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SCSL-03-01-T

(29442 – 29466)

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THE SPECIAL COURT FOR SIERRA LEONE

Trial Chamber II

Before: Justice Julia Sebutinde, Presiding
Justice Richard Lussick
Justice Teresa Doherty
Justice El Hadji Malick Sow, Alternate

Registrar: Ms. Binta Mansaray

Date: 19 July 2010

Case No.: SCSL-03-01-T

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC

DEFENCE REPLY TO PROSECUTION RESPONSE TO DEFENCE MOTION TO EXCLUDE CUSTODIAL STATEMENTS OF ISSA SESAY

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nick Koumjian
Ms. Sigall Horovitz

Counsel for Charles G. Taylor:
Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Morris Anyah
Mr. Silas Chekera
Mr. James Supuwood

I. Introduction

1. This is the Defence Reply to the Prosecution's Response to the Defence *Motion to Exclude Custodial Statements of Issa Sesay*.[1] In its Response, the Prosecution argues that the Defence's request -- to exclude eleven custodial interview statements given by Issa Sesay on the basis that the statements were given involuntarily and are therefore unreliable and their use and/or admission would result in an abuse of process – is unfounded.[2]
2. The Prosecution however goes on to make a concession and indicates that it only intends to use the first of the eleven custodial interview statements ("**Interview of 10 March 2003**").[3] With respect to this interview, the Prosecution argues that no improper inducements or benefits were promised to Sesay and that Sesay voluntarily waived his right to legal counsel before giving the statement. The *voir dire* transcripts and interview record itself, however, belie this suggestion.
3. The Prosecution would also have the Trial Chamber believe that the distinction between Sesay as an Accused and Sesay as a witness in the current case somehow eviscerates any malpractice by them, which occurred at the time of the interview. The Defence strongly opposes this this ill-conceived notion and urges the Trial Chamber to protect the integrity of the judicial process by excluding all statements, including the Interview of 10 March 2003, that were taken as a result of an abuse of process.

II. Submissions

The Interview of 10 March 2003 Resulted from an Abuse of Process and Must Be Excluded

4. There is nothing to prevent Trial Chamber II from considering the *voir dire* record and consequently adopting the findings of Trial Chamber I, namely that all eleven statements given by Issa Sesay were a result of an abuse of process and would bring the administration of justice into disrepute through their use and/or admission. While Trial Chamber II is not bound by this previous decision to exclude the statements, it cannot be insignificant that the justices of Trial Chamber I, having heard from seven people over the course of a week and a

[1] *Prosecutor v. Taylor,* SCSL-03-01-T-1002, Prosecution Response to Defence Motion to Exclude Custodial Statements of Issa Sesay, 12 July 2010 ("**Reply**") and *Prosecutor v. Taylor,* SCSL-03-01-T-998, Defence Motion to Exclude Custodial Statements of Issa Sesay, 1 July 2010 ("**Motion**").
[2] Response, para. 2.
[3] Response, para. 3.

half, determined this to be the lawful approach. The justices of Trial Chamber II should find this decision persuasive,[4] especially since the Justices of Trial Chamber I were in closer proximity to the facts at issue and heard live testimony from witnesses during the *voir dire*. In similar circumstances an appellate court would not interfere lightly with the exercise of discretion by a trial judge precisely because they would not have had the benefit of hearing the evidence live and thus would not share the impact and nuances of the evidence at first hand. The alternative in this case would otherwise be another *voir dire*; which would be, as previously argued, at the expense of judicial economy.

5. It is notable that Trial Chamber I, after considering all the evidence, did not single out Interview of 10 March 2003 interview out as a model of investigative propriety. Rather the Chamber excluded it along with the rest on the basis that all the interviews were tainted with impropriety. In relation to the Interview of 10 March 2003, the Defence would respectfully turn the attention of the judges to the portions of the *voir dire* transcripts discussed below, but particularly the portions dealing with events prior to the Interview of 10 March 2003.[5] This evidence overwhelmingly supports the Defence's position that the statements were obtained involuntarily, and in a general atmosphere of deception and blatant disregard for proper investigative protocol. The fifteen pages recorded during the Interview of 10 March 2003, and attached to the Prosecution Motion as Annex A, do not tell the entire story of what transpired prior to the Interview.

Circumstances Prior to and During Interview of 10 March 2003 Make it Involuntary

6. According to the Agreement between the United Nations and the Government of Sierra Leone which set up the Special Court, regular police powers, such as the authority to arrest, were to remain with the Sierra Leonean Police (SLP).[6] Instead, Sesay was arrested in the presence of six Prosecution investigators while the Special Court warrant only allowed for "a

[4] See Response, para. 11 and footnote 14.
[5] See especially Issa Sesay's testimony on *voir dire* of events that occurred prior to the Interview of 10 March 2003. RUF Trial Transcript, 19 June 2007, p. 24-43
[6] See *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, Article 17. See also Rule 55(B) of the SCSL Rules of Procedure and Evidence, which states, in relevant part, "The Registrar shall transmit to the relevant authorities of Sierra Leone, in whose territory or under whose jurisdiction or control the accused resides..." Rule 55(C)(i), moreover, directs that "The Registrar shall request the said authorities to cause the arrest of the accused and his transfer to the Special Court."

member" of the Prosecution to be present during the arrest.[7] In fact, it appears that it was the Prosecution, and not the SLP that exercised effective control of Sesay from the time of his arrest, and before formal transfer to SCSL custody at Bonthe was made.[8] Such a show of force by the Prosecution, rather than the SLP and/or the more neutral SCSL Registry,[9] created a coercive atmosphere prior to the Interview of 10 March 2003.

