Privy Council Appeal No. 18 of 1965

Salim Rakar - - - - - - - - *Appellant*

v.

The Queen - - - - - - - *Respondent*

FROM

THE SIERRA LEONE COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH JUNE 1966.

Present at the Hearing:
LORD MORRIS OF BORTH-Y-GEST
LORD PEARCE
LORD WILBERFORCE
[*Delivered by* LORD MORRIS OF BORTH-Y-GEST]

The appellant was one of five persons who were charged with Robbery with Aggravation contrary to section 23 (1) (*a*) of the Larceny Act 1916. A *nolle prosequi* was entered by the prosecution against one of them and a separate trial ordered in the case of another. With the two others the appellant was tried at Freetown before Cole P. J. and a jury of twelve. The information was dated the 29th October 1963. Evidence was heard on the 1st, 2nd, 3rd and 6th April 1964. After a summing-up on the 7th April 1964 the jury returned their verdicts. In regard to the 1st accused the jury were unanimous in finding him guilty. In regard to the 2nd accused 9 jurors found him guilty and 3 found him not guilty. The appellant was the 3rd accused. 8 jurors found him guilty and 4 found him not guilty. It is provided by section 27 of the Jurors and Assessors Ordinance (Cap. 38 of 1960) as follows:—

> " 27. (1) On the trial of any person or persons for any offence punishable by death the verdict shall be unanimous.
>
> (2) On the trial of any person or persons for any offence not punishable by death, if, after deliberation, there be a majority of two-thirds of the jury, the verdict of the majority of two-thirds shall be held, taken to be, and received by every Court in the said Colony as the verdict of the whole jury in the cause:
>
> Provided that where the number of the members of the jury has been reduced to eleven or ten under the provisions of section 37, the majority of eight and seven members of the jury respectively shall be deemed to be the verdict of the majority of two-thirds of the jury required by this section:
>
> Provided further that, if the Court is not satisfied that the verdict of the said majority is in accordance with the weight of the evidence, the Court may refuse to accept it, and in each and every such case the verdict shall be unanimous."

Following upon the return of their verdicts by the jury the learned judge said that he accepted the majority verdicts as regards the 2nd and the 3rd accused. The 1st accused was sentenced to 10 years' imprisonment and the 2nd and 3rd each to 7 years. All three appealed to the Court of Appeal. Their appeals were dismissed on the 24th October 1964.

The appellant petitioned for special leave to appeal to Her Majesty in Council and such leave was granted in January 1965.

The charge of robbery with aggravation related to the 30th August 1963. The allegation was that at a place between mile 40 and mile 41 in the Freetown–Bo Road in the Port Loko District of Sierra Leone the accused robbed one Olivio Paolo of one black tin trunk, £6,000 in money and a car key all of which were the property of a company that employed Olivio Paolo as an accountant. In the course of his duty Olivio Paolo had gone to Freetown and had drawn £6,000 from Barclays Bank. Some of the money was in £5 currency notes. That money (in a black tin box) was later being taken by Olivio Paolo from Freetown to Rokel. He was in an Opel car which was driven by a driver Abu Bangura. There were two other passengers in the car. At about mile 40 in a stretch of dual carriage way they had to stop because a Volkswagen car in front of them pulled up in a position which prevented their passing. What then happened was that four men rushed from the Volkswagen car. One had a pistol and the others were variously armed. These men obtained at pistol point the key of the Opel car, required the boot of the car to be opened, took from it the black tin box containing the £6,000 and placed it in the Volkswagen car. Two other men came out of the bush on one side of the road and joined the four attackers. The six men then went off in the Volkswagen car.

So far as the appellant was concerned the effective question at the trial was whether it was proved that he was one of the attackers. He gave evidence at the trial. He denied that he was involved in the robbery. His evidence was that he was ill in bed at Freetown on the 30th August. He said that he knew nothing of the robbery until the 5th September when he was asked some questions by the police.

