Present : De Sampayo J.

SILVA *v.* WICKRAMASURIYA *et al.*

851 to 854—P. C. Badulla, 9,575

Evidence of accomplice — Is corroboration necessary? — Evidence Ordinance, ss. 133 and 114.

A conviction based on the uncorroborated testimony of accomplices is not bad. It is, however, generally unsafe to convict on such tainted evidence. The question whether an accused person may be convicted on such evidence is left for the Court to decide in the circumstances of each case.

"The rule as to corroboration has no application in the case of an accomplice who is merely a youthful tool in the hands of one who stands to him in a position of authority."

THE facts are fully set out in the judgment.

Bawa, K.C. (with him *Canakaratne*), for accused, appellants.

Schneider, S.-G., for respondent.

Cur. adv. vult.

October 30, 1917. DE SAMPAYO J.—

An important point in the law of evidence has to be considered in this case. The accused have been charged with having aided and abetted one Thevarayan, the tappal cooly of Poonagalla estate, in committing theft of 100 lb. of tea from Poonagalla estate. The first accused is the son of one Charles Wickramasuriya, who carries on trade in a boutique at Koslanda, and he no doubt assisted his father in the business. The second, third, and fourth accused were employed as salesmen in the boutique. The case against them may be shortly stated as follows. The accused met Thevarayan, by appointment, on Poonagalla road, about 1½ miles from the boutique, late at night on April 23 last. Thevarayan, who was accompanied by another cooly, brought two bags containing tea, and delivered them to the accused. The tea was weighed in a balance taken for the purpose by the accused, and was then stated to be 84 lb. in weight. The tea was received by the accused and taken to the boutique, where the next day Thevarayan was paid the price agreed upon, viz., Rs. 18. The tea was subsequently weighed at the boutique, and found to be a little over 100 lb. in weight. On the orders of the boutique-keeper, Charles Wickramasuriya, the tea was mixed with inferior tea, and part of it was left in the front of the boutique for sale, and the balance put in the store. This story is related by Thevarayan himself, who has been charged with the main offence and convicted in another case, and by one Hendrick Appu, who accompanied the accused from the boutique on that might and was present when Thevarayan brought and delivered the tea. Hendrick Appu was employed as a kitchen servant at

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the boutique, and appears to have accompanied the party at the instance of the first accused. On April 25 the police searched the boutique and found 28 lb. of the mixed tea. Mr. Coombe, manager of Poonagalla Group, said that the tea found was broken orange pekoe and broken pekoe mixed with tea of a bad quality. The good tea contained tips, and Mr. Coombe produced a similar sample from Poonagalla factory. He could not speak of any shortage of tea, but said that, as the factory produced 4,000 to 7,000 lb. of tea daily, a shortage of two bags could not be detected. Thevarayan himself admitted that the tea he sold to the accused was Poonagalla tea, but sought to exculpate himself by saying that the Assistant teamaker gave it to him, and that he and another cooly named Suppramaniam removed it in two bags, and delivered it to the accused at the place and time mentioned.

It will be seen that the whole case depends on the evidence of Thevarayan and Hendrick Appu, who are in the position of accomplices, the former in the fullest sense and the latter in a less degree. The question is whether the conviction based on their evidence alone can be supported, and, if not, whether the evidence is corroborated in material particulars. The English doctrine that an accused person cannot be convicted on the uncorroborated testimony of an accomplice is not referable to any positive law, but is a rule of practice so universally observed that it has acquired the force of law. It is not necessary to refer to the numerous decisions on the subject; they were all reviewed recently by the Court of Criminal Appeal in *King v. Baskerville,* [1] which once for all settled the nature and extent of corroboration required. The following propositions laid down in the considered judgment delivered by the Chief Justice, Lord Reading, are relevant to the present case. The corroboration must be in some material particular tending to show that the accused committed the offence charged; it must be by some evidence other than that of an accomplice, and, therefore, one accomplice's evidence is not corroboration of that of another; the corroboration need not be direct evidence, but may be circumstantial evidence of the connection of the accused with the crime, such as the discovery, in a case of theft, of any part of the stolen property in the accused's house or any place indicated by the accomplice; the jury before whom the accused may be tried should be warned of the danger of convicting upon an accomplice's evidence without corroboration, but should, however, be informed of their legal power to convict on such unconfirmed evidence; if after proper warning the jury convict, the Court of Appeal will not quash the conviction merely upon the ground that the accomplice's evidence was uncorroborated; but the Court will review all the facts of the case, and will interfere if, after considering all the circumstances of the case, it thinks the verdict unreasonable.