7. The Prosecution failed to follow other procedural guarantees designed not only to safeguard the rights of Sesay but to ensure the integrity of the Special Court. According to Article 17 of the Special Court Statute, Rule 52(A),[10] and per the terms as rearticulated in warrant of arrest, the Prosecution should have given Sesay a copy of the Indictment immediately after he was taken into Special Court custody. This would have allowed Sesay the best opportunity to understand the circumstances he was facing, prior to being interviewed for the first time. Yet the Prosecution evaded the clear letter of the law by conducting the entire Interview of 10 March 2003 with Sesay before serving him with a copy of his Indictment. All the while during the interview, the Prosecution referred to Sesay as Accused or Suspect interchangeably, as if he understood the charges against him in the first place. The Prosecution should not be allowed to benefit from this purposeful malpractice. That would undermine the integrity of the judicial process.
8. Furthermore, Rules 43 and 63 specify that all questioning by the Prosecutor of a suspect or an accused must be audio-recorded. However, the *voir dire* testimony of Prosecution investigator John Berry, Prosecution investigator Joseph Saffa, and then-accused Issa Sesay, makes it clear that within an hour of Sesay's arrest, the Prosecution investigators questioned Sesay off the record, at least as regards his willingness to cooperate, prior to the recording of the Interview of 10 March 2003.[11] There are differing accounts of what was discussed during this initial questioning at Jui Barracks, but it is clear that Sesay's collaboration as an insider witness was solicited. As Sesay has testified during his examination in chief before Trial

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[7] See also Rule 55(D): When an arrest warrant issued by the Special Court is executed, a member of the Prosecutor's Office may be present as from the time of arrest".
[8] Motion, Berkeley Report Annex, p. 17 and RUF Trial Transcript, 15 June 2007, p. 40, 44, and 59.
[9] Rule 57, titled "Procedure after Arrest" puts the Registry and the Government of Sierra Leone, not the Prosecution, in charge of the Accused until he is formally transferred to SCSL custody.
[10] Rule 52(A) reads: "Service of the indictment shall be effected personally on the accused at the time the accused is taken into custody of the Special Court or as soon as possible thereafter". See also Rule 55(C)(ii). The plain intention of these rules is that the accused should know what charges are being levied against him shortly after being arrested, in order to safeguard his rights.
[11] See RUF Trial Transcript, 14 June 2007, p. 7-8; 15 June 2007, p. 79.

Chamber II, John Berry told him, "This is the end of your life".[12] The *voir dire* record further shows that Prosecution investigators, including Morissette, told Sesay that because Sierra Leonean courts had the death penalty, cooperation with the Prosecution was the only way to save his life.[13] Sesay previously testified that he agreed to talk to the Prosecution because he had no choice.

9. In his own words he said: "Well, what could I do? I'm in your hands, I'm in your hands. Whatever this journey take".[14] Sesay further explained that Morissette "made some threats that I should accept what they told me. That was why I accepted and all what he said in that room, I was handcuffed. It was only when I said, okay, I was in their hands. Whatever they said I was ready to speak with them".[15]
10. The exact nature of this initial questioning, by Gibril Morissette, John Berry and Joseph Saffa, former members of this same Prosecution, which included inducements such as telling Sesay he could avoid spending his life in prison in exchange for cooperation, is not available for the Trial Chamber to consider because the Prosecution failed to record the questioning as required by Rule 63. In view of the clear letter of the law, the Defence submits that this omission by the Prosecution was deliberate and calculated and therefore cannot be condoned.
11. A further incentive to cooperate, which was known to Sesay prior to the Interview of 10 March 2003, was the release from custody of Gibril Massaquoi in exchange for his cooperation with the Prosecution. Sesay has testified that Gibril Massaquoi was arrested at the same time as he and Morris Kallon, but that he was released almost immediately to the Prosecution.[16] This necessarily impacted Sesay's willingness to cooperate.
12. Additionally, contrary to the Prosecution submissions in its Response, Sesay's position at the time of his questioning was never made clear to him. The distinction between Sesay the Accuesd and Sesay the Suspect was not made clear to him. This could only have compounded his confusion and thus likely impacted his willingness to talk. The reference to him as a suspect especially, when he was already an accused would have led him to believe that there was a chance that the charges could be dropped against him easily. The Prosecution's Response at paragraph 17 acknowledges that the definitions in Rule 2 make it

[12] *Prosecutor v. Taylor,* SCSL 03-01-T, Trial Transcript, 13 July 2010, p. 44328, but see p. 44327-30.
[13] RUF Trial Transcript, 19 June 2007, p. 38-40.
[14] RUF Trial Transcript, 19 June 2007, p. 38-39.
[15] RUF Trial Transcript, 19 June 2007, p. 40-41.
[16] RUF Trial Transcript, 19 June 2007, p. 34-36; 38. See also *Prosecutor v. Taylor,* SCSL-03-01-T, Trial Transcript, 13 July 2010, p. 44326 and 44330.

clear that once a person is indicted he ceases to be a suspect, but then goes on to erroneously conclude that accused persons are a subset of suspects, suggesting that it was proper for the Prosecution to have intermixed the terms throughout the Interview of 10 March 2003. Rule 47(H)(ii) is however very clear. Upon approval of the Indictment, a suspect assumes the status of an accused. This moves the indictee from the general category of suspects to a very specific category of accused. The fact that Rule 63, which delineates the procedure to follow when questioning an accused, refers back to the rights advisements and audio recording procedures listed in Rules 42(A)(iii) and 43, which deal with suspects, does not mean that the two terms are interchangeable. Trial Chamber I found that "the statements were a product of improper inducements made by the investigators emanating from the implanted belief in the mind of the Accused that he was to be a witness and not an accused".[17] And it must have been obvious to Sesay that he would only be useful as a witness if he was able to implicate others.

