SHANKARAN

v.

REGINAM

[SUPREME COURT, 1963 (MacDuff C.J.), 16th November, 1962, 4th January, 1963]

Appellate Jurisdiction

Criminal law—police informer—not an accomplice.

Criminal law—evidence—police informer—corroboration—need to scrutinize evidence.

An informer who takes part in a police trap is not an accomplice and his evidence, though subject to close scrutiny, does not require to be corroborated. Authorities considered.

Cases referred to:

Hari Narayan Singh v. R. [1958–59] F.L.R. 95: *Ellis Work ats. Police* (1939) 3 F.L.R. 264: *Bechu ats. Police* (1944) 3 F.L.R. 374: *Jenks v. Turpin* (1884) 13 Q.B.D. 505: *Subbaiya Pillay ats. Police* (1946) 3 F.L.R. 410: *Davies v. D.P.P.* [1954] 1 All E.R. 507: *R. v. Mohamed Shariff Dossa* (1945) 13 E.A.C.A. 100: *R. v. Mulji Bhanji* (1947) 14 E.A.C.A. 108: *Sayce v. Coupe* [1952] 2 All E.R. 715; 116 J.P. 699: *R. v. Mullins* 3 Cox C.C. 526: *R. v. Heuser* 6 Cr. App. R. 76: *R. v. Bickley* 2 Cr. App. R. 53: *Habib Kara Vesta v. R.* (1934) 1 E.A.C.A. 191: *R. v. Hasham Jiwa* (1949) 16 E.A.C.A. 90: *March v. Johnston* [1959] Cr. L. Review 444: *Smith v. O'Donovan* (1909) 28 N.Z.L.R. 94: *R. v. Coleman* [1960] J. of Cr. Law 241: *R. v Hopley* 16 E.A.C.A. 110: *Brannan v. Peek* [1948] 1 K.B. 68; [1947] 2 All E.R. 572.

Appeal against conviction.

Kapadia for the appellant.

Lewis (Solicitor-General) for the Crown.

MACDUFF C.J. [4th January, 1963]—

The appellant was convicted by the Magistrate, First Class at Taveuni of the offence of " selling liquor without a licence contrary to section 48 of the Liquor Ordinance (Cap. 209, Laws of Fiji) ". He was fined £30 and ordered to pay £15 costs. He now appeals against conviction and sentence.

The only ground of appeal against conviction was—

> " 3. The learned trial Magistrate erred in accepting the evidence of Ioane Tale and Sgt. Josefa Salabogi inasmuch as such evidence constituted a trap and the said Ioane Tale was an agent provocateur."

In support of that contention the appellant relied on the remarks of Goddard, L.C.J., in *Brannan v. Peek* [1948] 1 K.B.D. 68 to this effect—

"But before parting with this case, there is another point of much greater public importance. The court observes with concern and with strong disapproval that the police authority at Derby apparently thought it right in this case to send a police officer into a public house for the purpose of committing an offence in that house. It cannot be too strongly emphasized that unless an Act of Parliament provides that for the purpose of detecting offences police officers or others may be sent into premises to commit offences therein—and I do not think any Act does so provide—it is wholly wrong to allow a practice of that sort to take place. I am not commenting here so much on the conduct of the police officer, because obviously he must have been obeying the orders of his superiors. If the police authorities have reason to believe that offences are being committed in public houses, it is right that they should cause watch to be kept by detective officers, but it is not right that they should instruct, allow or permit a detective officer or constable in plain clothes to commit an offence so that they can say that another person in that house committed an offence. If, as the police authority assumed, a bookmaker commits an offence by taking a bet in a public house, it is just as much an offence for a police constable to make a bet with him in a public house, and it is quite wrong that the police officer should be instructed to commit this offence. I hope the day is far distant when it will become common practice in this country for police officers, who are sent into premises for the purpose of detecting crime, to be told to commit an offence themselves for the purpose of getting evidence against another person. In this case it seems to me the more reprehensible because, as the justices find in terms, on the second occasion at any rate the appellant was reluctant to bet with the police constable. In the result, I think, this conviction must be set aside, and the appeal must be allowed with costs."

