1940 *Present* : **Keuneman J.**

P. SIVASAMBU, INSPECTOR OF POLICE *v.* NUGAWELA.

797-8—M. C. Dandagamuwa, 5,700.

Evidence—Offer of bribe to public servant—Evidence of accomplice—Previous statements made by accomplice—Independent testimony—Duty of Magistrate before conviction on uncorroborated testimony—Evidence Ordinance, ss. 133 and 157.

A person who offers a bribe to a public officer is an accomplice.

Where two persons have co-operated in the payment of a bribe the evidence of one is no corroboration of the other.

Previous statements by an accomplice do not constitute independent testimony, which is necessary for the corroboration of the testimoney of an accomplice.

Although under section 133 of the Evidence Ordinance a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, the Magistrate should have clearly before him the fact that he is dealing with the evidence of an accomplice and he must give clear and satisfactory reasons for convicting in the absence of corroboration.

APPEAL from a conviction by the Magistrate of Dandagamuwa.

H. V. Perera, K.C. (with him *G. G. Ponnambalam* and *Cyril E. S. Perera*), for accused, appellant in 797.

J. W. R. Ilangakoon, K.C., A.-G. (with him *Nihal Gunasekera, C.C.*), for complainant, respondent in 797.

[1] *(1892) 1 S. C. R. 180.*
[2] *(1907) 10 N. L. R. 234.*
[3] *(1920) 22 N. L. R. 111.*
[4] *(1896) 2 N. L. R. 40.*

J. W. R. Ilangakoon, K.C., A.-G. (with him *Nihal Gunasekera. C.C.*), for complainant, appellant in 798.

H. V. Perera, K.C. (with him *G. G. Ponnambalam* and *Cyril E. S. Perera*), for accused, respondent in 798.

Cur. adv. vult.

May 29, 1940. KEUNEMAN J.—

The accused-appellant, who is the Ratemahatmaya of Katugampola hatpattu, was charged under three counts with obtaining gratifications other than legal remuneration as a motive or reward for doing official acts, namely,

(1) a gratification of Rs. 5 obtained from K. Peter Fernando on January 6, 1939, for appointing him as a kangany to supervise the relief works at Talgammana Wewa ;

(2) a gratification of Rs. 17 obtained from S. H. M. Appuhamy (Jr.) on January 30, 1939, for appointing him as kangany of the relief works at Dandagamuwa Tank ; and

(3) A gratification of Rs. 5 obtained from M. J. M. Kiri Mudiyanse, Vel-Vidane of Welpalla, on February 10, 1939, for appointing him as kangany of the relief works, Mankade-oya.

All these offences were punishable under section 158 of the Penal Code.

The learned Magistrate acquitted the accused in respect of counts (1) and (2), and convicted him under count (3). In appeal No. 797, the accused appeals from this conviction, and in appeal No. 798, the Attorney-General appeals against the acquittal so far as it relates to count (1). I shall deal with appeal No. 797 first.

The accused is admittedly a public servant, and was only interdicted from duty on May 12, 1939, after the material dates in this case. It was established in evidence that it was a part of his official duties to appoint kanganies and overseers under the scheme for the administration of relief which came into force in December, 1938.

The story of the prosecution as regards the third count is given by Kiri Mudiyanse himself and by the witness Deonis Fernando. Both these witnesses were Vel-Vidanes. Shortly stated, the story amounts to this. Kiri Mudiyanse and Deonis say that they received information about the appointment of Kanganies and overseers from the Korala of Hundirapola, who informed them that payments had to be made in order to obtain these posts. The scale of charges was variously given by the two witnesses ; according to Kiri Mudiyanse Rs. 10 and Rs. 15 was to be paid to obtain the posts of kangany and overseer respectively, while Deonis gives different figures. Both these witnesses were dissatisfied with the amounts demanded, and met later and decided to pay Rs. 5 each direct to the accused, in order to obtain the jobs. In pursuance of this object, the two witnesses went together to the accused's walauwa on February 10, 1939, in the morning, but the accused had left or was about to leave on official business. They therefore waited till the accused returned in the evening, and then went up to him as he was seated in the verandah. Kiri Mudiyanse handed to the accused Rs. 5

placed on betel leaves. Deonis also handed him money on betel leaves. Deonis says that he intended to give Rs. 5 in one-rupee notes, but by mistake only Rs. 4 was actually given and one note remained in his pocket. The accused asked them to give their names to the clerk, Perera, and told them they would be appointed kanganies when the new lists came out.

