IN RE MOKE TA'ALA

SUPREME COURT OF NEW ZEALAND (FULL COURT). Wellington. 1956. March 19, 20, 28. BARROWCLOUGH C.J. GRESSON J. STANTON J. McGREGOR J. SHORLAND J.

Criminal Law - Evidence - Accomplice - No Provision in Samoan Statute-law relating to Accessories before or after the Fact - All Offences deemed to be Misdemeanours - Common-law Category of Accomplices, for Application of Rule as to Evidence of Accomplices, not including, in Samoa, Accessories before or after the Fact - Such Rule applicable, in Samoa, only to Persons "committing, procuring, or aiding and abetting" Offence charged - Samoa Act 1921, sections 149, 204, 214, 349.

Criminal Law - Practice - Trial - Judge with Assessors - Summing-up of Judge in Open Court unnecessary - Where Judge sums up in Open Court for Guidance of Assessors, Summing-up to conform with Rules followed by British Courts for Guidance of Jury - Such Rules including Rule of Law Relating to Warning as to Evidence of Accomplices.

At a trial, in accordance with the law of Western Samoa, before a Judge sitting with assessors, a summing-up in open Court is not necessary.

Latoatama, Folitolu, and Tamaeli v. Williams, [1954] N.Z.L.R. 594, followed.

But where the trial Judge thinks it expedient to sum up, and does in fact sum up in open Court for the guidance of the assessors, the summing-up should conform with the rules which are followed and observed in British Courts of Justice in summing-up for the guidance of a jury, including the rule of law that, when a witness for the prosecution is or may be an accomplice, it is incumbent upon the trial Judge to direct the jury to decide whether in fact such witness is an accomplice, and to tell the jury that, if they find him to be an accomplice, they should pay heed to the warning which ought always to be given in such a case.

The issue of accomplice vel non is one for the Court - comprising Judge and Assessors - and not, as in the case of a trial in New Zealand, for the Judge alone.

Davies v. Director of Public Prosecutions, [1954] A.C. 378 [1954] 1 All E.R. 507, referred to.

Semble: That the rule of law as to evidence of accomplices, which was defined in Davies v. Director of Public Prosecutions, [1954] A.C. 378; [1954] 1 All E.R. 507, is in force in Western Samoa as a common-law rule applicable under section 349 of the Samoa Act 1921, subject to the necessary modifications hereinafter referred to.

The action of P., one of the witnesses for the prosecution, in counselling the accused to dispose of the incriminating weapons for which the Police were searching, could have been regarded as motivated by a desire to suppress or destroy evidence of the accused's guilt; and, on that footing, under the law of England and of New Zealand, P. might have been held to be an accessory after the fact.

R. v. Levy, [1912] 1 K.B. 158; 7 Cr. App. R. 61, followed.

R. v. Sweeney, (1905) 7 G.L.R. 529, not followed.

The Samoa Act 1921 contains no provision comparable with section 92 of the Crimes Act 1908 (New Zealand); and, having regard to the fact that it prescribes its own criminal code and to the provisions of sections 204 and 351 therein, it would be inconsistent with the Samoa Act 1921 in view of the qualification in section 349, to hold, even if it were only in connection with the rule as to the evidence of an accomplice, that P., a witness for the prosecution, could be an accessory after the fact.

Semble: That, for the purposes of a criminal trial in Western Samoa under the provisions of the Samoa Act 1921, the category of accomplices for the purpose of applying the common-law rule as to evidence of accomplices is confined to persons "committing, procuring, or aiding and abetting" the offence charged, and cannot include accessories before or after the fact at common law.

By reason of section 214 of the Samoa Act 1921 (providing that there shall be no distinction between felonies and misdemeanours, and that, for the purpose of any rule of the common law or of any enactment in force in Samoa, all offences are to be deemed to be misdemeanours), P. could be an accomplice only if he were a person, "committing, procuring, or aiding and abetting" the offence charged; and, on the evidence, P. could not be held to be a person within that category.