These remarks were approved by Humphreys, J. It must here be said, however, that *Brannan v. Peek* was, in fact, decided on the question as to whether or not a public house was a public place and that the quoted remarks of Goddard, L.C.J. are no more than expressions of his opinion as to the desirability of police "agents provocateur" inducing the commission of an offence.

In the case under appeal the whole of the facts clearly showed that the police through the agency of the witness, Ioane Tale, laid a trap for the appellant and the real issue before this Court is whether Ioane Tale is an accomplice and, if so, whether his evidence requires corroboration. The learned Solicitor-General referred me to the cases dealing with these aspects which have been before this Court and in view of the conflicting nature of some of the decisions has asked that they be considered.

A number of cases were reviewed by Low, C.J., in *Hari Narayan Singh v. R.* 1958–1959 F.L.R. 95, although the facts in that case were dissimilar to those in the case at present under appeal in that in that case the offence was not committed as the result of a police trap. For that reason it may be convenient to consider the decisions to which he was referred.

The first of these was *Ellis Work ats. Police* 3 F.L.R. 264, which case again was not in respect of a police trap. In that case it was held that the purchaser of liquor was an accomplice of the unlicensed vendor from whom he purchased the liquor and that his evidence required corroboration. It would appear, however, that this proposition was not canvassed at all and

that it was good law was accepted by both counsel and by the Acting Chief Justice. That decision was disapproved in *Hari Narayan Singh v. R.* where the learned Chief Justice referred to it in these terms—

> " He called in aid the case of *Ellis Work ats. Police* 3 F.L.R., 264. The facts in that case are almost the same as the facts in the instant case. With respect, I do not consider that that case was correctly decided and it should not, in the future, be followed. The learned Appellate Judge found that there was no corroboration in the case but, in fact, the brief report seems to indicate that there was. He found also that the mere fact of the purchase of beer from the appellant made the purchaser an accomplice. This, of course, is not so because the purchaser was not participating in the commission of the offence of selling liquor without a licence with which that appellant was charged; he was, perhaps, unwittingly assisting that appellant in the commission of the offence by buying beer from him."

With respect to the learned Chief Justice while I agree that the decision in *Ellis Work ats. Police* is not good law I disagree with him in his reasons for so holding as will appear later.

The next case to which reference was made was *Bechu ats. Police* 3 F.L.R., 374 where the appellant had been charged with supplying liquor to a member of the Armed Forces. The soldier to whom the liquor had been supplied was called as a witness and Corrie, C.J., held—

> " The only question on this appeal is that of lack of corroboration of the evidence of the witness Dziadus. He, however, was not assisting the appellant in conducting the business of the supply of liquor to members of the armed forces, and hence he appears to come within the rule in *Jenks v. Turpin* (1884) 13 Q.B.D., at p. 534: and thus would not require corroboration."

In this judgment the learned Chief Justice based his decision on *Jenks v. Turpin* (1883–1884) 13 Q.B.D. 505 which is authority only for the proposition that players in a common gaming house cannot be convicted of conducting or assisting in conducting or having the care or management of a common gaming house. For that reason the decision in Bechu's case cannot be regarded as authoritative although I am in agreement with the decision but again for other reasons.

Some two years after Bechu's case Thomson, J., came to a different conclusion in the case of *Subbaiya Pillai ats. Police*, 3 F.L.R., 410 which he distinguished from Bechu's case. The appellant in this appeal had been convicted of supplying liquor to a prohibited person, the only evidence as to the supplying being that of the prohibited person himself. Thomson, J., reasoned as follows:—

> " It is clear from the evidence that the appellant's conviction stood or fell according as the evidence of Ismail, the recipient of the liquor, was or was not believed, and it therefore falls to be considered whether or not Ismail was an accomplice in the offence in such a sense as to cause his evidence to invite corroboration. In my opinion, he was. By s. 21 of the Penal Code a person is deemed to have taken part in committing an offence who ' does . . . any act for the purpose of enabling or aiding another person to commit the offence '. It is possible that as a matter of interpretation this is to be restricted to acts which are unlawful either *per se* or by reason of the intent with which they are done. But even subject to this restriction what Ismail did clearly

brought him within the scope of the section. By being in possession of the liquor, he was himself committing an offence in contravention of Regulation 69 and he was also doing an act which not only enabled but was necessary to enable the appellant to commit the offence in contravention of Regulation 70 with which he was charged.