On the 5th September the police held an identification parade. The first and second accused and the appellant together with others were paraded. Olivio Paolo picked out the first accused as having been one of the attackers but he did not pick out anyone else. The driver of the Opel car—Abu Bangura—was not invited to the parade because he had told the police (on the 31st August) that he could not identify his attackers.

Olivio Paolo gave evidence at the trial. He identified the first accused as having been one of the attackers and as having carried and pointed first one pistol and then two pistols. He did not identify the appellant. He had told the police that the atackers were masked but that the mask of the first accused had fallen away. Abu Bangura gave evidence and in his evidence he did identify the three accused as having been among the attackers.

Two other parts of the evidence call for special mention. A taxi driver Sallu Conteh gave evidence that on the 2nd September he drove from Freetown to Mano. So far as now relevant his evidence was that he drove the first accused and the third accused to a house in Mano. Both the accused went into the house. The appellant came out. When subsequently the first accused came out he was carrying a brown suitcase. The appellant in his evidence agreed that he had gone to Mano. He had gone with the first accused who had told him that he was going to visit his grandmother. On arrival at Mano the first accused told him that his grandmother had gone elsewhere. The appellant said that he did see the first accused come out of the house with a suitcase but as he had understood that the visit was to a grandmother there seemed nothing surprising in the incident. He had no knowledge of the contents of the suitcase.

There was evidence also that on the 5th September the police went to a house in Mano which could probably reasonably be inferred to be the same house that was visited on the 2nd September as above described. It proved to be the house of an aunt of the first accused. In circumstances which need not be referred to in detail the police found a sum of £400 in £5 notes. Having regard to the denomination of the notes and to the

fact that on the strap on bundles of the notes there was the bank stamp of Barclays Bank dated the 20th August it was a reasonably clear inference that the £400 was a part of the money which the attackers (whoever they were) had taken on the 30th August.

After the first accused was arrested he made a statement to the police on the 7th September. He did not sign it and at the trial objection was taken to its admission in evidence on the ground that he did not make it. The jury were given a clear direction that they should only accept it if they were satisfied that he made it and that if they were so satisfied they should then consider what weight to give to it while remembering that it could only be evidence against the first accused and not against anybody else. The statement as recorded was virtually a confession but it implicated, among others, the appellant. In the statement the first accused described how on the 30th August the box was taken to a certain place and prised open and the money taken out, how he with others drove to another place, how he left to fetch a container for the money, how on his return with a suitcase he found that the money was then only £3,700, how on the 31st August he took the money in the suitcase to his aunt's house in Mano (not telling her that the case contained money) and how on the 2nd September with the appellant and another he went by taxi to Mano and collected the suitcase containing the money.

The first accused did not give evidence at the trial. He made a statement from the dock.

In regard to the witness Abu Bangura there were various circumstances, which need not here be recited, which could raise a reasonable suspicion that he may have been an accomplice of the attackers on the 30th August. The jury were directed that they should consider whether Abu Bangura was an accomplice. They were warned that if they thought that he was an accomplice then it would be dangerous for them to convict on his evidence alone and that they should look for corroboration. They were told that if they considered Abu Bangura to be an accomplice then they should consider whether there was evidence (apart from his) which they could accept and which implicated the accused in the commission of the crime.

From a recital of the facts it is manifest that the summing-up to the jury required a differentiation between the cases of the three separate persons who were accused and who were being tried together at one trial and demanded mention of the particular considerations affecting each accused. A very difficult and complex task was, as their Lordships think, performed with obvious care and in most respects with great accuracy and clarity but their Lordships have been driven to the conclusion that unfortunately there were at least two passages in the summing-up which contained error which might so seriously mislead a jury and adversely affect the appellant that he would be deprived of the protection of the law. The inclusion in the summing-up of the passages in question may well have turned the scale against the appellant. Even with their inclusion one-third of the jury were in favour of an acquittal.

The scheme of the summing-up was orderly and helpful. The ingredients of the offence were described. The standard of proof was explained. The facts were outlined. The general case of the prosecution was reviewed. Finally the case of each accused was separately considered with an analysis of what was put forward both by prosecution and by defence.

