1940

Present : **Soertsz J.**

BEDDEWELA *v.* ALBERT.

617—M. C. Galle, 25,891.

Evidence—Decoy—Evidence does not require corroboration—Different footing from accomplice.

A decoy is on a different footing from an accomplice so far as the rule of practice regarding corroboration is concerned, although the evidence of a decoy should be probed and examined with great care.

APPEAL from a conviction by the Magistrate of Galle.

Nihal Gunesekera, C.C., for complainant, appellant.

No appearance for accused, respondent.

Cur. adv. vult.

October 24, 1940. SOERTSZ J.—

This is an appeal, sanctioned by the Attorney-General, against an order made by the Magistrate, acquitting the accused-respondent of three charges made against him for receiving bets, other than taxable bets, in contravention of sub-section (3) of section 3 of the Betting on Horse-racing Ordinance.

The facts are these :—A race meeting for horses was arranged to take place at Nuwara Eliya on March 30, 1940. Silva, the principal witness in this case, went to the Assistant Superintendent of Police, Galle, at about 10 o'clock that morning, and informed him that the accused was accepting bets on the races due to be run, and he showed the Assistant Superintendent of Police some tickets issued to him to attest certain bets he had made. Thereupon, this police officer wrote out a chit (P 11) in duplicate in these terms. "Re. 1 Place, Keen Sight, Golden Baby, Saidan" and gave it to Silva with a one-rupee currency note, after taking down in writing the

serial number of that note, and requested him to go to the accused and make the bet indicated. Silva went accompanied by one Richard. When they reached the accused's place of business, and sought to make the bet, the accused said that the races had already started, and he was not prepared to take "all-on" bets at that stage. Silva then sent Richard off to inform the police that the accused would not take the bet indicated, and that he was, therefore, taking "trebles", that is to say, selecting three horses to win three nominated races. P 7, P 7A, and P 7B are the tickets which Silva says, were issued to him by the accused in respect of the three "trebles" selected by him. A short time later, the police party were seen approaching the place where the accused was taking bets, and the accused thought it was time to run a race of his own, and started off at a quick pace, through a passage, taking his books with him. The policemen gave chase, and among them there appears to have been one fleetor of foot than the accused, a constable named Raffial, and he outstripped the accused, and put an end to the race.

The accused was searched by P. C. Jayasinghe in the presence of the Assistant Superintendent of Police, and Sub-Inspector Beddewela, and he was found to be carrying a fifty-cents "treble" book P 1, a ten-cents "treble" book P 2, Rs. 16.61 including the one-rupee note P 5 given to Silva by the Assistant Superintendent. The accused was taken to the Police Station. Silva followed, and reached the station a little later. He produced the three "treble" tickets issued to him, and when book P 2 was examined, it was found that those tickets had been issued out of that book.

I should have thought that if the evidence of Silva and of the police officers were accepted, there could hardly be a more flagrant case of a man taken in the act of receiving non-taxable bets. And yet, the learned Magistrate although he accepts all this evidence, finds the accused not guilty.

There is discernible in the judgment of the Magistrate an undertone of reproach of this Court for this startling result. He says "on the evidence, I am satisfied that the raid was duly carried out and the accused arrested with the production referred to . . . . If someone has witnessed the actual bet taken by the witness Silva with the accused, and had corroborated him in that respect, then no doubt the charge would be established. Without that in the face of the several Supreme Court decisions I am unable to hold there is any corroborative evidence of the bet by Silva. It is not that I disbelieve Silva".

It is obvious that the Magistrate has misdirected himself both on the law and on the facts. Even if it is assumed that Silva was an accomplice, the rule of law is quite clear that a conviction may be entered upon his evidence alone. Section 133 of the Evidence Ordinance enacts that "An accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice", but it has become a rule of *practice* that in a trial by Judge and jury, the Judge should warn the jury that it is dangerous to convict on such evidence, and he may even advise them not to do so, but if despite the caution and the advice the jury accept the evidence of the accomplice because they are impressed by it, and convict

the accused, the conviction is good. Likewise, when a Judge is performing the functions of both Judge and jury, he must so caution and advise himself in reality, not merely by way of formal compliance with an imperative rule of practice, and if after doing that he is able to say "although I realize that this witness is an accomplice, and I should, ordinarily, hesitate to convict on the evidence of an accomplice, I believe the accomplice before me in this case", then he may and, indeed, he must convict. In the event of such a finding by the jury or by the Judge, if the evidence of the accomplice supports the finding, I do not think an Appeal Court will disturb it.