At this stage, and in parenthesis, I would observe that to my mind this case is clearly to be distinguished from the local case of *Bechu v. Police* (Fiji Criminal Appeal No. 1 of 1944). In that case the person who was alleged to be an accomplice had himself at no time committed any offence, and moreover, at the time that judgment was given (14th September, 1944), the Penal Code was not in force."

In Hari Narayan Singh's case reference was made to *Davies v. Director of Public Prosecutions* [1954] 1 A.E.R. 507. In that case Lord Simonds defined an accomplice in these terms:—

"There is in the authorities no formal definition of the term 'accomplice': and your Lordships are forced to deduce a meaning for the word from the cases in which *X*, *Y* and *Z* have been held to be, or held liable to be treated as, accomplices. On the cases it would appear that the following persons, if called as witnesses for the prosecution, have been treated as falling within the category—

(i) On any view, persons who are *particeps criminis* in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanours). This is surely the natural and primary meaning of the term 'accomplice'. But in two cases, persons falling strictly outside the ambit of this category have, in particular decisions, been held to be accomplices for the purpose of the rule: viz.

(ii) receivers have been held to be accomplices of the thieves from whom they receive goods on a trial of the latter for larceny [*R. v. Jennings* (19); *R. v. Dixon* (20)], and

(iii) when *X* has been charged with a specific offence on a particular occasion, and evidence is admissible, and has been admitted of his having committed crimes of this identical type on other occasions, as proving system and intent and negativing accident: in such cases the court has held that, in relation to such other similar offences, if evidence of them were given by parties to them, the evidence of such other parties should not be left to the jury without a warning that it is dangerous to accept it without corroboration: *R. v. Mohamed Farid* (12)."

Following this authority the learned Chief Justice held in Hari Narayan Singh's case—

"In the instant case, which—of course—is not a felony, the same principle applies and it must be shown that the witness whose evidence is complained of was in fact *particeps criminis* in respect of the actual offence charged against the appellant. The witness Jolame Jale might have committed some different offence but he certainly was not guilty of an offence in so far as selling liquor without a licence was concerned as the element of *mens rea* was not present."

Here with respect I think the learned Chief Justice has reached the real test of whether or not the witness was an accomplice.

Two East African cases were referred to, both of which are of persuasive authority only. In *R. v. Mohamed Shariff Dossa* (1945) 13 E.A.C.A. 100 it was held that the purchaser of milk in excess of the controlled price was not an accomplice. The reasoning of their Lordships appears in their judgment which reads—

> " But we would go further and say that the witness Mohamed Ali who made the purchase of the milk is not an accomplice. He acted under the instructions of his European employer in going on a message and even though he paid a price for the milk which was prohibited by the regulations, the reason for his doing so was not that he or his employer wished to do so, but for the reason that the overcharge was made by the vendor or his agent. This did not constitute him an accomplice in our opinion and his evidence if believed did not require corroboration to sustain a conviction. In other words the purchaser was not an accomplice in the seller's offence but the victim of it, that is his employer was. The seller took advantage of the buyer's need for milk to obtain an illegal price for it. It seems to be a serious misuse of the English language to say that the victim of such an offence or his agent is an accomplice in the commission of that offence. The case of *Rex v. King* (10 C.A.R. 117) where the charge was living on the immoral earnings of a woman seems to be in point. There the Court held that the woman was not necessarily an accomplice though she had earned the money and given it to the accused."