[1] *(1916) L. R. 2 K. B. 658*

Before considering the applicability of these principles, it is convenient to dispose of an argument strongly pressed upon me, on behalf of the accused, to the effect that the same result should follow in this case as in P. C. Badulla-Haldummulla, No. 9,576, decided by my brother Ennis on August 2 last. That was a case in which Charles Wickramasuriya, the proprietor of the boutique at Koslanda, was charged with the offence of theft of tea in the circumstances above mentioned, and was convicted by the Police Magistrate. There the same two accomplices, Thevarayan and Hendrick Appu, and certain other witnesses, were called for the prosecution, and the accused gave evidence on his own behalf, and also called three or four witnesses. My learned brother examined the evidence in that case, and considered that there was no proof that the tea found in the accused's boutique was stolen tea, and concluded his judgment as follows: "And there are grave reasons against accepting, without strong corroboration, the evidence of the two self-condemned accomplices, the tappal cooly and the accused's cook Hendrick, the evidence of an accomplice being always infamous evidence." It is clear that the judgment in appeal setting aside the conviction proceeded upon a consideration of the evidence as recorded in that case, and the remark with regard to Thevarayan and Hendrick undoubtedly represents the point of view from which the evidence of accomplices must necessarily be looked at in all cases. The present case was tried before another Magistrate, and before the conclusion of the proceedings the opinion of the Supreme Court as to the accomplices was brought to his notice. He then said that it placed him in a difficult position, as he had already formed a strong opinion, and proceeded to record his reasons at length for his conclusions of fact, but deferred his judgment pending the return of the other record from the Supreme Court. Ultimately he gave judgment convicting the accused, and with regard to what was said about Thevarayan and Hendrick Appu's evidence by the Supreme Court, he said that, as already stated, that evidence had impressed him very strongly, and added, that it found strong corroboration from the facts which he had previously commented on. In the circumstances, I do not think that I ought to take the judgment in appeal in the previous case as an entire guide. I can only consider the evidence in this case anew myself. Incidentally I may note that, apart from the actual existence of corroboration, the fact of the Supreme Court judgment being brought to the notice of the Magistrate before verdict is something of the same kind as the warning which it is necessary in England to address to a jury, and since the Magistrate, nevertheless, convicted the accused, the principle mentioned above, that the Appeal Court will not quash a conviction merely on the ground of want of corroboration, appears to be applicable in this case

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I have so far dealt with the English rule of practice as to corroboration of an accomplice's evidence. Our law on the subject is contained in section 133 of the Evidence Ordinance, No. 14 of 1895, which expressly enacts: "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." To hold that corroboration is imperatively necessary would be to refuse to give effect to the second part of this section, and it has been so decided in India under the corresponding section of the Indian Evidence Act: *R. V. Ramasami Padayachi*,[1] *R. v. Gobardham.*[2] It is no doubt generally unsafe to convict on such tainted evidence, and this rule of caution is enforced by illustration (*b*) to section 114 of the Evidence Ordinance, to the effect that "the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars." It will be observed that the presumption is not a conclusive one, but may be met by the circumstances of a particular case. The whole matter is thus reduced to a question of the exercise of discretion by the Court of trial. It is, therefore, necessary only to consider whether in this case the Police Magistrate rightly exercised his discretion.