Alleged Waiver of Right to Counsel was Involuntary

13. If the Prosecution wants to disregard Trial Chamber I's findings in relation to the involuntariness of the Interview of 10 March 2003, then it cannot seek to rely on Trial Chamber I's findings in relation to the voluntariness of the rights waivers that Sesay signed prior to being interviewed. In support of its intention to use the Interview of 10 March 2003, the Prosecution highlights that Trial Chamber I found that the Prosecution had fulfilled its obligations under Rules 42 and 63 and that Sesay's waiver of the right to counsel was voluntary. The Prosecution also notes that Trial Chamber I found that the interviews did not take place under "coercive or oppressive circumstances".[18]
14. However, those findings were only by a 2-1 majority, with Justice Itoe dissenting.[19] In fact, Trial Chamber I failed to adequately explain its decision to find the rights waivers

[17] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-1188, Written reasons - Decision on the admissibility of certain prior statements of the Accused given to the Prosecution, 30 June 2008, para. 60.
[18] Response, para. 8, also para. 6.
[19] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-1188, Separate concurring and partially dissenting opinion of Hon. Justice Benjamin Mutanga Itoe on the decision on the admissibility of certain prior statements of the Accused given to the Prosecution, 30 June 2008 ("**Justice Itoe's Dissent**").

voluntary.[20] The Defence submits that the rights waivers were not knowing and voluntary either and are, in fact, a secondary basis for the exclusion of the Interview of 10 March 2003.

15. During the Interview of 10 March 2003, Gilbert Morissette, showed his ignorance of or disregard for the significance of the right to counsel when asking Sesay, "Are you willing to waive the right to counsel and proceed with the interview in preparation of a witness statement; yes or no? In other words, are you willing to discuss with us your involvement; are you willing to tell us what happened and what you know of these events?"[21] By conflating Sesay's right to counsel with Sesay's willingness to talk to the Prosecution (and thus secure his release), Morissette made it seem like foregoing the right to legal counsel was Sesay's only option for cooperating with the Prosecution. No further explanation was ever made to Sesay about what it meant to waive his right to counsel.
16. John Berry admitted that he did the "bare minimum" in relation to the reading of the required rights waiver each day, and Morissette stated that he did not feel that he had an obligation to be confident that Sesay understood that he had a legal right to counsel at any time.[22] The Prosecution's cavalier approach to this fundamental right should not be condoned by allowing the admission of statements obtained in violation of this right.
17. Sesay testified on *voir dire* that in an unrecorded conversation prior to the Interview of 10 March 2003, John Berry told him that Sesay should just say "yes" to the questions that the investigators asked about the papers being read to him.[23] Sesay also testified that he didn't even know what the English term "waiver" meant and that he misunderstood the term "counsel" to mean "consul".[24] Thus Sesay's signature on the standard rights waiver forms cannot be seen as a knowing and voluntary waiver of his right to counsel.
18. Justice Itoe in dissent confirmed the Defence's position, stating:

> It is clear that for the waiver [of the right to counsel] to be deemed to have been voluntarily given, the Prosecution must show and prove that it fully and comprehensively explained not only the nature of the document but also the consequences that go with its signature by the suspect. It is not enough just to rattle through the textual reading of the waiver, but to really make a comprehensive explanation of its contents and implications of signing of the waiver.[25]

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[20] See full explanation in the Motion, Berkeley Report Annex, p. 24-27.
[21] RUF Trial Transcript, 5 June 2007, p. 106.
[22] RUF Trial Transcript, 12 June 2007, p. 79.
[23] RUF Trial Transcript, 19 June 2007, p. 40-42.
[24] RUF Trial Transcript, 19 June 2007, p. 42.
[25] Justice Itoe's Dissent, paras. 42-43.

There is No Significant Legal Distinction between Sesay as an Accused and Sesay as a Witness

19. In relation to the use and/or admissibility of the 10 March 2003 statement, there is no significant legal distinction between Sesay's role as an Accused in his own case and his role as a witness in the current case. The Prosecution cannot be allowed to benefit from breaking the rules. The Prosecution's intention from the beginning was to secure Sesay as an insider witness against Charles Taylor.[26] It cannot be lawful then, for the Prosecution to arrest Sesay and take a statement from him in violation of his rights as an Accused, knowing full well that it would likely be used later against Charles Taylor (if not against Sesay himself). Such improper Prosecutorial tactics implicate the rights not only of the Accused Sesay, but the Accused Taylor to a fair trial and should have no place in international criminal justice.