In the judgment of the Court of Criminal Appeal the Lord Chief Justice said—

> " Mr. Hawtin argues that she was an accomplice. that must be in the offence with which the appellant was charged. It is sufficient to say that there is no evidence of this, and it is not necessarily the case. The only way in which it is possible to argue the case is to say that in doing some of the acts, which she must have done to carry out the intention of the appellant, she must have been guilty of soliciting or some other offence. It is impossible to say that she is therefore an accomplice in the crime with which the appellant was charged.
>
> Similarly in the present case ' the only way in which it is possible to argue the case ' put forward on behalf of the appellant that these witnesses are accomplices is to say that the witnesses in question in this case must have been guilty of some other offence, to wit, purchasing at a price above the controlled price Reg. 11 (2) of the Defence (Control of Prices) Regulations]. The words ' It is impossible to say that she is therefore an accomplice in the crime with which the appellant was charged ' are applicable to the facts of the case before us."

Similar reasoning was used by their Lordships in the subsequent case of *R. v. Mulji Bhanji* (1947) 14 E.A.C.A. 108 the headnote to which reads—

> " To render a person an accomplice it was necessary to show he was guilty of the offence charged: in this case, selling at an excessive price. But Ali Saidi had only bought and was therefore not an accomplice."

In my view in neither of these cases has the fact on which depends whether the witness is an accomplice or not emerged with sufficient clarity and the reports would appear to indicate that the ground on which a witness was held not to be an accomplice was that he was a purchaser and therefore, could not be an accomplice in an offence of selling, a ground with which I would take the liberty of disagreeing.

In *Sayce v. Coupe*, 116 J.P.R. 552 Lord Goddard, L.C.J. deals with the question of principals in the second degree in these words—

> " The second summons charges the respondent with aiding and abetting ' a person unknown ' (who must have been Wood) to commit the offence, that is to say, buying these goods from a person whom he knew was not a licensed dealer in tobacco. Counsel for the respondent has argued that because the statute does not make it an offence ' to buy ', but only makes it an offence ' to sell ', the charge of aiding and abetting the sale cannot be preferred. It is obvious that it can be preferred. The statute does not make it an offence to buy, but none the less, on ordinary general principles of criminal law, a person who, knowing the circumstances and knowing that an offence is being committed, takes part in or facilitates the commission of the offence, becomes guilty as a principal in the second degree, and, therefore, it is impossible to say that a person who buys does not aid and abet a sale."

It appears to me that Lord Goddard's reasoning in this case is not only logically sound but is also sound in law.

In this Colony it would appear that the definition of Lord Simonds in *Davies v. Director of Public Prosecutions* (*supra*) and Lord Goddard's reference to principals in the second degree should be read subject to the provisions of the Penal Code which defines principal offenders, although in parenthesis I should say that since the question of the liability of accessories after the fact to be treated as accomplices has not been canvassed before me I express no opinion in regard to whether or not they are accomplices. Section 21 of that Code reads—

> " 21. When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—
>
> (*a*) every person who actually does the act or makes the omission which constitutes the offence;
>
> (*b*) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
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> (*c*) every person who aids or abets another person in committing the offence;
>
> (*d*) any person who counsels or procures any other person to commit the offence.
>
> In the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.
>
> A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.
>
> Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission."

It is clear then that any person who comes within that definition is an accomplice. It then becomes a question for decision in each particular case whether on the facts of that case a person is an accomplice or not.

To apply the reasoning of Lord Goddard in *Sayce v. Coupe* (*supra*) and the definition of principal offenders in the Penal Code to the facts of the present case in my view the witness Ioane Tale were he not an *agent provocateur* or police spy or informer must be an accomplice of the appellant in the offence of selling liquor without a licence. He had knowledge that the appellant in selling liquor to him was committing an offence, without his procuring the sale to be made to him, without his participation by buying from the appellant the offence could not be committed, it is impossible to say then that he did not abet the sale.

Here I must say that I have dealt only with those cases where the witness has the necessary *mens rea* to bring him within the definition of a principal offender. The question of the necessity of such guilty knowledge in the case of an offence of absolute liability has not been canvassed and I express no opinion in regard to a witness participating in such an offence without *mens rea* being an accomplice.