I have so far dealt with this case on the supposition that Silva was an accomplice. But, in fact, he is not. He belongs to the class which English cases describe as "informers", that is to say "persons who have joined in or even provoked the crime as police spies." (*Phipson, 6th ed. 486.*) There is a long line of English cases in which it has been laid down that the rule relating to the corroboration of accomplices does not apply to informers. Roscoe sums up the law on this point as follows:—"Agents, provocateurs, spies, informers, detectives, &c., are not accomplices. Such persons employed in entrapping criminals 'are entirely distinguished in fact and in principle from accomplices, 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'. This decision was followed in *Bickly*[1] and in several other cases. Lord Alverstone C.J. said, 'I do not like police traps any more than does anybody else; but at the same time there are some offences the commission of which cannot be found out in any other way'". (*Roscoe Criminal Evidence, 15th ed. 156.*) That is the view taken in Indian cases too. Ameer Ali in his treatise on the *Law of Evidence* says, on the authority of judicial decisions referred to by him, "Though a great degree of disfavour may attach to a person for the part he has acted as informer, yet his case is not treated as that of an accomplice" (*5th ed. p. 829*).

In view of this, strictly speaking, it would appear that it would be legitimate for a Judge sitting with a jury to put before them the evidence of those who come under the class "informs" without the caution and advice he is required by the rule of practice to administer when dealing with the evidence of accomplices, and that, likewise, it would be legitimate for a Judge sitting alone to act upon the evidence of a witness belonging to the class "informers" without pausing to caution himself as he must do in the case of accomplices. Best in his treatise on *Evidence* (*12th ed.*) *p. 161* suggests that the true reason for the differentiation is that "the objection to the evidence of accomplices arises from the obvious interest which they have to save themselves from punishment by the conviction of the accused against whom they appear". If their evidence fails to secure the conviction of their associates in the crime, they themselves were convicted on their own plea and suffered punishment according to the old law of approvement. In the modern law, although the accomplice is not in as great a plight as that, he "is not assured of his pardon, but gives his evidence *in vinculis*, in custody; and it depends on the title he has from his behaviour whether he shall be pardoned or executed". *Rex v.*

[1] *2 Cr. A. R. 53.*

Rudd.[1] In regard to persons falling within the designation of "informers", the worst that can be said against them as a class is that they generally testify in expectation or hope of reward. That is, undoubtedly, a matter which must be taken into account by Judge and jury in estimating the value of their evidence, but it is not a matter which, in my opinion, calls for the application of the rule of practice relating to the evidence of accomplices.

There has, however, been a tendency to convert the rule of practice in regard to the corroboration of accomplices into a fetish, and to go down before it in blind worship. No discrimination is made between accomplices and informers, and once a witness is found to be one or other of these, then by rule of thumb as it were, it is thought his evidence must be rejected whatever its intrinsic value. That is just what has happened in this case. The Magistrate involves himself in paradox. He refuses to act upon evidence which he believes. The Magistrate gives a good reason for believing Silva's evidence. He says "in the Excise case referred to he gave very good evidence, and so he did in this case", but his apology for not acting upon that evidence is that decisions of this Court require him not to act upon it.

I have examined most of these cases, and it seems clear that in nearly every one of them the evidence of the decoy was rejected not merely because he was a decoy, but for some additional reason, such as his bad character, his ill-will towards the accused, his unsatisfactory demeanour, and things like that.

For instance, in *Caldera v. Pedrick*[2], there was evidence to show that there was a special reason and a special motive for the decoy wishing to implicate the accused. It is true Garvin J. said, "whether there was such a motive or not, there is the fact that he was a decoy". But he went on to say, "I prefer, therefore, *in this case* to follow the opinions which have been previously expressed by Judges of this Court that it is *not desirable* that a person should be convicted upon the sole evidence of a decoy". In estimating the assistance that can be derived from that judgment, proper emphasis must be laid on the words "in this case" in view of the fact that there was evidence of "special motive".

In *Almeida v. Adiriyan*[3], Akbar J. rejected the evidence of the decoy not only because he was a decoy but also because there were strong reasons in that case for suspecting the bona fides of the prosecution. Moreover, he found that the decoy's and the Inspector's version of the sale was unconvincing. All he said, by way of general observation on the evidence of decoys, was that their "evidence should be examined with great care as interested parties may on little inducement give the necessary touch to their evidence in order to secure a conviction". That is, if I may say so, an unexceptionable observation.