20. The Defence's concern is not that the Interview of 10 March 2003, obtained improperly, would implicate Sesay; the Defence is not attempting to protect Sesay in any way.[27] Rather, the Defence is concerned about the integrity of the judicial process in general and, more specifically, that in an attempt to not implicate himself during the involuntary interview, Sesay unreliably passed blame to other people, namely Charles Taylor. While the Special Court Indictment against Taylor was not unveiled until June 2003, Taylor was the first defendant to be indicted by the Special Court for Sierra Leone, and Sesay must have been aware of this. David Crane has stated that prior to Sesay's arrest, the Prosecution had been using "intermediaries" and "other surreptitious means" to secure his cooperation as an insider witness,[28] during which time it is reasonable to believe that the Prosecution discussed its number one indictee. Thus, anyone in Sesay's position (trying to seem helpful to the Special Court investigators in order to avoid trouble for himself) would necessarily have wanted to tell the investigators what he believed the investigators wanted to hear, especially in relation to Taylor.

21. At the time of his interviews Sesay was in effect a co-defendant of the accused Charles Taylor. Indeed much of the questioning of Sesay was directed at persuading him to implicate

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[26] Motion, para. 2, footnote 2. See also statement by David Crane suggesting that Sesay's arrest was designed to secure his cooperation as a witness: "We made it look like he was being arrested with everybody, but at the time we thought that Issa Sesay was going to work with us... it turned out that finally he changed his mind, and we dropped the matter and he was prosecuted". See Motion, Berkeley Report Annex, p. 17.

[27] See, cf., 13. The Defence submits that Rule 90(E) is inapplicable because it is not arguing that Sesay should be shielded from answering questions which might tend to incriminate him. The Defence is arguing that material obtained in violation of the Special Court Statute and Rules of Procedure and Evidence should not be allowed to be used to benefit the Prosecution in judicial proceedings.

[28] Motion, Berkeley Report Annex, p. 16-17.

Taylor in the offences with which Taylor now stands charged. This is compounded by the blurring of the boundary between Sesay's role as potential witness and Sesay's role as an accused during the course of Sesay's questioning. Sesay had a clear interest and motive in implicating others because of the likelihood that this might assist his own position. In this regard, it is a fundamental rule in English Law that statements made by one defendant, either to the police or to others (other than statements, whether in the presence or absence of a co-defendant, made in the course and pursuance of a joint criminal enterprise to which the co-defendant was a party), are not evidence against a co-defendant unless the co-defendant either expressly or by implication adopts the statements and thereby makes them his own.[29] The practice of cross-examining one defendant on another defendant's interview is impermissible. In fact, the judge, in an English trial, is required to direct the jury in the following terms: *"The statement which B made to the police in A's absence implicating A is not and cannot be evidence against A. A was not present and had no opportunity to contradict it. You must therefore disregard it when you consider the case against A.*[30]

Admission of the Voir Dire *Transcripts through Rule 92*bis *is Proper*

22. Per the terms of Rule 92*bis,* the Trial Chamber may, in lieu of oral testimony, admit in whole or in part, information including [...] transcripts, that do not go to proof of the acts and conduct of the accused. The Trial Chamber may admit this evidence if it is relevant to the purpose for which it is submitted and if its reliability is susceptible of confirmation.

23. The Prosecution argues that the *voir dire* records from the RUF Trial are largely irrelevant and unhelpful in resolving the issues before this Trial Chamber, and that Rule 94, the mechanism for judicial notice, would be the appropriate channel for admission of findings from another case.[31] But the contents of the *voir dire* transcripts themselves are not adjudicated facts nor legal conclusions as the Prosecution errantly claims. Instead, they are sworn testimony of four Prosecution employees/agents and one Defence employee as well as Issa Sesay himself, describing the circumstances surrounding the custodial statements taken from Sesay in 2003, of which the Interview of 10 March 2003 is obviously a part. The

[29] *R v Rudd* (1948) 32 Cr. App. R. 138; *R v Gunewardene* (1951) 2 K.B. 600, 35 Cr. App. R. 80; *R v Rhodes* (1960) 44 Cr. App. R. 23. See generally Archbold Criminal Pleading Evidence and Practice, para. 15-388.
[30] See, ex, Crown Court Bench Book provided to Judges and Recorders by the Judicial Studies Board of England and Wales.
[31] Response, para. 4 and 26.

transcripts are obviously relevant to the admissibility and/ or reliability of the Interview of 10 March 2003 and should be admitted if the interview is admitted. The transcripts should be admitted in whole because they place events leading up to the Interview of 10 March 2003 in the context of an orchestrated plan to secure Sesay as an insider witness against Charles Taylor, with blatant disregard by the Prosecution of the Special Court's statutorily prescribed investigative protocols.

III. Conclusion

24. The Trial Chamber must exclude the use during the cross examination of Issa Sesay, all of the statements that were excluded by Trial Chamber I, on the basis that they resulted from "fear of prejudice and the hope of advantage" and were made involuntarily as a result of "improper inducements"; including the Interview of 10 March 2003.
25. Based on the record of the *voir dire*, Trial Chamber II can independently conclude that the statements were made involuntarily, after a complete disregard by the Prosecution of proper investigative protocols. Furthermore, Trial Chamber II can easily conclude that the rights waivers made by Sesay were not knowing and voluntary and thus the statements should be excluded on that basis alone.
26. The use and/or admission of the eleven custodial interview statements given involuntarily by Issa Sesay, including the Interview of 10 March 2003, at a time when Sesay was attempting to secure his own release by implicating others, would bring the administration of justice into disrepute and should not be permitted.