To hold that P.'s offence was so intimately connected with the offence charged against the accused that P. should be regarded as an accomplice would be to include within the term "accomplices" a class of persons whom the law has hitherto not regarded as such; and the circumstances of the case did not afford any reason for such an extension.

Davies v. Director of Public Prosecutions, [1954] A.C. 378; [1954] 1 All E.R. 507, followed.

APPEAL pursuant to section 83 of the Samoa Act 1921.

The appellant was charged before the High Court of Samoa in that he did, on September 27, 1955, at Poutasi, Falealili, murder Failelei Lavasi'i, of Fagaloa, a Police Constable. The hearing of the matter took place before the High Court of Western Samoa consisting of the Chief Judge and four Assessors. On December 23, 1955, the appellant was convicted, the Assessors having unanimously decided that the prisoner was guilty of murder, and the Chief Judge having concurred in such decision.

The matter came before the Supreme Court of New Zealand by way of appeal pursuant to the provisions of section 83 and the following sections of the Samoa Act 1921. The appeal was both on fact and law.

The appellant appealed with the leave of the High Court of Western Samoa.

T.P. McCarthy, for the appellant. This is an appeal on the ground that the judgment of the High Court of Western Samoa is erroneous in fact and law for the following reasons:

(a) This Court has jurisdiction fully to review the decision of the High Court: Latoatama, Folitolu, and Tamaeli v. Williams, [1954] N.Z.L.R. 594;

(b) On all the evidence, there was a reasonable doubt as to the guilt of the accused, and this is a sufficient ground for this Court to intervene;

(c) The Court below acted on the evidence of an accomplice, or possible accomplice, without administering the usual warning.

In many respects, the Samoa Act 1921 is similar to the Cook Islands Act 1915, which was considered by this Court in Latoatama, Folitolu, and Tamaeli v. Williams, [1954] N.Z.L.R. 594. [After reviewing the provisions of the Samoa Act 1921:] The parties to an offence are defined in section 200 of the Act. There is no mention in the statute of an accessory after the fact, but section 149 provides that every one is liable to three years' imprisonment who conspires or attempts to obstruct, prevent, or pervert the cause of justice in any civil or criminal cause. That section brings in what is normally referred to as an "accessory after the fact". Section 74

elates to the procedure of the High Court, that is, to the principles which his Court should apply in an appeal such as this: see Latoatama's case, /1954/ N.Z.L.R. 594; and see also Sheo Swarup v. The King Emperor, (1934) 1 T.L.R. 10. /Reviews the evidence in detail./

Shires, in support. As the evidence shows, Sione Peterson, a witness or the prosecution, was an accomplice, as an accessory after the fact; and, n accordance with the common-law rule, the Chief Judge should have warned he Assessors that, as, under the law of Samoa, he was an accessory after the act, there was a danger of convicting the appellant on Sione Peterson's ncorroborated evidence. Sione Peterson could not have been prosecuted as an ccessory after the fact; but his offence was so intimately connected with he offence charged that he should be regarded as an accomplice. The law of estern Samoa applicable here is the common-law rule defined in Davies v. irector of Public Prosecutions, /1954/ A.C. 378; /1954/ 1 All E.R. 507, pplied in R. v. McDonald, /1955/ N.Z.L.R. 699: see section 349 of the amoa Act 1921 and section 2 of the English Laws Act 1908. The common law in orce in New Zealand is also in force in Western Samoa, subject to its pplicability. The common-law rule cannot be said to be inapplicable to a rial by the Judge with Assessors: Mahadeo v. The King, /1936/ W.N. 203; /1936/ 2 All E.R. 813.