The conviction has been attacked on a number of points.

The first point is that a mass of inadmissible evidence has been led in the case, which had the effect of prejudicing the Magistrate. This evidence falls into two classes :

(*a*) evidence of offences other than those with which the accused was charged, and

(*b*) evidence of statements and complaints made against the accused by persons not called as witnesses.

As regards (*a*), it was argued that the evidence given by Deonis that he also gave a bribe on the same occasion was inadmissible. Similarly, there was evidence given relating to the first and second counts by witnesses who state that on each of these occasions they also offered bribes. The evidence on the third count is typical of the kind of evidence led as regards the first and second counts. On each of these occasions, a number of persons met together with the intention of offering bribes to the accused. They acquainted each other of their intentions, and went in a body to the accused's house, and there, one after another offered sums of money placed on betel leaves to the accused, who accepted them. The acts of each set of witnesses were inextricably mixed together, and if the witnesses other than the ones named in the charge had remained silent about their offers of bribes, an imperfect and probably unreal picture of the events of that day would have been given. The Attorney-General argued that these other offers of bribes were really a part of the *res gestae*, and this evidence may well be so regarded. At the least, it may afford an explanation of the presence of these witnesses on the occasion in question, and the part that each witness actually played on that day. In any event, I do not think there has been any serious prejudice to the accused by the admission of this evidence, and certainly the evidence elicited strongly fortifies one of the arguments of Counsel for the defence which will be dealt with later.

As regards (*b*), it is clear, and not denied, that evidence which should have been excluded has been admitted into the case. A fairly serious instance is the letter P 9. This is a letter dated March 18, 1939, written by the witness Subasinghe to the Minister for Labour, in which he states that representations had been made to him by responsible people that the accused, his clerk Perera, and the Korala of Pitigal korale have received various sums of money from various people to obtain the posts of overseers and kanganies under the relief scheme works. The letter continues : "I made very careful inquiries which have satisfied me as to the truth of these allegations".

The Attorney-General has pointed out that no objection was taken to this document by the accused's Counsel, and that in fact the existence

and some of the contents of this document had been elicited by accused's Counsel in cross-examination of the prosecution witness Illankoon, before the document was produced. This is correct, but, whatever the circumstances, I am of opinion that this document should never have been admitted, and that its admission may have had a prejudicial influence on the decision of the Magistrate. In fact, I have come to the opinion that the evidence of Subasinghe, the private investigator into these matters, was unnecessary, where it was not irrelevant. I shall deal later with P 7 and P 22, statements of Kiri Mudiyanse and Deonis. recorded by Subasinghe. At the most, Subasinghe's evidence may have been called merely to show that he had not instigated a false charge against the accused, as alleged by the defence. As far as the prosecution was concerned, it was sufficient to get a bare denial of these allegations. In fact, however, in his examination-in-chief, Subasinghe was allowed to speak not only to the statements made to him by Kiri Mudiyanse and Deonis, but also to say, "I also had several similar complaints against the accused . . . . I have recorded a number of statements regarding general allegations of bribery". This evidence was objected to by accused's Counsel, but was admitted on the ground that the accused had already put his good character in issue. I hold that this ruling was wrong. This is not evidence of bad character under section 54 of the Evidence Ordinance. It is not evidence of "general reputation" or of "general disposition" within the meaning of the illustration. It is evidence of individual complaints, and it is not shown that any of these complaints resulted in a conviction. The admission of this evidence was capable of creating prejudice in the mind of the Magistrate.