The next question is whether a police spy or *agent provocateur* is an accomplice within the meaning I have assigned to that term. As a corollary does the evidence of Ioane Tale require corroboration? An early case which is in point is *R. v. Mullins* 3 Cox C.C. 526, the head note to which reads—

> " A person employed by Government to mix with conspirators, and pretend to aid their designs for the purpose of betraying them, does not require corroboration as an accomplice."

At page 531 Maule, J. is reported to have summed up to the jury in these words—

> " But the practice I have referred to has never extended to the case of spies, and with good reason. An accomplice confesses himself a criminal, and may have a motive for giving information, as it may purchase immunity for his offence. A spy, on the other hand, may be an honest man, he may think that the course he pursues is absolutely essential for the protection of his own interests and those of society; and if he does so, if he believes that there is no other method of counteracting the dangerous designs of wicked men, I can see no impropriety in his taking upon himself the character of an informer. The government are, no doubt, justified in employing spies; and I do not see that a person so employed deserves to be blamed if he instigates offences no further than by pretending to concur with the perpetrators. Under such circumstances they are entirely distinguished in fact and in principle from accomplices, and although their evidence is entirely for the jury to judge of, I am bound to say that they are not such persons as it is the practice to say require corroboration."

The case of a " police trap " was considered by the Court of Criminal Appeal in *R. v. Henry Heuser* VI Cr. App. R. 76, where, by arrangement with the police the informer met the appellant, an offence was committed and two police officers witnessed the offence. In delivering the judgment of the Court, Avory, J. said—

> " In this case we think there is no ground for the contention that the police officers were accomplices, and therefore required corroboration. Appellant had the benefit at the trial of the ruling that the witness Procter did require corroboration. Speaking for myself, I am not satisfied at all that that was so. But even assuming it in the appellant's favour, there is no ground for saying that when the police have informa-

tion that an offence is likely to be committed, and go to the place for the purpose of detecting it, they thereby become accomplices merely because they assent to the informer going there too, for the purpose of entrapping the offender."

From this judgement the Court seemed to be of opinion that the informer himself, although in theory an accomplice, did not require corroboration. Another case before the same Court was *R. v. Bickley*, 2 Cr. App. R. 53, where the witness was a woman acting under police instructions in order to trap the appellant into supplying a noxious thing to her with intent to procure miscarriage. Walton J. delivering the judgment of the Court said—

" In the first place, the fact that the woman was a police spy in no way invalidates her evidence, nor must her evidence be regarded as that of an accomplice. As the law stands at present, it seems established that a police spy does not need corroboration. Mullins (above)."

Two cases have been before the Court of Appeal in Eastern Africa. The first was *Habib Kara Vesta and Others v. R.* (1934) 1 E.A.C.A. 191. The main part of the decision in that case, which was a trap case under the Dangerous Drugs Ordinance (Kenya), 1932, is clearly expressed in the headnote of the case in the following terms:—

" *Held.*—That, although there was no corroboration of the evidence of one Lees who, on taking it upon himself to try to suppress the drug traffic in Mombasa, induced the accused to supply a drug, yet corroboration was not necessary because his activities were those of an agent of justice and not of an accomplice, and that his motive in instigating the appellants to the commission of an offence was the capture of offenders and not the perpetration of offences. Held, therefore, on the authority of cases decided in England, India and East Africa, that a witness found to be a genuine police spy is not an accomplice, and therefore does not require corroboration. The cases establishing that principle fall into three categories which are discussed in this judgment. A spy, since his complicity extends only to the *actus reus* and not to the *mens rea*, is not truly an accomplice."

In a later case *R. v. Hasham Jiwa* (1949) 16 E.A.C.A. 90, their Lordships referring to the earlier case of Habib Khan Vesta said—

" In our opinion that decision is still binding on this Court and correctly embodies the law of England on the point. We have carefully considered all the decisions put before us by the appellant's counsel but not one of them in our view overrules that 1934 decision of this Court."