As to whether Sione Peterson was an accessory after the fact, see . v. Levy, /1912/ 1 K.B. 158; 7 Cr. App. R. 61. There is no definition f "accessory after the fact" in the Samoa Act 1921, as in section 92 of the rimes Act 1908. For the common-law definition, see 2 Russel on Crimes, 10th d., 1867. R. v. Sweeney, (1905) 7 G.L.R 529, need not be considered.

Sir William Cunningham, for the Crown. It is agreed that this Court has aid down the principles on which this appeal must be dealt with in Latoatama, olitolu, and Tamaeli v. Williams, /1954/ N.Z.L.R. 594, 599, I. 23. The rus is on the appellant to show that the High Court of Samoa reached a wrong ecision in convicting him of murder. Normally the appellate Court should efer to the conclusion of the trial Judge as to the credibility of witnesses hom he, but not the appellate Court, has seen and heard. The appellate Court hould attach the greatest weight to his opinion because he saw and heard the itnesses, and it should not disturb his judgments unless it is plainly nsound: Sim's Supreme Court Practice, 9th Ed., 444; Sheo Swarup v. The King-mperor, (1934) 51 T.L.R. 10, 12. It has not been shown that the trial was ot in conformity with natural justice or that a substantial miscarriage of justice has taken place. As to the duty of the trial Judge in respect of the vidence of accomplices, see Willans v. Slater, /1947/ N.Z.L.R. 924: /1947/ .L.R. 486; and Oxnam v. Ferguson, /1948/ N.Z.L.R. 314; /1948/ G.L.R. 280.

cCarthy in reply.

Cur. adv. vult.

The judgment of the Court was delivered by

McGREGOR J.: The function of this Court in considering the matter n appeal is set out in the judgment of the Full Court in Latoatama, Folitolu, nd Tamaeli v. Williams, /1954/ N.Z.L.R. 594, where the Court dealt with ections in the Cook Islands Act 1915 precisely similar to those of the Samoa ct 1921, with which we are concerned. There, in delivering the judgment of he Court, Stanton J. says: "In our opinion, the effect of these provisions s that the appeal is an appeal on fact and on law, the question being, not hether there was evidence on which the High Court could arrive at its ecision, but whether the decision is right or wrong. We think that the ormal rule must apply that it is for an appellant to satisfy the appellate ribunal that the judgment is wrong. The proceedings differ in this respect rom a general appeal under section 315 of the Justices of the Peace Act 1927, n which this Court, having reheard the witnesses, holds itself free to arrive t an independent judgment on the facts unembarrassed by the findings of the ourt below....It has to be remembered, too, that this Court, on the hearing f an appeal, is entitled to review the case in all its aspects of law as ell as fact, and that, if wrong views were taken by Judge or assessors in he High Court, this Court is entitled and bound to exercise its own judgment

on every question that can be shown to have arisen, whether it be a question of law or a question of fact. It is the duty of this Court to apply the law correctly to the facts which it finds to be proved, and the ultimate decision is the decision of this Court on the facts and the law, and not the decision of the Judge and Assessors" (ibid., 599,600).

It is common ground that the deceased person Failelei was at about 8.15 p.m. or 8.20 p.m. in the Police fale at Poutasi. With him in the fale were his wife, Fa'apaia Failelei, and Ioane Luafutu. The deceased was lying on the floor of the fale face downwards on pillows. A shot was heard and immediately afterwards it was discovered that the deceased had been injured by a projectile from a weapon, which projectile had penetrated his back and emerged from his chest and as a result of this injury the deceased died almost immediately.

The evidence implicating the appellant can be summarised under six headings:

1. There was evidence that the shot had been fired from a .45 automatic pistol.

2. There was evidence that the pistol concerned was the property of one Sione Peterson; that the appellant had on occasions been permitted the use of the weapon, and that it was in his possession on the afternoon before the shooting.

3. There was evidence that, on the following morning, the appellant had hidden the pistol under a coconut tree; and some days later, on October 6, he had taken the Police to the place where it had been hidden and had produced it to the Police.