There is also much other irrelevant matter introduced into the case, but there the whole or the bulk of this evidence has been introduced in the cross-examination by the defence Counsel.

That a certain degree of prejudice may have been imported into the case is, I think, possible, for, when the Magistrate deals with the defence witnesses, one cannot fail to detect a note of over-emphasis. To give a single example, the witness Pabilis, admitted that the Adigar, accused's father, spoke to him in Court about the case, and that later he went to the Adigar's house, because he thought the Adigar may be angry because he was among the witnesses for the prosecution. The Magistrate thought that this showed not only that the witness had been interfered with, but that he had been suborned. I need only say that as regards the latter finding, the Magistrate has held as a fact what at the most may have been a matter of surmise.

The most serious objection taken by the accused's Counsel is that the Magistrate has not kept in mind the fact that both Kiri Mudiyanse and Deonis were accomplices. There is clear evidence that in this matter the two men were acting in concert, and that the intention to offer bribes was entertained by them voluntarily, and not as the result of pressure exercised by the accused. or indeed, by onyone else. I think that, if their evidence is examined, it is difficult to resist the conclusion that they abetted the offence committed by the accused. They should have been treated as accomplices. The Magistrate has undoubtedly failed to take this fact into consideration.

Counsel further argued that there was no corroboration of the evidence of these accomplices. I think this contention is right. The only other evidence led on the third charge was that of the alleged statements made by the two witnesses to Subasinghe and to Mr. Ernst, the Government Agent. The statements made to Subasinghe were P 7 by Kiri Mudiyanse, and P 22 by Deonis, and were recorded on March 9, 1939. Subasinghe says that complaints were made to him by these two persons a few days earlier. It is necessary to have a clear conception as to the value of these two statements. In the language of Lord Hewart C.J. in *Rex v. Lowell*[1] such complaints are "not evidence of the facts complained of" but are merely "matters which may be taken into account . . . . in considering the consistency and therefore the credibility of the story". Where, accordingly, the law regards the evidence of one witness sufficient in itself to establish guilt, the evidence of that witness may be tested as to its consistency and credibility by proof of complaints made to the same effect by the witness earlier. But in the case of an accomplice, the rule of practice requires something more than the mere testing of his story. In the language of Lord Reading in *Rex v. Baskerville*[2], there "must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him—that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it". There is ample authority that previous statements made by accomplices do not constitute the "independent testimony" which is needed—*vide* the judgment of Lord Hewart C.J. in *Rex v. Whitehead*[3]: "Corroboration must proceed from something extraneous to the witness who is to be corroborated". He adds that otherwise the accomplice would only have to repeat his story twenty-five times to get twenty-five corroborations. *Vide* also *Iver v. Hendrick Appu*[4] and *Dole v. Romanis Appu*[5].

Further, in this case, the statements P 7 and P 22 and the previous statements made to Subasinghe cannot in any event be used "to corroborate the testimony" of Kiri Mudiyanse and Deonis under section 157 of the Evidence Ordinance. (In passing, I may note that these words, "*to corroborate the testimony*", appear to bring out the distinction mentioned in *Lowell's Case.*) The offence alleged was committed on February 10, 1939. No statement or complaint was made till early in March. At that time Kiri Mudiyanse was disappointed because he had not been appointed kangany, and Deonis because he had been discontinued after a short period of service. It is clear that complaints were not made "at or about the time when the fact took place", and accordingly these statements should not have been admitted even to test the consistency and credibility of the evidence given by the witnesses.

The reasons I have already mentioned apply with equal force to the statements P 10 and P 11 recorded by the Government Agent on March 27, 1939. I hold that they should not have been admitted.

