lorry to Sekondi, where it was purchased by one Kunadu, who keeps a drug store and deals in all manner of goods. No trace of the cloth was found, but it is said to have been sold at Koomassi.

6. The Appellant is said to have paid for the hire of the lorry and to have actually received a sum of money from Kunadu and paid out a lesser sum to the 2nd and 3rd accused, and so to have been guilty both of conspiracy and of actual receiving.

7. "Conspiracy" is defined in Section 49 of the Criminal Code as follows :—

> "If two or more persons agree or act together with a common purpose for or in committing or abetting a crime, whether with or without any previous concert or deliberation, each of them is guilty of conspiracy to commit or abet that crime as the case may be."

"Receiving" is defined in Section 43 of the Criminal Code as follows :—

> "A person is guilty of dishonestly receiving any property which he knows to have been obtained or appropriated by any crime if he receives, buys or in any manner assists in the disposal of such property otherwise than with a purpose to restore it to the owner."

8. The case was tried by Smith A.C.J. with three Assessors. The Appellant who was a Welfare Officer and in a superior position to that of the co-accused, gave evidence on oath. He said that the 3rd accused who had worked under him as a cook told him that a friend (the 2nd accused) had bought some khaki cloth at an auction, and that he had

p. 48, l. 33.
p. 49, l. 4.

introduced the 3rd accused to Kunadu, whom he knew to be a dealer in cloth as well as other articles. He denied either receipt or payment of any money except that he agreed with the lorry driver for a fee of 10s. which was paid by the 3rd accused. p. 54, l. 35, p. 50, l. 3.

9. At the conclusion of the evidence the learned Judge summed up the case to the Assessors and left the decision on each point to them. pp. 64–73.

He warned the Assessors on the danger of accepting the evidence of accomplices, and of co-accused persons, and in particular he said "You must remember that what each accused said to the police (and those statements I presume were given apart from each of the other accused) is evidence only against the particular accused giving the statement, and if in the course of that statement he mentioned his co-accused what he said about them is not evidence against them, though it is, in so far as it affects himself, evidence against him." p. 66, l. 21. p. 66, l. 35. p. 67, l. 4.

After saying "You will treat Kunadu also as an accomplice" he proceeded "that leaves out the only people who are not accomplices— the two policemen and Mr. Adams of the B.O.D. and the night watchman who was on the other shift, so it is very important for you to examine the evidence to see how far the evidence of these witnesses that I have mentioned is corroborated by what I might call untainted evidence (and I include in that category the evidence of the accused persons themselves) and can be accepted." p. 68, l. 22. p. 68, l. 31.

As to the Appellant the learned Judge directed the Assessors that if his statement is true "obviously he cannot be convicted," and after mentioning the evidence of various accomplices including an alleged statement of Yaro (2nd accused) that "Boateng paid him £100," he concludes :— p. 72, l. 31.

> "If you think that the evidence shows that he merely put the parties into touch with one another and that Kunadu bought the khaki at 26/- per 12 yard piece, which you may agree would be about the market price about that period . . . then you will come to the conclusion that he had no guilty knowledge. On the other hand if you believe what Yaro says that the price obtained was £100 that is to say less than a shilling per yard and that Boateng resold it to Kunadu at more than double what he paid for it then you should have solid grounds for finding conclusively that he knew at the time he was handling the khaki that it was stolen property." p. 72, l. 48.

10. One Assessor found the 1st accused guilty on the first charge and not guilty on the second, but two Assessors found him guilty on both charges. p. 62.

All found the 3rd accused not guilty on both charges, and all found the 2nd and 4th accused (Appellant) guilty on both charges.

11. Under the heading "Court notes of verdict" the learned acting Chief Justice said :— p. 63.

> "I accept the opinions of the Assessors as to the 1st accused on the 1st count and as to the 2nd 3rd and 4th on both counts.

I accept the opinions of the majority of the Assessors as to the 1st accused on the second count, and I find 1st 2nd and 4th accused guilty on both counts and 3rd accused not guilty on both counts. 3rd accused is discharged."