The position in Scotland has been set out in *March v. Johnston*, referred to in 1959 Criminal Law Review 444, where two policemen bought liquor from the complainer, and hotel keeper, after hours and it was held—

" That in Scotland the true criterion for the admissibility of police evidence is fairness to the accused. The mere fact that the policemen might have been guilty of a technical offence did not affect the matter, but it would have been otherwise if the police had pressed the complainer to commit the offence or had tricked him into doing so. As it was, there was nothing in the conduct of the police which was in the least improper, and nothing which made their evidence incompetent. If evidence of this sort were to be automatically excluded, there would be a wholesale flouting of the law."

I have also been referred to the New Zealand case of *Smith v. O'Donovan* [1909] 28 N.Z.L.R., 94 where it was held that—

> " There is no rule of law that the evidence of an informer in a criminal prosecution must be corroborated, and, although, where the informer is a probationary police officer, who is to some extent earning promotion by his success in detecting offences against the law, it is the duty of the Magistrate to scrutinise his evidence closely and weigh it carefully before acting upon it, if in the opinion of the Magistrate the witness is trustworthy, there is no rule of practice which requires his evidence to be corroborated. Such evidence is not in the same category as that of an accomplice, or of an informer who has a direct pecuniary interest in the result."

While the witness was referred to as an informer from the report I think there is little doubt that he induced the commission of an offence by himself purchasing liquor after hours.

I think the question of police traps and *agents provocateur* was set out in proper perspective by the Metropolitan Magistrate at Clerkenwell Magistrate's Court in *R. v. Coleman and Others* reported in 1960 Journal of Criminal Law 241, where a police officer with two police informers paid to see an exhibition of obscene films. The learned Magistrate, dealing with the submission that the remarks of Goddard, L.C.J. in *Brannan v. Peek* (*supra*) applied said—

> " That it was very difficult for the police in cases of this kind to get evidence unless they set a trap by pretending they were ordinary members of the public. The only way they could do that was to get into touch with people who had these films and see if they would give them a showing.
>
> Such traps had been approved by the Court of Criminal Appeal. For example, in an abortion case, it was held that two women police officers had acted properly by pretending they were pregnant and had asked a person thought to be procuring abortions for drugs to obtain a miscarriage
>
> In such a case, Lord Birkett had said ' The police had been quite right to do this. Legitimate steps should be taken where it was thought that an offence had been committed '.
>
> This was what the police had done in the present proceedings. In certain cases this was what the police had to do and such devices were permissible provided they did not force unwilling people to commit offences."

It appears clear therefore that an informer who takes part in a police trap is not an accomplice and his evidence, although subject to close scrutiny, does not require to be corroborated.

In the present case Ioane Tale did no more than ask to be supplied with liquor. He did not persuade the appellant against his will. In my view his evidence was rightly admitted and required no corroboration. The appeal against conviction is therefore dismissed.

The appellant also appeals against the quantum of the fine and costs ordered to be paid. In regard to the fine counsel for the appellant has referred to an East African case, *R. v. Hopley* 16 E.A.C.A. 110. That again was a case of an offence committed as the result of a police trap. Sentence was reduced in that case because—

> " There is a difference in degree of criminality between a person who of his own volition commits an offence and one who in the face of great temptation which he has not himself brought about, succumbs to it."

In that case also their Lordships took into account the fact that another accused escaped with a much lighter sentence because the state of his health made a prison sentence undesirable. Neither of those considerations have any application in the present case. The sentence imposed was a severe one, but having regard to all the circumstances I am unable to say that it was manifestly excessive.

The costs ordered to be paid appear to be rather high. However, a perusal of the record indicates that a police officer from Labasa attended the hearing on two occasions and presumably he travelled by air in which case the costs are not excessive. I think it advisable, however, where costs of this amount are awarded, for a Magistrate to make a brief note on the record of how he assesses the costs ordered to be paid.

In the result appeal against sentence is also dismissed.

Appeal dismissed.

Solicitor for the appellant: *K. C. Ramrakha.*

Solicitor-General for the Crown.