[1] *129 L. T. 638.*
[2] *(1916) 2 K. B. D. 658 ; 115 L. T. 453.*
[3] *(1929) 1 K. B. D. 99 ; 139 L. T. 640.*
[4] *34 N. L. R. 330.*
[5] *40 N. L. R. 449.*

It is also clear law that one accomplice cannot corroborate another accomplice. Deonis' evidence, therefore, cannot be regarded as supplementing that of Kiri Mudiyanse.

Under section 133 of the Evidence Ordinance, a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. But, it is necessary that the Magistrate should have clearly before his mind the fact that he is dealing with the evidence of an accomplice, and he must give clear and satisfactory reasons for convicting in the absence of corroboration. The Appeal Court can then assess the cogency of his reasoning. In this case the Magistrate has clearly not appreciated the fact that both Kiri Mudiyanse and Deonis were accomplices.

I am of opinion that the judgment of the Magistrate cannot be supported. I set aside the conviction, and acquit the accused on the third charge. This disposes of appeal No. 797.

In appeal No. 798, the Attorney-General appeals against the acquittal by the Magistrate of the accused on the first charge. The evidence in relation to that charge was given by Peter Fernando himself and by Bandappuhamy and Sunderahamy. All these witnesses say that on January 6, 1939, they went to the accused's house, accompanied by the Headman of Dahanagedara and in the society of several other applicants for the posts of kangany and overseer. The Headman introduced the parties to the accused, and one after another they offered to the accused betel with money placed on it, for the purpose of securing the posts they desired. These amounts were accepted by the accused.

The Magistrate considered this evidence and pointed out certain contradictions in the stories. Some of these contradictions are not without a degree of importance. The Magistrate stated: "I may not ordinarily have considered them sufficiently material to create a reasonable doubt in my mind regarding the payment, but in this case, in view of the serious consequences which must result from a conviction, I feel that the proof must be more cogent than in other cases. That is to say, it must leave no room for any doubt whatever". This is a misdirection, for in this case, as in all criminal cases, the Magistrate should have given the accused the benefit of any reasonable doubt, and should not have taken into account any doubts which he did not consider reasonable.

But, on the other hand, in connection with this charge, the Magistrate has failed to consider whether Bandappuhamy and Sunderahamy were accomplices. Clearly, Peter Fernando was an abettor, and therefore an accomplice. The evidence shows that each of these persons, including Peter Fernando, independently conceived the intention of offering a bribe to the accused in order to secure employment as kangany of the Relief Works. They arrived at this intention voluntarily and without any compulsion. At the instance of the Headman of Dahanagedara, they all assembled at the Headman's house on January 6, 1939. Here all these men informed each other of the object of their coming, namely, to offer bribes to the accused. They all set out for the accused's house, some in a cart, some on bicycles. Those who went ahead on bicycles waited at a boutique till the rest of the party in the cart arrived. The whole party was then conducted to the house of the accused by the

Headman, and, on arrival, one after another offered the bribe placed on betel leaves to the accused. I think it is clear that, at any rate, from the time they arrived at the Headman's house and consulted together, they were all acting in concert and co-operating with each other in the giving of the bribes. It is not necessary to consider whether they were abettors of the offence. I think there is evidence that each was an accomplice of the others. "A person who offers a bribe to a public officer is an accomplice . . . . Persons merely present when money is given to a bribe-taker are not accomplices, but the case is different if they have co-operated in the payment of the bribe, or taken some part in the negotiations for its payment. In the latter case they cannot be regarded as independent witnesses and their evidence is tainted"—vide *Ameer Ali on The Law of Evidence, 9th ed., p. 953.* I hold in this case that Bandappuhamy and Sunderahamy should have been treated as accomplices, as well as Peter Fernando. Their evidence does not supply corroboration to the story of Peter Fernando.

There is no other independent evidence which gives the necessary corroboration.

I think, in view of this fact, that it would be very dangerous to upset the acquittal of the accused on this first count. He is entitled to obtain the benefit of the presumption that these witnesses are unworthy of credit.

Appeal No. 798 is dismissed.

Appeal allowed in 797.

Appeal dismissed in 798.