Respectfully Submitted,

Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 19th Day of July 2010
The Hague, The Netherlands

Table of Authorities

SCSL

Prosecutor v. Taylor, SCSL-03-01-T-998, Defence Motion to Exclude Custodial Statements of Issa Sesay, 1 July 2010

Prosecutor v. Taylor, SCSL-03-01-T-1002, Prosecution Response to Defence Motion to Exclude Custodial Statements of Issa Sesay, 12 July 2010

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Prosecutor v. Sesay, Kallon, Gbao, SCSL-04-15-T-1188, Separate concurring and partially dissenting opinion of Hon. Justice Benjamin Mutanga Itoe on the decision on the admissibility of certain prior statements of the Accused given to the Prosecution, 30 June 2008

Prosecutor v. Sesay, Kallon, Gbao, Trial Transcript, 5, 12, 14, 15, and 19 June 2007

UK Case Law

R v Rudd (1948) 32 Cr. App. R. 138

R v Gunewardene (1951) 2 K.B. 600, 35 Cr. App. R. 80

R v Rhodes (1960) 44 Cr. App. R. 23

Authorities Provided

*138 Leonard Rudd

Court of Criminal Appeal

1 March 1948

(1948) 32 Cr. App. R. 138

Lord Chief Justice , Mr. Justice Humphreys and Mr. Justice Birkett

March 1, 1948

Summing-up—Joint Trial—Evidence by One Prisoner on Oath—Admissibility as Evidence against Co-Prisoner—Direction in Special Circumstances.

The recognised and universal principle of law that, whereas a statement made in the absence of the accused person by a co-defendant cannot be evidence against the accused person, yet if that co-defendant goes into the witness-box and gives evidence in the course of a joint trial, then his sworn evidence becomes evidence for all purposes in the case including that of being evidence against the accused person, has been in no way altered or detracted from by the decision in ***139** Meredith and Others (1948), 29 Cr. App. R. 40 . The headnote to that case correctly states a course which it may be desirable to adopt in directing the jury on a joint trial in certain cases, but does not purport to abrogate from the above-mentioned accepted principle.

Application for leave to appeal against conviction and sentence.

The applicant was convicted at Birmingham City Quarter Sessions on November 29, 1947, of receiving stolen property and was sentenced by the Deputy Recorder to three years' penal servitude.

It is unnecessary to set out the facts of the case, beyond stating that a co-defendant of the applicant named Powell gave evidence implicating the applicant.

G. A. J. Smallwood , for the applicant:

The summing-up of the Deputy Chairman was unsatisfactory. He should have adopted the principle laid down in Meredith and Others (1943), 29 Cr. App. R. 40 , and warned the jury that they ought not to regard the evidence of the applicant's co-defendant Powell as evidence against the applicant. Further, Powell was in the position of an accomplice and the jury should have been warned of the danger of accepting his evidence without corroboration.

No counsel appeared for the Crown.

Humphreys, J.:

The applicant was convicted at Birmingham City Quarter Sessions before the Deputy Recorder of receiving stolen property knowing it to have been stolen. It is quite unnecessary to deal with the facts of the case in any detail because it is admitted that there was ample evidence to go to the jury and the grounds of appeal do not challenge that fact.

We are asked to give leave to appeal against conviction on three grounds. The first, which was the ground suggested by the applicant himself in his original notice of appeal, was that ***140** the learned Judge in summing-up did not refer to the fact that a statement made by the applicant's co-defendant Powell in the absence of the applicant was not admissible against the applicant. To that objection there are two conclusive answers. The first is that the Deputy Recorder did refer to the matter, for he told the jury that a statement made by one prisoner in the absence of the other was not admissible against the other. The real gravamen of that attack on the summing-up is that the Deputy Recorder said this once only and did not repeat it. The second answer is that, inasmuch as Powell gave evidence on oath and repeated all that he said in his statement, it would not have made much difference if the learned Deputy Recorder had referred to the matter many times.

I turn now to the second ground, which is a further ground settled by counsel since the adjournment of this case a week ago. It is put in this way: "The learned Deputy Recorder never directed the jury that the sworn evidence of Powell should not be used in evidence against me in

