(10) *Reed v. Hales* [1872] 11 N.S.W.G.C.R. 317; 33 Dig. 481 (AUS).

ACTION for damages for malicious prosecution.

S. B. Patel, for the Plaintiff.

P. Rice for the defendant submitted that the plaintiff's case was ill founded since it had not been shown that the criminal proceedings pleaded as the substance of the case had terminated in favour of the plaintiff (*Metropolitan Bank v. Pooley, Quartz Hill Gold Mining Co. v. Eyre*). A *nolle prosequi* did not amount to such a termination. (*Goddard v. Smith, Rich v. Forman, Cotterell v. Jones, Reed v. Hales*).

S. B. Patel, for the plaintiff submitted that it was not clear whether a *nolle prosequi* does or does not put an end to the proceedings (*R. v. Allen*) and that the plaintiff need not prove that the cause of action was at an end (*Brook v. Carpenter*).

MAXWELL ANDERSON, C.J.—As part of his case the plaintiff must show that the proceedings against him had terminated in his favour. *Gilchrist v. Gardner* is authority for the proposition that a *nolle prosequi* does not operate as a discharge or acquittal on the merits and there is some authority (*Archbold* p. 112) to the effect that fresh process may be issued on the same indictment. A *nolle prosequi* is distinct from and has not the same effect as offering no evidence and submitting to an acquittal (*Elworthy v. Bird*). I hold therefore that a *nolle prosequi* does not terminate criminal proceedings in favour of the accused so to enable him to found an action for malicious prosecution on the proceedings.

PICKERING *ats.* POLICE.

[Appellate Jurisdiction (Thacker, Acting C.J.) October 3, 1935.]

Liquor Ordinance, 1932—s. 66[1]*—supplying liquor to a native—evidence—corroboration of accomplice—variation between summons and conviction—material witness not called by prosecution—Appeals Ordinance, 1934—ss. 22, 24, 25*[2]*—powers of supreme court in appellate jurisdiction compared with those of courts in England hearing a stated case.*

Pickering sold two glasses of home brewed beer to a Fijian constable. Beer and brewing utensils were found in Pickering's rooms on the same day.

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[1] *Repealed Vide Liquor Ordinance, 1946 s. 70.*

[2] *Repealed. The sections were as follows:—*

"22. *The Court may adjourn the hearing of an appeal and upon the hearing thereof may confirm reverse or vary the decision of the District Commissioner or remit the matter with the opinion of the Court thereon to the District Commissioner or may make such other order in the matter as to it may seem just and may by such order exercise any power which the District Commissioner might have exercised and such order shall have the same effect and may be enforced in the same manner as if it had been made by the District Commissioner. Provided that the Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.*"

"24. *No judgment shall be given in favour of an appellant if the appeal is based on any objection to any information complaint summons or warrant for any alleged defect therein in matter of substance or form or for any variance between such information complaint, summons or warrant and the evidence adduced in support thereof unless it be found that such objection was raised before the District Commissioner whose decision is appealed from nor unless it be found that notwithstanding it was shown to the District Commissioner that by such variance the appellant had been deceived or misled such District Commissioner refused to adjourn the hearing of the case to a future day. Provided that if the appellant was not at the hearing before the District Commissioner represented by counsel or a solicitor the Court may allow any such objection to be raised.*"

"25. *Upon the hearing of any appeal the Court may hear and determine the case upon the merits notwithstanding any defect in form or otherwise in the conviction order or judgment and if the appellant is found guilty the conviction order or judgment shall be confirmed and if necessary amended.*"

Vide Criminal Procedure Code Cap. 4 ss. 352, 380, 382.

HELD.—(1) The rule as to corroboration of accomplices being a rule of practice and not of law, a question of lack of corroboration under the rule is not a question of law which will be entertained on an appeal by case stated.

(2) *Semble*, as to the rule that the police should in all cases call all material witnesses or otherwise offer an explanation why a material witness is not called.

[**EDITORIAL NOTE.**—(1) As to whether the police constable should be regarded as an accomplice *vide Work ats. Police* [1939] 3 Fiji L.R.—*Police ats. Leu Hop & ors.* [1939] 3 Fiji L.R.—

(2) As to the duty of the prosecution with regard to material witnesses *vide R. v. Ramtamankal* [1941] 3 Fiji L.R.