It is true, as noted above, one accomplice cannot be said to corroborate another, if such corroboration is necessary. But, since the evidence of an accomplice is legally sufficient to support a conviction, I think that if one accomplice has a different relation to the act constituting the offence from another, and, being personally unconnected with the other, he gives independent evidence tending strongly to confirm the other, the Court will have less reason to refuse to convict. In this case Thevarayan and Hendrick Appu had nothing to do with each other. Thevarayan was the thief, and Hendrick Appu only assisted the accused in disposing of the stolen property. Hendrick Appu came out with his story quite apart from Thevarayan. It appears that on the day after this occurrence he was beaten by the first accused for some reason or other, and he ran away from the boutique. He took his revenge by going at once to the Town Arachchi of Koslanda and making a disclosure of the whole affair. The details elicited from him subsequently received remarkable confirmation from Thevarayan. Moreover, the rule as to corroboration has no application in the case of an accomplice who is merely a youthful tool in the hands of one who stands to him in a position of authority. *Ramasami v. Govenden*,[3] per Sir S. Subramania Ayar C.J. Now, Hendrick Appu is a youth of nineteen years of age; he had nothing to do with the business in the boutique; he was only a kitchen boy, and was on this occasion more or less a tool in the hands of the accused. With regard to

[1] *(1878) I. L. R. 1 Mad. 394.*
[2] *(1887) I. L. R. 9 All. 528, 553.*
[3] *(1903) I. L. R. 27 Mad. 271.*

Thevarayan, he was no doubt the principal accomplice, but the circumstances in which he gave evidence negative the existence of the reasons which usually operate in discrediting an accomplice. The evidence of an accomplice is generally regarded as untrustworthy, because he is likely to swear falsely in order to shift the guilt from himself, or because he hopes to obtain favour from the prosecution and thus escape punishment. Thevarayan in no way attempted to shift the guilt from himself on to the accused. His part of the transaction was quite distinct from theirs, and involved him in the commission of an offence altogether apart from their guilt or innocence. Moreover, his chance of any favour from the prosecution was long past. He had been charged in another case and convicted, and he actually came from jail to give evidence in this case. In my opinion the evidence of these two witnesses should be considered on its merits, and after reviewing the whole case I am unable to say that the Police Magistrate ought not to have acted on that evidence, or that his judgment is unreasonable, except, perhaps, with regard to the fourth accused, whose case I shall deal with presently.

The evidence of Thevarayan and Hendrick Appu, on the other hand, is not wholly without corroboration. They said, for instance, that Rs. 18 was paid for the tea on the next day at the boutique. As a matter of fact, a payment of Rs. 18 is entered on April 24 in the account book of the boutique. The payment is entered as for purchase of " coconuts," but this the Magistrate regards as a mere blind. Again, Hendrick Appu stated that the scales used for weighing the tea at the time of its receipt had a hole with a nail inserted so as to affect the index, and that the tea, which when weighed by this false balance in Thevarayan's presence was 84 lb., was in fact 105 lb. when weighed at the boutique without the nail. The Police actually found in the boutique a pair of scales of the character spoken of by Hendrick Appu. It is true that the whole quantity of tea was not found at the time of the search, nor was the tea found in the original condition. But it is sufficiently clear from Mr. Coombe's evidence that the tea, with which some inferior tea was mixed, was not of a kind ordinarily forming the stock in trade in a boutique, and I think there is reasonable ground for inferring that it was stolen tea. These particulars are corroborative, and in some degree connect the accused with the offence charged, because the accused are assistants or salesmen at the boutique.

[His Lordship then dealt with the evidence against the fourth accused.]

The conviction of the fourth accused is set aside, and the sentence of the first accused is altered to a fine of Rs. 100, with the alternative of rigorous imprisonment for three months in default of payment. The appeals are otherwise dismissed.

Varied.