Having referred to the facts and to the case for the prosecution the learned judge addressed himself to the question—" How do they set about to prove it? " He explained the difference between direct evidence and circumstantial evidence. He then said:—

> " You will recall that Olivio said that he was certain the first accused was the man who carried the pistol in the first instance and pointed it at him and then at George. He said also that the first accused was the one who ran back to the Volkswagen car and returned with another pistol. George also identified this accused as did Abu Bangura. As regards the second accused, it was Bangura

> alone who pointed him out. As to the third accused, it was again Bangura alone who pointed him out. The prosecution then put forward the proposition that the money was stolen and taken to Mano and kept there but that as soon as the police were on the scent, as far as the first accused was concerned, all three accused were seen in a car chartered by him *en route* to Mano. Two of them at least got there and collected the money. All three were later found in a car in which a suitcase in which was put the money which the first accused had got from Mano. The car with all three accused was driven on to as far as Wellington by the 'Two Sisters Cotton Tree' with the suitcase and money."

If the prosecution had put forward "the proposition" that on the 2nd September the appellant was knowingly a party to the collection of the stolen money then a most careful warning from the learned judge was called for when referring to such proposition. It was mere surmise so far as the appellant was concerned. There was grave danger that at this point and particularly having regard to the language used that the jury might think that there was some evidence that the appellant knew that stolen money had been taken to Mano. The fact that it was so taken was stated by the first accused in his statement but his statement was not evidence against the appellant. It is true that elsewhere in the summing-up there was a warning to that effect but in this passage in the summing-up a jury might have been seriously misled unless the state of the evidence was at that stage carefully explained and unless the warning that the first accused's statement was not evidence against the appellant was given at that stage. Otherwise there was danger that the jury might think that proof was to be found possibly in the "proposition" of the prosecution or possibly in the unsworn statement made by the first accused in the absence of the appellant.

The reference to the journey to Mano with the words "two of them at least got there and collected the money" was particularly damaging. There was no evidence given, which was admissible against the appellant, that he "collected the money". His whole case was that he knew nothing about the money. His case was that his journey to Mano was an entirely innocent one and that the fact that the first accused brought out a suitcase was not a circumstance in any way calculated to arouse suspicion. No evidence, admissible against him, was given which proved that he knew what were the contents of the suitcase. The following sentence was also damaging—"All three were later found in a car in which a suitcase in which was put the money which the first accused had got from Mano." The only evidence that the suitcase contained money was in the statement of the first accused. When in the next sentence there was again a reference to "the suitcase and money" the jury, by this further reiteration, may have been further misled into thinking that some evidence had been given which was admissible against the appellant which proved (*a*) that the suitcase contained money which was the stolen money and (*b*) that the appellant knew this.

Their Lordships recognise that there were circumstances that were well calculated to arouse suspicion. It is however in precisely such a situation that the rules of evidence are a safeguard for an accused person. The evidence which was given which was admissible against the appellant was limited. Abu Bangura identified him. Beyond that there was merely a link between him and Mano (in that he went there) and a link between Mano and some of the stolen money (in that some of it was found there). With the first accused the appellant was at a house in Mano on the 2nd September. In that house there was found some of the stolen money on the 5th September. It was imperative that no more than the admissible evidence should be stressed. Great prominence was in fact given to the "suitcase and money". What the jury may have understood to be an assertion that there was some direct evidence connecting the appellant with the "suitcase and money" could only have related to the evidence as to what the first accused said in a statement.

The passage in the summing-up following that quoted above was partly a repetition and summary and partly an amplification of what had gone before. Again there was a coupling of the " suitcase and money ". The full passage was as follows:—

> " The prosecution say that the first accused took part in the commission of the crime. The Police interviewed the first accused sometime on the 2nd September. You will recall the evidence of Detective Sub-Inspector Smith who told you that on the 2nd of September he saw the first accused about the robbery. Then about 4 p.m. all of the accused were seen in the first accused's house and later the first and third left for Mano; that later the second accused also was seen going in the direction of Mano; that the first and third accused were seen with a suitcase coming from a house at Mano and all three of them were later found in a car coming to Freetown and the car which stopped at Wellington had had in it the suitcase and money which had been retrieved from Mano."