He then proceeded to pass sentence on the 1st 2nd and 4th accused. Addressing the Appellant he said :—

p. 74. "You are a man who ought to know better than to have done what you did. The evidence is that you made a very handsome profit out of this transaction. A man of your calibre ought to be the kind of man to stop men of the calibre of your associates in the dock, but instead of that you were apparently quite willing to assist them and in a sense to exploit them as you made more money than they did. You will doubtless lose your employment with Government after Government has spent considerable sums of money in training you to perform your duties efficiently, but in view of the fact that this is the first time that you have been convicted you will do two years imprisonment with hard labour on each count to run concurrently."

p. 81. 12. On appeal the West African Court of Appeal Sir Walter Harragin C.J. Gold Coast President, Sir John Verity C.J. Nigeria, and
p. 81, l. 21. John Alfred Lucie-Smith C.J. Sierra Leone, after citing the observations made by the Acting Chief Justice in his summing up as to the statement of Yaro (2nd accused) see paragraph 9 supra, said :—

p. 81, l. 31. "Yaro in his statement to the police certainly indicates something of this description, but this is not evidence against the Appellant, and when Yaro gave evidence in the witness box he did not refer to this transaction. Had the matter rested there, it might have been fatal, but it is fortunate for the Crown that there is other reliable evidence which supports this statement which no doubt through inadvertence the learned Judge omitted. We refer to the evidence of Sub-Inspector Amaning, and a man by the name of Musa Kado both of whom state that the Appellant asked Kado at the station if he Kado had been present when the Appellant paid £200 to Yaro. This suggestion of the Appellant clearly shows that he was intimately concerned in the transaction which has now turned out to be highly criminal and corroborates the evidence of Kunadu that he paid the Appellant more than £200. In these circumstances we are of opinion that the misdirection of the learned Judge referred to above could have caused no miscarriage of justice. The appeal is dismissed."

13. The incident referred to by the learned Judges is admitted by the Appellant, but he says that he put the question at the instigation of
p. 52, l. 8. Sub-Inspector Amaning. Musa Kado leaves that matter doubtful,
p. 36. and whichever story is true, it is admitted that Musa Kado denied having seen any such payment, and it is not suggested by anyone at the trial that the Appellant paid any money to the 2nd or 3rd accused, least of all by Kunadu who on the contrary states that he paid £279 to the Appellant.

14. It is submitted that the judgment of the Court of Appeal was appropriate only to a trial by jury. In a trial with Assessors there is no question of misdirection, or whether a misdirection can be cured by the consideration of other evidence. It was the function of the Court to decide whether the Trial Judge had convicted the Appellant properly on the evidence. This was rendered impossible by the failure of the learned Trial Judge to express his own opinion in the form of a judgment. It is however quite clear that the learned Trial Judge was not impressed by the incident mentioned by the Court of Appeal as being corroboration of the accomplice Kunadu.

15. The Appellant being without funds sought and obtained leave to appeal to Your Majesty in Council in forma pauperis on the 2nd June 1948. p. 84.

16. The Appellant humbly prays Your Majesty in Council to allow his appeal, and set aside the conviction and sentence passed upon him, for the following among other

REASONS

(1) BECAUSE the Appellant was convicted contrary to law on the opinion of the Assessors and not by the independent judgment of the Trial Judge.

(2) BECAUSE the order of the Trial Judge convicting and sentencing the Appellant is not a judgment as required by law.

(3) BECAUSE the statement on which the Assessors were invited to convict was inadmissible in evidence.

(4) BECAUSE the Appellate Court erred in accepting as corroborative evidence against the Appellant an incident at the police station during the enquiry, which (A) had not been mentioned by the Judge in his summing up, (B) admitted of an innocent explanation, (C) did not corroborate any part of the prosecution case.

(5) BECAUSE it is not proved that the Appellant had any guilty knowledge.

(6) BECAUSE the conviction of the Appellant is bad in law and unsupported by the evidence, and should be set aside.

A. G. P. PULLAN.

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