A

PAUL SENDERE

v.

B **REGINAM**

[COURT OF APPEAL, 1971 (Gould V.P., Marsack J.A., Tompkins J.A.), 26th August, 7th September]

Criminal Jurisdiction

C *Criminal law—practice and procedure—case for prosecution resting upon accomplice evidence—whether incumbent upon judge to acquit at close of prosecution—Criminal Procedure Code 1961 (British Solomon Islands Protectorate) s.256(1).*

Criminal law—evidence and proof—corroboration of accomplice evidence—trial judge entitled to consider unsworn statement by accused in court.

The appellant and one John Sitea were tried together for the offence
D of shopbreaking and larceny. The case for the prosecution rested almost entirely on the evidence of accomplices whom the trial judge described in his judgment as thoroughly untrustworthy. John Sitea elected to give evidence on oath and denied any complicity in the offences: the charges against him were dismissed, the trial judge finding no adequate corroboration of the accomplices' evidence. The appellant elected to make an unsworn statement in which he admitted breaking into the store in ques-
E tion; he was convicted. The essential requirement of section 256(1) of the Criminal Procedure Code is that the court, if it considers that there is no evidence that the accused committed the offence, shall record a finding of not guilty.

Held: 1. The trial judge was entitled to accept the unsworn statement of the appellant as being consistent with the evidence of the accom-
F plices; in the case of John Sitea the accomplice evidence was entirely uncorroborated, which justified the distinction made.

2.(a) The effect of section 256(1) of the Criminal Procedure Code is that if, at the close of the prosecution case, there is evidence which, if accepted, could lead to a conviction, the trial judge is under no obligation to give a final determination concerning the weight to be attached to that
G evidence and to answer the question whether it satisfies the requirement of proof beyond reasonable doubt.

(b) In the present case there was such evidence and the trial judge had therefore not contravened the provisions of section 256(1).

Cases referred to :

H *Karioki v. R.* (1934) 1 E.A.C.A. 160.

Issa v. R. [1962] E.A. 686.

Frost and Hale v. R. (1964) 48 Cr. App. R. 284; 108 S.J. 321.

Appeal from a conviction of the High Court of the Western Pacific at Honiara.

D. Pathik for the appellant.

T. U. Tuivaga for the respondent.

The facts sufficiently appear from the judgment of the court.

7th September 1971

Judgment of the Court (read by Marsack J.A.) :

This is an appeal against the conviction of the appellant before the High Court of the Western Pacific sitting at Honiara on the 2nd July, 1971, of the offence of shopbreaking and larceny, and also against the sentence of twelve months' imprisonment imposed on that conviction.

Two other persons were charged jointly with the appellant : one, John Sitea, with the same offence as that with which the appellant was charged, and the other, Dilaomae Sade, with being an accessory after the fact.

The case for the prosecution rested almost entirely on the evidence of three other persons who had been involved in the burglary, and were properly described by the learned trial Judge as accomplices. One of them, Pia Fikumae, had already been convicted of the offence and sentenced to imprisonment. He gave evidence explaining exactly the part which the appellant had played in the burglary. Later in his evidence, when he was questioned as to the participation of another person, he went back on the statement which he had given to the police and, upon the application of the prosecutor, was declared to be a hostile witness.

At the completion of the case for the prosecution, the learned trial Judge held that the 3rd accused, Dilaomea Sade, had no case to answer, and entered a verdict of acquittal. He then explained to the other two accused persons their rights in the matter of giving evidence, making an unsworn statement not liable to cross-examination, or remaining silent. The 1st accused elected to give evidence on oath, in which he denied any complicity in the offence. The appellant made an unsworn statement in the course of which he said :

> "As regards the breaking into the store. That is true. We did break in. I was surprised to find that Fikumae reported me to the police. I had never done anything with Fikumae in the past. That is all I have to say."

Giving judgment, the learned trial Judge described the accomplices who gave evidence as "reluctant witnesses; themselves involved, and thoroughly untrustworthy." As he could find no adequate corroboration of their evidence against the 1st accused, John Sitea, he dismissed that charge.

