ENOTIADES v THE PEOPLE (1965) ZR 144 (HC)

HIGH COURT
PICKETT J
27th October 1965

Flynote and Headnote

[1] Criminal procedure - Appeal in general - duty of appellate court - questions of fact:

Even where an appeal turns on a question of fact, the appellate court's duty is to re-hear the case, maintaining sensitivity to the great advantage of the trial judge in determining issues of credibility but realising at the same time that factors other than manner and demeanour (on which the trial judge's advantage is based) affect issues of credibility.

[2] Evidence - Corroboration - ambiguous confession not corroboration of testimony containing discrepancies by juvenile thieves:

The ambiguous statement 'Yes, I am in trouble' does not sufficiently corroborate testimony of two juvenile thieves containing discrepancies.

Cases cited:

(1) *R v Baskerville* [1916] 2 KB 658.

(2) *Chiteta v R* 1960 R & N 199.

(3) *Coghlan v Cumberland* (1898) 1 Ch. 704.

(4) *R v Schama and Abramovitch* (1914) 11 Cr. App. R 45; 84 LJKB 396.

Magnus and Jones, for the appellant
Cave, Asst. State Advocate, for the respondent

Judgment

Pickett J: This appellant appeared before the learned senior resident magistrate, Kitwe, on the 24th day of September, 1965, and on subsequent days upon a charge of receiving stolen property contrary to section 286 (1) of the Penal Code, Chapter 6 of the Laws of Zambia, involving a considerable quantity of cigarettes, of unknown value. At his trial the appellant pleaded Not Guilty to the charge, but he was convicted and on the 9th day of October, 1965, he was sentenced to six months' imprisonment with hard labour. From his said conviction and sentence he now appeals to this High Court, and his appeal has been conducted by Mr Magnus, QC, who also conducted his defence in the lower court.

Before proceeding to deal with this appeal, the facts of the case may be stated very briefly in the following terms: Premises known as the Eskimo Hut, Strand Avenue, Kitwe, were broken into in the early hours of the morning of the 22nd day of August, 1965, and a large quantity of a varied assortment of cigarettes were stolen. This crime was committed by P.W.2, a juvenile of 13 years, and P.W.3, another juvenile of 11 years, assisted by at least one other person unknown, and according to the evidence of these two juveniles, they carried these stolen boxes of cigarettes to the premises of the appellant, where they left them with the appellant, who they say told them to come back later.

There were a number of discrepancies in the evidence of these two juveniles, all of which have been most properly pointed out to me by Mr Magnus.

The version of the appellant was a denial of the stories told by P.W.2 and P.W.3, and an assertion that all he knew about these cigarettes was the report he received from his employee Mrs Kontou to the effect that she had found the cigarettes at the rear of the cafe and had placed them in the company's van before telling the appellant where she had found them. This version was in the main fully supported by the testimony of Mrs Kontou.

There were a number of slight discrepancies in the evidence of the two main defence witnesses, and it is the submission of the defence that the learned magistrate tended to ignore the discrepancies in the evidence of P.W.2 and P.W.3, whilst he attached great significance to the discrepancies in the testimony of the defence witnesses.

At the outset of this appeal, Mr Magnus intimated that he would argue it purely as an appeal against conviction and accordingly regard should be had only to grounds 1 to 6 of the grounds of appeal submitted.
First of all, I shall deal with grounds 3 and 4 which are in the following terms:

3. There was no or no sufficient corroboration of the evidence of the admitted accomplices.
4. That the learned senior resident magistrate misdirected himself in law in holding that there was corroboration or sufficient corroboration of the said evidence.

According to the learned magistrate's judgment, *vide* page 10 thereof, he observes:

' I find that the remark in these circumstances corroborates the evidence of the thieves, the remark being the one made by the appellant to Inspector Young, "Yes, I am in trouble".'

The question of what are the essentials of corroboration was fully set out in the judgment of Viscount Reading, CJ, in the case of *R v Baskerville* [1916] 2 KB 658, and as these essentials were obviously well known to the magistrate, since he referred to this case in his judgment, I shall not quote this case in detail.
[1] I have given my fullest consideration to this remark by the appellant, and to the whole of the circumstances in which it was made, in the light of paragraph 813 - headed 'Ambiguous Confessions' - contained in the Tenth Edition of *Phipson on Evidence.* After such consideration, I am of the opinion that the learned magistrate was in error in finding that the only significance he could attribute to the remark in those circumstances was that the appellant had a guilty mind concerning cigarettes and in treating this remark as corroboration.
Accordingly, this leaves me with the consideration of the final paragraph of the magistrate's judgment, 17, which reads as follows:

' Had there not been corroboration of the accomplice's evidence I should nevertheless, bearing in mind the great risk of so doing, have convicted the accused on the uncorroborated evidence of the thieves because I feel absolutely certain that their uncorroborated evidence is true.'

This in effect means, Mr Magnus submitted, that the magistrate was prepared to accept the uncorroborated testimony of two self-confessed thieves; two undoubted accomplices and juveniles of the age of eleven and thirteen years respectively, whose testimony contained a number of discrepancies, regarding one of which the magistrate frankly states:

' I can make no attempt to reconcile,'

to the testimony of the defence witnesses, against whose characters before this affair no aspersions could have been cast, as regards their honesty.
[1] The approach which should be adopted by an appellate court when it is dealing with an appeal on questions of fact from the decision of a judge sitting without a jury, has been the subject of a considerable number of decisions. The only quotation I shall make in this judgment is from the judgment of Tredgold, CJ, in *Chiteta v R* 1960 R & N 199, at page 204 where he quoted with approval a passage from the judgment of the Master of the Rolls in *Coghlan v Cumberland* (1898) 1 Ch. 704, which reads as follows:

' The case was not tried with a jury and the appeal from the judge is not governed by the rules applicable to new trials after a trial and verdict by a Jury. Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to re-hear the case, and the Court must reconsider the materials before the judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross - examined before the judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the Court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen.'

It seems to me that if the learned magistrate had given full and fair consideration to the uncorroborated testimony of these two juvenile accomplices, containing the discrepancies to which I have previously referred, and to the evidence of the appellant and Mrs Kontou, he must at the very least have felt a reasonable doubt as to the guilt of the appellant. Moreover, I would also say that, in my opinion, the principles enunciated by Lord Reading, CJ, in the case of *R v Schama and Abramovitch* (1914) 11 Cr. App. R 45, regarding the consideration of an accused person's explanation in a case of receiving stolen property, are fully applicable to a case of receiving stolen property contrary to section 286 (1) of the Penal Code, Chapter 6 of the Laws of Zambia.

In these circumstances, therefore, I shall allow this appeal, reverse the finding and sentence, and acquit the appellant.

Appeal allowed.