Cases referred to :

(1) *R. v. Baskerville* [1916] 2 K.B. 658 ; 86 L.J.K.B. 28 ; 115 L.T. 453 ; 80 J.P. 446 ; 25 Cox. C.C. 524 ; 12 Cr. Ap. 81 ; 14 Dig. 464.

(2) *Reg. v. Stubbs* [1855] 25 L.J.M.C. 16 ; 19 J.P. 760 ; 7 Cox. C.C. 48 ; 14 Dig. 461.

(3) *R. v. Dora Harris* [1927] 2 K.B. 587 ; 20 Cr. Ap. 86.

APPEAL BY CASE STATED. The facts appear from the judgment.

Said Hasan, for the appellant.

D. R. McDonald, for the respondent.

THACKER, Acting C.J.—This is an appeal by way of case stated by John Pickering against George Grahame Kermode the respondent, whereby the appellant appeals from the decision, dated 18th June, 1935, of the Chief Police Magistrate convicting the appellant under s. 66 of the Liquor Ordinance No. 25 of 1932[1] for unlawfully supplying liquor, to wit, two glasses of home brewed beer of an intoxicating nature, to a native, namely Constable Akuila, and whereby the appellant was fined £5, or in default one months' imprisonment with hard labour. It is sufficient to quote the following from the Magistrate's stated case.

> "I did not consider that the failure of the prosecution to produce the man Billy was fatal "to the case. I formed the opinion that the facts deposed to by District Inspector Kermode as "to finding the beer and other utensils in the appellant's rooms on the same evening of the "day on which the alleged supply of liquor took place was sufficient corroboration of the "constable's evidence. I had in mind the principles laid down in *R. v. Baskerville* [1916] "2 K.B. 658 and especially that enunciated by Lord Reading C.J. at p. 667 that corroboration "need not be direct evidence that the accused committed the crime ; it is sufficient if it is "merely circumstantial evidence of his connection with the crime. I felt that the constable "might safely be believed and I accordingly convicted the appellant and fined him £5 or in "default one month's imprisonment with hard labour."

The questions of law which the appellant raises on this special case are :—

(1) That there was no corroboration or alternatively insufficient corroboration of the evidence given by Akuila the constable, who the appellant's counsel states was an accomplice in the offence. For the sake of the appellant's argument I shall assume that this was so, although there is nothing to show it from the Magistrate's stated case, and it may not in fact be the case.

(2) That there is a variation between the wording of the summons which refers to three glasses of beer and that of the conviction which refers only to two. There is nothing to show whether this objection was raised in the lower court.

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[1] *Repealed. Vide Liquor Ordinance*, 1946 *s.* 70.

(3) That the prosecution did not call a material witness. Now, this Court can hear and decide only questions of law and the first point taken by the appellant is not a question of law but one of practice and I am bound by the decisions in *R. v. Stubbs* 25 L.J.M.C. 16, which was not cited by either counsel but in which it was decided that it is a rule of practice that a person, unless there is a proper warning to the jury, shall not be convicted on the uncorroborated evidence of an accomplice ; but also that corroboration is not legally requisite. There is no need for me to go into the facts of this particular case. It is sufficient to quote shortly from the several judgments.

Jervis, C.J.—

> "We cannot interfere though we may regret the result that has been arrived at for it is "contrary to the ordinary practice. It is not a rule of law that accomplices must be confirmed "in order to render a conviction valid, but it is usual in practice for the judge to advise the "jury not to convict on such testimony alone and juries generally attend to the judge's "direction and require confirmation. But it is only a question of practice. In this case the "jury have acted on the evidence and we cannot interfere."

Again from Willes J.—

> "This is not a question of law but of practice and questions of law only can be reserved "for our opinion."

Now this Court when an appeal is brought before it by way of special or stated case is in the position of the Court of Crown Cases Reserved which was the court of Criminal Appeal in England prior to the passing of the Criminal Appeal Act, 1907,[1] or alternatively in the position of the English Divisional Court of the K.B.D., and it is not competent for this Court to entertain any question on a case stated other than a question of law. Ss. 15 and 17 of our own Appeals Ordinance 1934 confirm this.[2] This Court hearing an appeal by way of special case is not concerned with the weight of evidence. The powers of the Court are clearly laid down in *Paley* on *Summary Convictions*, 8th Edition, page 425, as follows :—

> "Although the evidence is set forth in the case, yet the Superior Court does not put itself "in the position of the Justices in deciding on its weight or sufficiency, but accepts their "finding upon facts within their jurisdiction as conclusive, whatever may be the opinion of the "Court itself as to the value of the evidence. The Superior Court in such a case has only to "see whether the determination is erroneous 'in point of law.' The main question decided on "the case, namely, whether an offence has or has not been committed within the statute, "would be subject to review as involving a question of law, but the subordinate facts leading "up to it would be left entirely to the decision of the justices. The circumstances which lead "to the conclusion of law are for the justices ; it is for the Superior Court to say whether "they are sufficient to warrant the conclusion. The justices have no right to make such a "statement of facts, and ask an opinion on them, except only so far as they raise a point of "law."