4. There was evidence of certain confessions made by the appellant to several persons including Sione Peterson, Sale Peterson, Aki Aki, and Moamoa.

5. There was some evidence that the appellant was in the Poutasi area about the time of the shooting, and was at that material time missing from the fale at Tafatafa.

6. There was some evidence that the appellant had expressed an intention to do harm to the deceased some two months earlier, and had visited the deceased's fale about that time when the deceased and his wife were absent.

It is proposed to discuss the evidence under these headings.

/After a detailed examination of the evidence, the judgment continued:/

To summarise the matter it seems to us that, having discarded the evidence in connection with the earlier episode alleged to have taken place during the fence-construction period, and having set aside the evidence of Sione, Sale, and Ofe as to the confessions made by Moke to them, there was still cogent evidence from the identification of the lethal pistol, Moke's association with this pistol both before and after the shooting, his confessions to Aki Aki and Moamoa, and his absence from the Tafatafa fale at the crucial time, to enable an inference to be drawn that Moke was the perpetrator of the crime; and that it has been proved beyond any reasonable doubt that Moke is the guilty person. We do not think that these inferences are displaced by the evidence as to the confession made by Sale that he was the murderer, which was explained as a mere boastful statement, or the criticism that has been directed that other persons may have had similar opportunity to commit the crime.

It has been emphasised by counsel for the appellant that there is no evidence from which any deduction can be made as to the motive of Moke to harm the Police constable. Certain suggestions have been made that Moke

ay have been anxious to remove the constable owing to his activities in pprehending Sione, a matai to whom Moke owed allegiance or service, on account f Sione's offence in the dynamiting of the fish. It is most difficult, in ur opinion, and more especially in view of our lack of experience in such atters to fathom the native mind; and we would hesitate on the evidence to ccept any evidence of motive. But the prosecution is not bound to prove otive; and, in view of the cogent evidence against Moke in the respects we ave mentioned, we do not feel that the fact that the prosecution has failed o satisfy the Court on the question of motive can affect our conclusions.

The foregoing is no more than a mere summary of the more compelling vidence against the appellant, and there are other matters that we have not ound it necessary to discuss. For the reasons we have mentioned, we are ompletely unsatisfied that the judgment of the High Court was wrong; and, part from the remaining question to be considered as to whether Sione Peterson as an accomplice and the Chief Judge had failed to warn the Assessors of the anger of convicting on the uncorroborated evidence of an accomplice, we would ismiss the appeal.

A further argument in support of this appeal was founded on the roposition that one of the witnesses for the prosecution - Sione Peterson - as or might have been an accomplice, and that in his summing-up to the ssessors the learned Chief Judge failed to give the warning that is ppropriate and necessary in such a case. Upon this aspect of the appeal this ourt has had the advantage of hearing an extremely able and well-presented rgument by Mr Shires; but, for the reasons set out hereafter, we are of pinion that that argument ought not to prevail. It should be mentioned in the irst place that this was not a trial before a Judge and a jury, but a trial, n accordance with the law of Samoa, before a Court sitting with Assessors. t such a trial a summing-up in open Court is not necessary: Latoatama, olitolu, and Tamaeli v. Williams, [1954] N.Z.L.R. 594 - a case in which the rial was governed by legislative provisions not materially different from hose governing trials in Western Samoa for offences punishable by death or mprisonment for more than five years. But where, as in this case, the trial udge thinks it expedient to sum up - and does, in fact, sum up - in open ourt for the guidance of the Assessors, then we think the summing-up should onform with the rules which are followed and observed in British Courts of ustice in summing-up for the guidance of a jury. Those rules include the ell-known and long-established rule - now a rule of law, and no longer a ere rule of practice - that, when a witness for the prosecution is or may be n accomplice, it is incumbent upon the trial Judge to direct the jury to ecide whether in fact such witness is an accomplice, and to tell the jury that, f they find him to be an accomplice, they should pay heed to the warning hich ought always to be given in such a case.

