R. v. MUTALE MUKONGE.
R. v. MUTALE CHANDA.

CRIMINAL REVIEW CASE NO. 25 OF 1940.

Neglect of duty—Penal Code section 106*—accomplices—evidence must be corroborated—statement made by witness before trial inadmissible—duty of warder to arrest an escaped prisoner.*

In both these cases all the witnesses for the prosecution other than those who gave formal evidence and the wife of one of the witnesses were accomplices and it was consequently highly desirable that their evidence should have independent corroboration. It is necessary in such cases for the Magistrate to direct his mind to this point specifically. In these two cases the High Court held that there was corroboration. It was also pointed out by the High Court that certain statements which were made by a witness before the trial should not have been admitted in evidence as the witness was present and could give the evidence himself.

On the question of corroboration of the evidence of accomplices, see also *R.* v. *Luliya and Three Others* 4 N.R.L.R. 4; *Mackay* v. *The Queen* 5 N.R.L.R. 190; *Reg.* v. *Dadds* 5 N.R.L.R. 332, and *Davies* v. *D.P.P.* 38 Cr. App. Rep. 11, 1954 1 A.E.R. 507.

The Prisons Ordinance was repealed by the Prisons Act, 1855, section 20 of which gives to every prison officer the power to arrest escaped persons. Section 93 of the same Act makes it an offence to harbour an escaped prisoner. Aiding an escape is an offence contrary to section 102 of the Penal Code.

Law, C.J.: Exhibits B and C in Case 18 and exhibits A and B in Case 19 should not have been admitted in evidence. They were not statements made by the respective accused, but by a convict witness who himself gave evidence. Those exhibits, therefore, must be excluded from consideration. The irregularity of their admission in evidence, however, cannot be said to have prejudiced the trial of either of the accused.

In both cases, apart from the formal evidence, the convictions rested on the testimony of convicts who were clearly accomplices. As regards the witness Malekana, the wife (*sic*) of Ned Phiri, the question is whether or not she must be treated as an accomplice. From her evidence it appears that she saw the escapee, James Kombe, at Ned Phiri's hut some time after he had escaped. She prepared food for someone but says she did not know for whom, which, in the circumstances, is doubtful. It is difficult to avoid the suspicion that she did not know she was playing a part which was assisting both the accused to shelter James Kombe from arrest.

The Magistrate remarked that the evidence of the convicts must be received with reserve. A very proper observation. Assuming that Malekana was an accomplice, is it clear that the Magistrate directed his mind to the fact that her evidence and the evidence of the convict accomplices required independent corroboration? Corroboration by one accomplice of another accomplice's evidence is not corroboration in law (*Rex* v. *Noakes*, 1832, 5 C. and P., p. 326). The law is very strict in these matters. Although it is competent for a jury to convict on the uncorroborated evidence of an accomplice it is the practice for the Judge to warn them of the danger of so doing (re Meunier (1894) 2 Q.B., p. 415). In the absence of such a warning a Court of Appeal will generally quash the conviction. (*Rex* v. *Tate* (1908) 2 K.B. p. 680.) In the present cases, the Magistrate took the place of judge and jury. Did he convey such a warning to himself? There is nothing on record in either case to indicate that he did so. The law on this subject is settled, and is reviewed in the well-known case of *Rex* v. *Baskerville* (1916) 2 K.B. p. 658, and is discussed in *Archbold*, 30th Edition (1938) at pp. 464 and 465.

In my opinion the Magistrate did not direct his mind to the question of accomplice evidence. It is true he realised that convicts were giving evidence. But that is not going far enough. He should have realised that the witnesses were accomplices and dealt with their evidence accordingly, as required by law.

These cases have been referred to the Attorney-General, and in view of his comments I entertain some doubt whether the woman Malekana can be regarded as an accomplice. In these circumstances her evidence may be accepted as corroborative of the general accomplice evidence.

One other matter, however, remains for consideration. Is it the duty of a warder to arrest a prisoner who has escaped from prison? If not, no offence can be said to have been committed under section 106 Penal Code. Section 4 (4) Prisons Ordinance 1931,[1] gives prison officers "the powers, authorities, protections and privileges of constables". The word "duty" is not included in that phrase. A power or an authority to do an act does not necessarily involve, in itself, a duty to do such act. On the other hand, section 25 Prisons Ordinance makes it an offence for any person not only to aid the escape of a prisoner but also to harbour or to conceal such prisoner. To my mind this section implies a duty not to give any such assistance to an escapee. It would seem, therefore, that a wilful breach of that duty must be a wilful neglect to perform a duty as well as being an accessory after the fact to an escape. Consequently, the respective convictions appear to be correct.

For the foregoing reasons no order will be made in revision in either case other than the confirmation of the sentence of eighteen months I.H.L. on Mutale Chanda.

[1] Now repealed.—*Editor.*