It is true that in the case of *R. v. Baskerville* [1916] 2 K.B.D. page 663 it is said as follows :—

> "This rule of practice, i.e., to warn juries that corroboration should be required of an "accomplice's evidence, is becoming virtually equivalent to a rule of law and since the Court of "Criminal Appeal came into operation this Court has held that on the absence of such a "warning by the judge the conviction must be quashed."

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[1] *Edw. 7, s. 23.*

[2] *Rep. The sections were as follows:—*

> *"15. Any person aggrieved who desires to appeal against a conviction order determination or "other proceedings of a District Commissioner on the ground that it is erroneous in point of "law or is in excess of jurisdiction may where the decision in such proceeding is one where- "upon an appeal is by this Ordinance allowed apply to such District Commissioner to state a "special case setting forth the facts of the case and the grounds on which the proceeding is "questioned."*
>
> *"17. The District Commissioner upon receiving the application of the appellant to state a "special case or the order of the Court so to do as the case may be shall draw up the special "case in the form in the Schedule hereto concisely setting forth such facts and documents (if "any) as may be necessary to enable the Court to decide the question raised in the case and "shall forthwith transmit the same together with a certified copy of the conviction order or "judgment appealed from and all documents alluded to in the special case to the Registrar."*

Vide Criminal Procedure Code (Cap. 4) ss. 367 and 377.

But it must be remembered that the Court of Criminal Appeal in England has by virtue of the Criminal Appeal Act 1907 larger powers to interfere with verdicts than this Court has when hearing a special case and its powers are wider than had (theretofore) before 1907 existed in criminal appeals.

The jurisdiction of this Court on a case stated is not that of the Court of Criminal Appeal in England.

The Appeals Ordinance 1934 provides powers for going into such matters as the weight or sufficiency of evidence and the calling of further evidence but that must be done by way of appeal on motion and, on appeals by a stated case, only questions of law can be heard. It is true that the learned Magistrate in the special case appears to be of opinion that corroboration is a question of law but in that he was mistaken.

Dealing with the appellant's second point, as to the variation between the wording of the summons and the conviction, there is nothing which will help the appellant here and the powers given in ss. 22, 24 and 25 of the Appeals Ordinance 1934 are amply sufficient for this Court to decide that there is nothing of substance in this point.

The third point namely that the prosecution did not call a material witness is more important. It is stated in *Rex. v. Dora Harris* [1927] 2 K.B.D. page 590 by the Chief Justice Lord Hewart and quoted in Archbold's Criminal Practice,

> " In criminal cases the prosecution is bound to call all the " material witnesses before the Court, even though they give in- " consistent accounts, in order that the whole of the facts may " be before the judge."

In my opinion the witness referred to shortly by the Magistrate as Bill should have been called or alternatively some explanation furnished to the Lower Court as to why this witness was not called. As certain Indian law reports which were cited show, an inference may be drawn against the prosecution if neither of these alternatives is before the Court. It does not appear from the Magistrate's stated case that any explanation was in fact offered or given by the prosecution. However, in view of the fact that appellant's counsel has not been able to quote, nor have I been able to find any case in which a conviction has been quashed because of the absence at the trial of a material witness, I am not prepared in this case to quash the conviction merely on that ground. I ought not to refrain, however, from giving it as my opinion that the Police should in all cases call all material witnesses or otherwise offer an explanation as to why a material witness is not called. I deal with this latter point more from the view of an intimation of good practice to the Police than as dealing with any question of law, for the reason that here again the appellant raises a question of a rule of practice rather than any question of law. The grounds therefore relied upon by the appellant fail and this appeal is dismissed, and the decision of the Magistrate affirmed. I wish to compliment Mr. McDonald on what I believe is his first appearance in the Courts of the Colony. His work in these two appeals has been most useful to the Court.