In the case before us, no warning was given, and the Assessors were ot invited to consider whether or not Sione Peterson was an accomplice. oreover, the trial Judge presumably did not direct his own mind to that opic when he was considering whether he should concur in the finding of the ssessors. It is, therefore, necessary to consider whether, on the evidence, he Court could properly have held Sione Peterson to be an accomplice. We ay "Court" advisedly; for the issue of accomplice vel non was one for the ourt - comprising Judge and Assessors - and not, as in the case in a riminal trial in New Zealand, for the jury alone.

In Davies v. Director of Public Prosecutions, [1954] A.C. 378; [1954] All E.R. 507, there is a recent, compendious, and authoritative judgment on he whole subject of accomplices and their evidence. It covers a number of oints that do not arise in the present appeal; but it deals conclusively ith the question as to what persons are to be regarded as accomplices for he purposes of the rule. Lord Simonds L.C. classifies under three categories he classes of persons, who, if called as witnesses for the prosecution, are o be treated as accomplices. His first category is as follows: "On any iew, persons who are participes criminis in respect of the actual crime harged, whether as principals or accessories before or after the fact (in elonies) or persons committing, procuring or aiding and abetting (in the ase of misdemeanours). This is surely the natural and primary meaning of he term 'accomplice'" (ibid., 400; 513).

The Lord Chancellor puts into a second and a third category persons, who, by two extensions of the term, have been treated as accomplices. It is unnecessary to quote His Lordship's description of the persons who come within the second and third categories, as it is not suggested that Sione Peterson is in either of them.

The appellant's own evidence was to the effect that on the day after the murder and after the Police had visited Sione Peterson's house, and after their search therein had failed to reveal the presence of a weapon of the type for which they were looking, the appellant said to Sione Peterson: "What about the weapons?" The appellant said he knew the Police had been searching for guns and that Sione Peterson had told him to throw the guns into the sea. Sione Peterson's account of this matter was practically identical with that of the appellant, and this evidence can be accepted. It was also common ground that the weapons had been in Sione Peterson's premises when the fruitless search was made; that the appellant took the guns away; but that they were not thrown into the sea, but were hidden. Upon this evidence it would have been open to the Court below to come to the conclusion that in seeking to dispose of the incriminating weapons Sione Peterson was attempting to obstruct, prevent, pervert or defeat the course of justice in a criminal matter. That is a crime under section 149 of the Samoa Act 1921. Though other motives and intentions could have been attributed to Sione Peterson in counselling the appellant to dispose of the weapons, it is clear that his action could have been regarded as motivated by a desire to suppress or destroy evidence of the appellant's guilt. On that footing, under the law of England and of New Zealand, Sione Peterson might have been held to be an accessory after the fact: R. v. Levy, /1912/ 1 K.B. 158; 7 Cr. App. R. 61, which appears to be more authoritative on this point than R. v. Sweeney, (1905) 7 G.L.R. 529.

We revert now to the class of persons placed by Lord Simonds in the first category of persons who are to be treated as accomplices. Mr Shires very properly did not submit that Sione Peterson was particeps criminis in respect of the actual crime charged. There was no evidence that he fired the fatal shot or that he was present when it was fired. But Mr Shires did submit that Sione Peterson ought to be regarded as an accomplice because (1) he was an accessory after the fact, or (2), alternatively, that he was guilty of an offence so intimately connected with the offence charged - murder - that the one could not have been committed without the other: that Peterson's offence could not be separated from that charged against the appellant, and that therefore he should be regarded as an accomplice. Peterson's offence was described as a cognate offence. We shall consider each of these submissions in turn.