With regard to the appellant, however, the learned trial Judge says this :

> "I may deal firstly with the position of the second accused. Although he had pleaded not guilty in the first instance, at the opening of the

defence he elected to make an unsworn statement from his place in which he categorically admits that he, together with the witness Fikumae (P.W. 2) broke into the store of Chan Wing Motors Ltd. as alleged in the charge. I have no hesitation in accepting that statement as true. It conforms with the evidence of his accomplice Fikumae. His presence at the scene is also confirmed by the evidence on oath of the first accused, John Sitea, and also by the witness Punianikeni. None of these witnesses is to be trusted but together with the accused's own admission in this court I have no doubt but that the admission is true. I therefore convict the second accused of the offence charged."

None of the accused persons was represented by counsel at any stage. Legal assistance is not readily available at Honiara.

The grounds of appeal as filed were prepared by the appellant himself without legal advice, and amount to a denial of guilt. At the hearing before this Court counsel by consent filed amended grounds of appeal, and these, as argued, may be briefly summarised as follows :

1. that the learned trial Judge erred in law in convicting the appellant upon his unsworn statement "we did break in";

2. that the learned trial Judge, having found that none of the witnesses Fikumae, Punianikeni, Rekweni was to be trusted, should not have accepted their testimony, and there was insufficient other evidence to justify conviction;

3. that as the learned trial Judge held that the evidence for the prosecution was insufficient to support a conviction, as evidenced by his dismissal of the charge against the 3rd accused, he should have ruled at the conclusion of the case for the prosecution that the appellant had no case to answer.

With regard to the first ground, it is well established that a confession made in Court in due course of legal proceedings is sufficient by itself to support a conviction. It amounts, in fact, to a plea of guilty; or, if a formal plea of not guilty has already been entered, to a reversal of that plea. Mr. Pathik quite properly points out that the offence of which the appellant was convicted was that of "shopbreaking and larceny", the larceny involving the theft of a safe valued at $250, and a cash register valued at $600. In counsel's submission the statement "As regards breaking into the store, that is true; we did break in" might be taken as a confession of the crime of shopbreaking, but could not, standing by itself, be taken as an admission of guilt of larceny.

In our opinion, there would be merit in this argument but for the fact that the conviction of the appellant does not rest on this confession alone. The learned trial Judge points out in the course of his judgment that the confession conforms with the evidence of his accomplice, Fikumae; and it adds corroboration to the evidence on oath of the witness Punianikeni and that of the 1st accused, John Sitea. It thus appears that the learned trial Judge has treated the admission made by the appellant as supporting the other sworn evidence against him, and not as the sole

foundation upon which the conviction is based. This other evidence definitely connected the appellant with the larceny charged against him as well as the shopbreaking. Accordingly this ground of appeal must fail. A

With regard to the second ground of appeal, it is clear that the learned trial Judge did not accept the evidence of the accomplices concerned as being trustworthy to the extent that the conviction might be based upon it, unless it was substantially corroborated in some material particular. With regard to the 1st accused, John Sitea, no such corroboration was forthcoming; this accused gave evidence on oath denying complicity in the crime, and the learned trial Judge held that in these circumstances he could not convict. The situation with regard to the appellant is, however, different in that not only did he not give sworn evidence denying his guilt, but he made a statement admitting it. The dismissal of the charge against John Sitea was accordingly justified on the whole of the evidence. The only evidence against him was that of accomplices; which was uncorroborated and which was insufficient to offset the sworn evidence of Sitea himself. In the case of the appellant there was a statement which the learned trial Judge was entitled to accept as consistent with the evidence of the accomplices, and which he has so accepted. Accordlingly we can find no substance in the second ground of appeal. B C

We now turn to the 3rd ground of appeal. In support of his contentions on this ground counsel for the appellant refers to section 256(1) of the Criminal Procedure Code in force in the Solomon Islands. This section reads :— D

> "256.(1) When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence (if any) of the accused person before the committing court has been given in evidence, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence, shall, after hearing, if necessary, any arguments which the public prosecutor or advocate for the prosecution or the defence may desire to submit, record a finding of not guilty." E