accordance with the decision of the Court of Criminal Appeal in Meredith and Others (1943), 29 Cr. App. R. 40 , and failed to direct them at all as to how they should regard it". It is an astonishing thing for this Court to be told that a learned Judge was guilty of misdirection in failing to direct the jury that the sworn evidence given in the case was not evidence against one of the parties being tried. Ever since this Court was established it has been the invariable rule to state the law in the same way—that, while a statement made in the absence of the accused person by one of his co-defendants cannot be evidence against him, if a co-defendant goes into the witness-box and gives evidence in the course of a joint trial, then what he says becomes evidence for all the purposes of the case including the purpose of being evidence against his co-defendant. That is the law as we have always understood it, and there is ample authority to that effect, and most assuredly Meredith and Others (*supra*) said nothing to the contrary. In Meredith and Others (*supra*) there were several prisoners, and the Court ***141** was dealing with the question whether the summing-up of the learned Recorder of London correctly directed the jury. The learned Recorder said, no doubt accurately, at the end of his summing-up, "These men all made statements, and it is impossible for you to listen to all those statements and not to realise that they are statements which may implicate some persons other than the men making them. You will do your best, members of the jury, to remember that those statements are only evidence against the persons who make them. I will go further than that. When the individual making a statement of that sort comes into the witness-box and gives evidence on oath, it is a different situation. What he says then does become evidence against the other person". He went on to say this: "but I endeavour in this class of case where there are a number of prisoners in the dock always to warn juries that so far as possible they should not use any evidence given by a person who is accused, when he is in the witness-box, against any one of his co-defendants". That obviously does not mean: "I am in the habit of directing juries that what a co-defendant has said is not admissible in evidence against another co-defendant", because the learned Recorder has just said to the jury: "what he has said does become evidence against the co-defendant". In our view, it is plain that what the learned Recorder was, in effect, saying to the jury was: "I always take care to warn juries of the danger of convicting solely upon the evidence of a co-defendant". That is good sense and, as the Lord Chief Justice (Lord Caldecote) observed in the judgment of the Court, a proper direction. The Lord Chief Justice, therefore, in that case, in giving the judgment of the Court dealing with the question of law, was clearly of the same opinion as all the other Judges in this Court have always been. When it is said that there was in that case, either by the learned Recorder in the first instance or by the Court of Criminal Appeal, a statement in law that a jury would be wrongly directed if they were told that they may take into consideration in considering the case of one defendant what has been said by a co-defendant, that is nonsense. We are ***142** satisfied that that was not the meaning of the learned Recorder or of the Lord Chief Justice when he used the expression (at p. 44): "that was a proper direction, and one that was fair to each of the appellants". I repeat that, in reading the judgment in Meredith and Others (*supra*) it must be remembered that what the Court was dealing with there was not a statement of law of universal application that evidence by a co-defendant in the witness-box is always admissible against another co-defendant. They were merely approving of the practice stated by the learned Recorder in that case as being perfectly fair to the then defendants, and for that reason the Court held that the direction was a perfectly proper one and that the appeal should be dismissed. That is the whole of that case, and it would be quite wrong to say that it is an authority for the proposition contended for by Mr. Smallwood; if it were, it would mean that the Court was intending to overrule or to differ from a whole series of cases, only one of which need be mentioned. Attached to the report of Meredith and Others (*supra*), there appears (at p. 46) a note of the decision of this Court in Garland (November 4, 1941). In giving the judgment of the Court, consisting of the Lord Chief Justice (Lord Caldecote), Lewis, J., and myself, I said: "The co-defendant of the appellant had given evidence before the jury on her own behalf, and what she said on that occasion was evidence for all purposes in the case and in that sense evidence against the appellant .... It is said that the learned Recorder [of London] omitted to remind the jury that in the position which she occupied in the case she ought to be treated as an accomplice, because her statement admitted to a great extent the case against her, and went on to state that she did what she did at the instance of the appellant. There is no doubt of the correctness of that proposition of law, and this Court will do nothing to weaken the force of those judgments in which it has been repeatedly said by this Court that it is most desirable that a Judge dealing with such a case, where it involves the evidence of an accomplice, should remind the jury of the danger of convicting upon the evidence of an ***143** accomplice unless corroborated". We then went on to consider the facts of that case, and inasmuch as there was ample evidence of corroboration in that case, we dismissed the appeal. That disposes of the second of the objections.

The third ground which was probably intended to be raised by the words "he failed to direct them at all as to how they should regard the evidence" has been better put by Mr. Smallwood in his argument. He says that there should have been a direction with regard to corroboration of Powell, who was an accomplice. We agree that it would have been very much better if there had been such a direction. Indeed, we go so far as to say that there should have been a direction that Powell's evidence was in all probability that of an accomplice, and that if the jury took that view they ought not to act on it unless they found it to be corroborated. In fact there was no such direction, but, inasmuch as there was ample corroboration of the evidence of Powell both by other witnesses and by the admissions made in the witness-box by the applicant himself, we see no reason why we should not adopt the same course as we did in Garland (*supra*) and say that for that reason, whether it be called an application of the proviso to section 4 of the Criminal Appeal Act, 1907 , or referred to in some other way, we shall refuse to interfere with the verdict of the jury, being satisfied that there has been no miscarriage of justice.

I am reminded that on p. 14 of the First Supplement to Archbold's Criminal Pleading, etc. (31st ed.), there is the following reference to Meredith and Others (*supra*): "Where several prisoners are tried jointly, and one or more of them gives evidence on oath, it may in some cases be desirable that the jury should be directed that, although the evidence given by one prisoner does in those circumstances strictly become evidence against his co-prisoners, they should not regard it as such, but should use that evidence only for the purpose of considering whether that individual prisoner has given an explanation which may be true, or whether his evidence compels the jury to disbelieve him". When the matter is ***144** looked at in that light, we agree that there may be cases in which it is desirable that that course should be taken.

With regard to sentence, the Court is of opinion that the sentence of three years' penal servitude, having regard to all the matters which had to be taken into consideration, was rather heavy. We propose to reduce that sentence to one of eighteen months' imprisonment, and the time during which the applicant has been treated as an appellant will count towards his sentence.

Application for leave to appeal against conviction refused .

Sentence reduced .

Representation

Solicitors: Freeland & Passey, Birmingham, for applicant.
***145**

*600 Rex v Gunewardene.

Court of Criminal Appeal

13 June 1951

[1951] 2 K.B. 600

Lord Goddard , C. J. , Lynskey and Devlin , JJ.