Mr Shires admitted that the Samoa Act 1921 contains no provision comparable with section 92 of the Crimes Act 1908 (New Zealand), which defines an accessory after the fact and which, coupled with section 190 of the same Act, makes an accessory after the fact to murder liable to imprisonment for life. But he submitted that section 349 of the Samoa Act 1921, which made applicable to Samoa the law of England as existing on January 14, 1840, incorporated the common law; and that, under the common law, Sione Peterson was an accessory after the fact, and that he, therefore, came within the first category stated by Lord Simonds.

There are two answers to that submission. In the first place section 349, in incorporating the law of England, itself contains this qualification: "Save so far as inconsistent with this Act..." Section 351 of the Samoa Act 1921 declares that the statute law of New Zealand (which includes section 92 of the Crimes Act 1908) shall not be in force in Samoa. Section 204 of the Samoa Act 1921 declares that no person shall be proceeded against for any offence at common law. Having regard to the fact that the Samoa Act 1921 prescribes its own criminal code and to the provisions of the two sections just quoted it would, in our opinion, be inconsistent with the Samoa Act 1921 to hold, even if it be only in connection with the rule as to the evidence of an accomplice, that Sione Peterson could be an accessory after the fact. In the second place, it is to be observed that, in defining the persons who fall into the first category, Lord Simonds in Davies v. Director of Public Prosecutions, /1954/ A.C. 378; /1954/ 1 All E.R. 507,

spoke of "accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanours)" (ibid., 400; 513).

It is not suggested, and on the evidence it could not properly be held, that Sione Peterson was an accessory before the fact. He cannot be held to be an accessory after the fact to a felony, because the Samoa Act 1921, by section 214, declares:

There shall be no distinction between felonies and misdemeanours or between offences punishable on indictment and by way of summary conviction; and, so far as may be necessary for the purpose of any rule of the common law or of any enactment in force in Samoa, all offences shall be deemed to be misdemeanours.

For the purpose of any rule of the common law - the very rule upon which Mr Shires founds his argument - all offences are deemed to be misdemeanours. Sione Peterson, therefore, cannot come within the class described by Lord Simonds as "accessories before or after the "fact in felonies", for, in Samoa, all offences are deemed to be misdemeanours for the purpose of any rule of the common law (including the rule as to the evidence of accomplices). Nor could he, on the evidence, be a person "committing, procuring or aiding and abetting "(in the case of misdemeanours)", even if what he did was, as it quite possibly was, a misdemeanour under the Samoa Act 1921. He neither committed, procured, nor aided and abetted. The murder was complete long before he advised the disposal of the incriminating weapons. Section 214 was overlooked by counsel on both sides.

It remains to consider Mr Shires's alternative submission that Peterson's offence was so intimately connected with the offence charged against the appellant that Peterson should be regarded as an accomplice. This submission is substantially that which was made by counsel for the appellant in Davis v. Director of Public Prosecutions, /1954/ A.C. 378, 385; /1954/ 1 All E.R. 507, 513, and clearly it was not accepted by the House of Lords in that case. Lord Simonds L.C. refers to the extensions of the term "accomplice" which have become embedded in our case law, and which it would be inconvenient for any authority other than the Legislature to disturb. He continues: "I can see no reason for any further extension of the term accomplice" (ibid., 401; 514). In that judgment, all of their Lordships who heard the appeal concurred. To accept Mr Shire's argument on the point now under consideration would be to add another category to those mentioned by the Lord Chancellor, and to include within the term "accomplices" a class of persons whom the law has not hitherto regarded as such. This Court is invited to accept a further extension of the term "accomplice" - an extension which the House of Lords saw no reason to accept. We do not think that the circumstances of this case afford any reason for such an extension. Upon the evidence, Sione Peterson could not properly be held to be an accomplice; and the learned Chief Judge was under no obligation to invite the assessors to treat him as such.

The whole case was very ably argued; but, for the reasons given, none of the grounds of appeal has been established and the appeal must therefore be dismissed.

Appeal dismissed.

Solicitors for the appellant: Biss, Cooper, and Shires (Wellington).
Solicitor for the Crown: Crown Solicitor (Wellington).