In counsel's submission the learned trial Judge made it clear, from his dismissal of the charge against the 3rd accused at the close of the case for the prosecution, and his dismissal of the charge against the 1st accused after the latter had given evidence, that in his view the evidence of the accomplices was unreliable and insufficient to support a conviction. The evidence of the accomplices was at that stage virtually the only evidence against the appellant. If that evidence were rejected, counsel contended, then the Judge should have, in the words of the section, considered that there was no evidence that the appellant had committed the crime. He should therefore have entered a verdict of not guilty without calling on the appellant. F G

Counsel for the Crown submitted that there is no obligation on the learned trial Judge at the conclusion of the prosecution to give a considered judgment on the evidence so far tendered; that if in his opinion a *prima facie* case has been made out the Judge is entitled to proceed as he did. Counsel cited the case of *Frost and Hale* (1964) 48 Cr. App. R. 284 in which it was held that the Judge should remind the jury that when a prisoner makes a statement from the dock the jury can attach to H

it such weight as they think fit, and should take it into consideration in deciding whether the prosecution have proved their case. The procedural position is, however, not the same in a trial by jury as in a trial before a Judge alone. The question for determination is the precise meaning to be given to the phrase "The Court if it considers that there is no evidence that the accused . . . . . committed the offence, shall . . . . . record a finding of not guilty."

In our view the contention of Crown Counsel on this point is sound that if, at the close of the case for the prosecution, there is evidence which, if accepted, could lead to a conviction, then the trial Judge is under no obligation to give a final determination of what may well be an intricate problem concerning the weight to be attached to that evidence, its probative value, and the answer to the question whether it satisfies the legal requirement of proof beyond reasonable doubt. It is to be noted that the section refers to 'no evidence', not to evidence which, on close examination, the Judge may decide to reject on technical grounds.

Had the appellant been represented by counsel, there is a great likelihood that counsel would have submitted that there was no case to answer; and in any event there would have been little chance that the appellant, acting under counsel's advice, would have made the incriminatory statement which led to his conviction. Be that as it may, the question this Court has to decide is whether in our opinion there was an obligation on the trial Judge, in the present case, to enter a verdict of not guilty against the appellant as soon as the prosecution case was closed. In our view there was no such obligation. There was evidence, which, if accepted, would justify the conviction of the appellant. It was not, in our view, incumbent on the trial Judge at that stage to examine carefully whether there was such corroboration as would impel him to accept the evidence of the accomplices, the acceptance of such evidence being in any event within his discretion. We do not think that it could be said that the Judge in this case acted in violation of the express provisions of section 256(1) of the Criminal Procedure Code.

The construction of the section in the relevant Criminal Procedure Code, similarly worded to section 256(1) quoted above, was considered by the East African Court of Appeal in *Karioki v. R.* (1934) 1 E.A.C.A. 160. The judgment in that case was referred to in *Issa v. R.* (1962) E.A. 686. At p. 687 the following passages is quoted from Karioki's case :

> "Our decision must depend upon the meaning we attach to the expression 'if the court considers that there is no evidence that the accused committed the offence'. We think that that expression must be construed as it stands. It is for the trial court to consider whether there is evidence, and not for us to decide whether there actually was evidence."

At p. 688 the judgment in Issa's case proceeds :

> "The effect of these cases is that it is clear beyond doubt that where an accused has been put on his defence and by his evidence has brought about his own conviction, an Appellate Court will not set aside the conviction solely on the ground that the trial court should have held that there was no case to answer."

The passages stated from the judgments in *Karioki* and *Issa* appear to us consistent with the views we have adopted as to the construction of section 256(1) of the Criminal Code

We hold therefore that this ground of appeal also fails.

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With regard to the appeal against sentence, it has been pointed out that the maximum sentence for this offence is fourteen years' imprisonment The learned trial Judge has a much better understanding of local conditions than the members of this Court; and for that reason we should be reluctant to interfere with the sentence unless we were satisfied that it was manifestly excessive or imposed upon a wrong principle. We are not satisfied in this case.

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In the result the appeal, both against conviction and against sentence, is dismissed.

Appeal dismissed.