1951 June 4, 13.

Criminal law—Evidence—Admissibility—Evidence to discredit opposing witness—Whether confined to general reputation for truthfulness and honesty—Admissibility of personal belief of discrediting witness—Grounds for belief—Admissibility in chief.

Joint trial—Statement of one prisoner admitting guilt and incriminating other—Whole statement admissible if proper warning given to jury.

The credit of any witness may be impeached by the opposite party by the evidence of persons who swear that they, from their knowledge of the witness, believe him to be unworthy of credit upon his oath. Such persons may not, on their examination in chief, give reasons for their belief, but they may be asked those reasons in cross-examination, and their answers cannot be contradicted.

At the trial of a prisoner for manslaughter, counsel on his behalf sought to call a doctor to give evidence to discredit a witness for the prosecution. Before calling him counsel informed the judge that the doctor's evidence would be to the effect that he, as a medical man, had examined the witness and had come to the conclusion that he was suffering from a disease of the mind and that he (the doctor) would therefore not regard his testimony as reliable. The judge considered that evidence to be inadmissible.

Held, that the doctor could state his individual opinion but not the facts on which it was founded, and that the evidence which he proposed to give was accordingly inadmissible.

There is no rule of law which prevents from being given in evidence the statement of one prisoner which implicates another prisoner tried jointly with him.

***601**

APPEAL against conviction.

The appellant, Sumatalage Reginald Gunewardene, a medical practitioner, was convicted of manslaughter at the Central Criminal Curt together with Alice Hanson, and was sentenced to three years' imprisonment. The case made against the appellant was that he was an accessory before the fact to an operation to procure an abortion on a woman who had died ag the result of it, and that he was therefore a principal in the second degree.

At the trial the prosecution put in a statement which Alice Hanson had made to the police admitting that she had performed the operation on November 13, 1950, and incriminating the appellant. The prosecution's case against the appellant was that he had driven the deceased woman, who was then pregnant, to Alice Hanson's house in order that the operation should be performed, that he drove her back again, and that he later attended her at the house of one of his patients. On November 15 he caused her to be taken to hospital but on her way there she died from general septicæmia.

The appellant denied the case made out by the prosecution except in so far as he admitted attending the deceased woman for what, he alleged, he thought was a normal miscarriage. His real defence was one of alibi at the material times.

At the trial the prosecution called a witness of the name of Davies who gave evidence highly prejudicial to the appellant. After the appellant had given evidence, his counsel wished to call a doctor to testify as to Davies' reliability as a witness, and told the judge that he intended calling the doctor to give evidence of the condition of Davies' mind. When counsel for the prosecution objected, counsel for the defendant submitted that the evidence was admissible on the ground of general reputation for truthfulness and honesty. He later withdrew the word "general" and said: "I am going to call this doctor to prove whether or not Davies is suffering from a particular mental state. I propose to ask what that

mental state is, what the effect of it is; and whether his evidence is to be rejected thereafter is a matter of inference for the jury".

The judge held that the evidence was inadmissible, and the doctor was not called.

There were three grounds for the appeal against conviction: that the judge wrongly refused to admit the evidence of the doctor to discredit the witness for the prosecution; that that part of Alice Hanson's statement which incriminated the appellant ***602** ought not to have been read; and misdirection, which ground does not call for report.

D. N. Pritt, K.C., and *Eric Myers* for the appellant.

The evidence of the doctor was admissible to discredit the evidence of Davies. The law is correctly stated in Reg. v. Brown and Hedley [1], where the court observed that the practice of calling witnesses to prove that they would not believe the opposing witnesses on their oaths was an ancient one. A witness may be called to say that he knows a previous witness and would not believe him on his oath. In Mawson v. Hartsink [2], which is not such a strong case, Lord Ellenborough allowed the question to be put in this way: "Have you the means of knowing what the general character of this witness was? And from such knowledge of his general character, would you believe him on his oath?".

[LYNSKEY, J. Have the cases gone further than allowing evidence of a witness's reputation?]

A witness is entitled to say that from this knowledge of another witness he would not believe him on his oath. The discrediting witness must have some means of knowledge. There is apparently no authority on the calling of a psychiatrist to say that he does not know a witness but that he has watched him giving evidence and has come to the conclusion that he is mad.

[LORD GODDARD, C.J. In Reg. v. Brown and Hedley [3] and Mawson v. Hartsink [4] the court was only concerned with evidence of general reputation.]

If a man, because of his mental state, is in the habit of making extravagant statements, that is surely part of his general character.

The case make it clear that the doctor could have been asked, and could have answered, this question: "From your knowledge of the witness Davies, is his evidence worthy of being believed?". The word "reputation" is used in many of the cases as contrasted with going into particular facts, which is not allowed. There are two distinct fields in this inquiry. The first, with which the court is not here concerned, is that evidence that a prisoner is of good character must be limited to general reputation; and accordingly any rebutting evidence must be subject to the same limitation. The second field, which is the only one here in point, ***603** is that it is a general rule of law, not limited to criminal trials, that evidence to discredit an opposing witness is of the personal opinion of the discrediting witness and is not confined to evidence of the general reputation of the witness whom it is sought to discredit. The discrediting witness speaks of his personal opinion from his knowledge of the other person, although evidence in chief of particular facts is never admissible.