If such words were to be used they demanded in connection with them and by way of qualification of them an emphatic warning as to the limited nature of the evidence against the appellant.

The summing-up proceeded to deal separately with the individual cases of the three accused. There were various references to the " bits and pieces of evidence " apart from the evidence of Olivio and of Abu Bangura. When the case of the appellant was being examined there was again a pointed reference to the " suitcase containing the money ". The summing-up at this stage had certain passages which resembled those above referred to. Again the jury were not warned of the extremely limited nature of the evidence affecting the appellant. The position was thus stated:—

> " The third accused was again identified by only Bangura after the latter had been in custody for about three days and after he had told the police that he could not identify any of the attackers. You may feel that he had something he was hiding. But that is entirely a matter for you. Apart from being identified as one of those who were seen at the scene, he was seen in the house of the first accused on the 2nd of September. He and first accused left by car for Mano that day, went inside the house at Mano and came out again boarded a car and returned to as far as Wellington with the suitcase according to the prosecution, containing the money. That also is entirely a matter for you. The prosecution say that the surrounding circumstances are such from which you can say the first and third accused or one of them was one of those who committed the offence."

The words " according to the prosecution " doubtless refer to the case as presented by the prosecution. Their case as against the first appellant could however be very differently supported as compared with their case against the appellant. The case for the prosecution could only be based upon evidence and not upon a " proposition ". If it was being suggested by the prosecution that the appellant was implicated by reason of some connection with a suitcase containing money it was imperative to assist the jury by pointing out the limit of the admissible evidence and to refer to the appellant's denial of any knowledge as to what the suitcase contained. The comments which their Lordships have made in regard to the earlier passages are here applicable.

As already stated the three accused appealed to the Court of Appeal. Among the points taken by the appellant in his grounds of appeal was the point that the only evidence touching the appellant other than that of Bangura was the evidence of Sallu Conteh and that it was not possible from the evidence of Sallu Conteh or from the circumstances to attribute knowledge to the appellant of the fact of the robbery or of the fact that the first accused was carrying money or was carrying money which resulted from robbery. In the judgment in the Court of Appeal this point was not specifically mentioned. It was said:—

"We do not know, of course, whether or not the jury did indeed regard Abu Bangura as an accomplice. Supposing, however, that they did, and supposing also that they heeded the learned judge's warning as to the danger of convicting without corroboration, in our opinion there was sufficient corroborative evidence to warrant their verdict."

That, however, did not deal with those parts of the summing-up which contain the directions and passages of which complaint is made.

It has been pointed out that after two-thirds of the jury had found the appellant guilty the learned judge accepted the majority verdict. That meant that pursuant to section 27 of the Jurors and Assessors Ordinance he did not "refuse to accept it" which he could have done if he was not satisfied that the verdict of the majority was not "in accordance with the weight of the evidence". The acceptance of the verdict by the learned judge cannot affect the present appeal. Had there not been the passages in the summing-up which are complained of there might not have been a majority of two-thirds of the jury in favour of a conviction. In that event there would not have been a verdict which could have been received "as the verdict of the whole jury in the cause".

Similar or comparable considerations show that this is not a case in which the proviso to section 20 (1) of the Courts (Appeals) Ordinance 1960 could be applied. The proviso enables a court of appeal, though of opinion that a point raised in a criminal appeal might be decided in favour of an appellant, to dismiss an appeal if they consider that no substantial miscarriage of justice has actually occurred. With a different summing-up more than four of the jury might have been in favour of an acquittal and no verdict of guilty could have been recorded.

For the reasons which have been earlier set out their Lordships will humbly advise Her Majesty that the appeal should be allowed and the conviction quashed.

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In the Privy Council

SALIM RAKAR

v.

THE QUEEN

DELIVERED BY
LORD MORRIS OF BORTH-Y-GEST

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