In Scharenguivel v. Mohamadu Segu[4], which was an appeal from an acquittal, an examination of the evidence showed that the decoy's story was improbable. Even if it was accepted, it was inconclusive. The acquittal of the accused was, therefore, inevitable quite apart from the fact that the evidence was that of a decoy. It is true that Fernando J. refers in the course of his judgment to the case of *Silva v. Silva*[5], in which Martensz J. said, "it is now well established that a person should not

[1] *Coop. 331.*
[2] *5 Times 70.*
[3] *6 Times 123.*
[4] *15 Times 7.*
[5] *32 N. L. R. 230.*

be convicted on the uncorroborated testimony of a decoy. The decoy is placed on the same footing as an accomplice", but it is not clear what Martensz J.'s authorities are for that observation. The only case he refers to is that of *Caldera v. Pedrick* on which I have already commented. The English and Indian cases and text writers, as I have shown, say definitely that decoys and accomplices are not on the same footing.

In *Fernando v. Andrages*[1], Jayawardana A.J. after coming to the conclusion that the evidence in the case was unsatisfactory, concludes with the remark "a person should not be convicted on the uncorroborated testimony of a decoy" and cites *Caldera v. Pedrck* in support.

In *Wijesuriya v. Lye*[2], Macdonell C.J. says, "it has been laid down *again and again*—see particularly per Garvin J. in *Caldera v. Pedrick*, that it is unsafe to convict on the uncorroborated evidence of a decoy". But he goes on to qualify this a little later when he says, "then it will be difficult to accept the decoy's version, above all, since the accused's evidence seems to fall short of providing the corroboration which, *even if not absolutely necessary*, is certainly desirable". In the case of *Kerr v. Wickramesinghe*[3] my brother Hearne J. ultimately relies on *Caldera v. Pedrick*, for he adopts *Wijesuriya v. Lye* and *Pieris v. Seneviratne*[4], both of which are based on *Caldera v. Pedrick*.

It will thus be seen, to say so with respect, that the course of these decisions is just a process of "snowballing," and that *Caldera v. Pedrick* keeps recurring as the nucleus for the proposition that a decoy must be corroborated in order to be believed. But that case hardly says that. Even if that is its implication, it is, as already pointed out, contrary to a formidable volume of English and Indian authority.

For these reasons, I venture to adhere to the opinion I expressed in *Siriwardane v. Vanderstraaten*[5], that a decoy or a spy is on a different footing from an accomplice so far as the rule of practice regarding corroboration is concerned, but that their evidence should be probed and examined with great care.

In the present case, the Magistrate examined the evidence of the decoy in that manner and believed it. It was his duty, then, to convict the accused. But he says that he would have found the charge established "if someone . . . . witnessed the actual bet taken by the witness Silva with the accused, and had corroborated him in that respect". The obvious rejoinder to that remark is that if such evidence was forthcoming, there was no need for the evidence of the decoy, unless the Magistrate thinks that more than one witness is required in a case. But that, of course, is not so.

Even if this were a case in which the law required corroboration, I find it present in an almost overwhelming degree. The accused runs away when he sees the police approaching; he is arrested and when he is searched, the marked currency note is found on him. But that is not all. Two 'treble' ticket books are found on him, and from one of them have issued the three 'treble' tickets which Silva gives up at the Police Station. All this the Magistrate accepts, rejecting the denial of the accused. But he says "the long interval of time *between* witness Silva's coming to the

[1] *31 N. L. R. 444.*
[2] *33 N. L. R. 148.*
[3] *39 N. L. R. 571.*
[4] *33 N. L. R. 157.*
[5] *39 N. L. R. 527.*

Police Station makes it possible that he got these slips from another person, and so the corroborative evidence offered by P 2 being on the accused loses its value". This observation has the sound, not of a good reason, but of a poor excuse, for not acting upon a strong piece of circumstantial evidence. The "long interval" was a matter of ten or fifteen minutes, and I fail to see exactly what the Magistrate intends to convey when he says that it is possible that Silva got the three 'treble' tickets from another person. If he means to say that Silva could have bought his 'treble' tickets not from the accused, but from another, then the question arises, how came the accused to have the book containing the counterfoils of the three tickets? The Magistrate finds that the book was found in the hands of the accused. It is very often possible, to offer some sort of explanation of facts by evolving far-fetched and fantastic theories, but when one is examining evidence judicially in order to ascertain whether a fact is proved or not, the Evidence Act affords the test when it says that "a fact is said to be proved when, after considering the matters before it, the Court either *believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists*".

I, therefore, set aside the order of acquittal, and remit the case to the Magistrate, and direct him to enter conviction and pass sentence.

Set aside.