This distinction between the two fields was pointed out in Reg. v. Rowton [5] which concerned the rule applicable only to criminal law. In reply to a statement by counsel that there was no distinction in principle between evidence as to the character of a witness and of a prisoner, Cockburn, C.J., said [6] that the cases were essentially different; that, in the case of the character of a witness as to his credibility on oath, the individual opinion of another was what was sought; but that in the case of a prisoner the general opinion of his character was the important matter.

The best treatment of the subject in the text books is in Roscoe's Evidence in Civil Actions (20th ed.) Vol. I, p. 187, where the question is put thus: "From your knowledge of the witness do you believe him to be a person whose testimony is worthy of credit?".

Mawson v. Hartsink [7] falls into place after certain other cases are considered: Rex v. Watson [8] *per* Bayley, J.; Sharp v. Scoging [9] where Gibbs, C.J., said that, in seeking to discredit a witness, another witness could be asked the general question whether he would believe the first witness on his oath; Rex v. Rudge and Another [10] where Lawrence, J., said that the only way in which a witness could be discredited was by general evidence of persons who were acquainted with him, as to their belief of his credibility on his oath; and Stebbings v. London and North-Western Railway Co. [11].

The doctor's evidence would have been "general" for two reasons: it does not seek to investigate particular facts in evidence in chief; and it follows exactly the general form of the question which the

cases show to be admissible. This little field, which is limited by the older cases, is a valuable one and does not lend itself to abuse. [Mawson v. Hartsink [12] further referred to.]

***604**

[LORD GODDARD, C.J. That case does not really support the passage in Roscoe for which it is given as an authority. It may be that there has been a relaxation of the rule since that case.]

Rex v. Davison [13] and Reg. v. Rowton [14] are both in the other field which is inapplicable here. [Counsel referred to Stephen's Digest of the Law of Evidence (12th ed.), Arts. 57 and 146; Russell on Crimes (8th ed.), pp. 1955 and 1074; and Rex v. Bispham [15] .]

Although in a joint trial there are necessarily some disadvantages, it was quite unnecessary for the whole of Alice Hanson's statement to be read out. The prosecution should have omitted those passages which merely referred to the appellant's alleged part in the crime.

Christmas Humphreys for the Crown.

It was in Rex v. Rookwood [16] and Rex v. Layer [17] that the general proposition was laid down. If the doctor's evidence had been admitted, the prosecutor would have been entitled to call witnesses to say that Davies was not mad, and so on ad infinitum.

[DEVLIN, J. That could only be done once.]

Yes, but once to every matter investigated, which would be completely impracticable: see Attorney-General v. Hitchcock [18] , *per* Rolfe, B. [19] . Rex v. Hardy [20] was quoted in Reg. v. Rowton [21] : "Character is the slow-spreading influence of opinion arising from the deportment of a man in society; as a man's deportment, good or bad, necessarily produces one circle without another, and so extends itself till it unites in one general opinion, that general opinion is allowed to be given in evidence".

The cases show that a discrediting witness may be called to speak of another witness's general reputation which is within his own knowledge; but the evidence which it was proposed to obtain from the doctor here was not evidence of general reputation, but merely of his own medical opinion: see Clarke v. Periam [22] and Martyn v. Hind [23] . Rex v. Jones [24] is an authority for preventing counsel from putting particular questions to a discrediting witness.

***605**

There are no modern cases. Rex v. Bispham [25] shows that the "general character" of the witness to be discredited is the vital matter. Reg. v. Burt [26] was decided before the Criminal Evidence Act, 1898 . In Cockle's Cases and Statutes on Evidence (7th ed.), at p. 314, it is stated: "Evidence to discredit a witness is admissible to prove:- that he has such a general bad character for veracity that he is not to be believed on his oath". Wherever the word "general" is used in the authorities, it means that general evidence may be given in the sense that a witness may only say what is the general reputation of a previous witness.

Alice Hanson's statement was admissible in full, and in fairness to her it was proper for the prosecutor to read the whole of it. In the absence of any application by the defence it was not for the prosecution to pick and choose how much of the statement should be read.

Pritt, K.C., replied.

Cur. adv. vult.

LORD GODDARD, C.J.

[delivering the judgment of the court:] The appellant was convicted of manslaughter and was sentenced to three years' imprisonment. At the end of the argument the court dismissed his appeal against conviction and intimated that they would give their reasons later. On reflection the court desired fuller consideration of the cases bearing on the admissibility of certain evidence so the order was not drawn up, and a further argument has now been addressed to us.

[His Lordship stated the facts and continued:] Some points as to misdirection were taken which, Mr. Pritt frankly admitted, were only minor points, and it is sufficient to say with regard to them that the court is of opinion that not only was there no misdirection but that the judge's summing-up was fair and adequate and not open to criticism in any respect.

As regards the first of the main questions which was argued, Davies, who was the brother of Mrs.

Hanson, was called to prove that the appellant had bribed, or attempted to bribe. Mrs Hanson to withdraw the statement she had made to the police and to say that she had made it in a moment of panic and that it was untrue. There is no doubt that the evidence of this witness was highly prejudicial to the appellant. He was severely and properly cross-examined with a view to showing that he was not a witness of ***606** truth, and he admitted that he had lied on many occasions. His evidence was wholly denied by the appellant, and after the latter's evidence his counsel desired to call a doctor to give evidence, as he put it, on Davies' reliability as a witness. When counsel for the Crown objected to this evidence, counsel for the appellant, said: "My Lord, I submit it is admissible on the ground of general reputation for truthfulness and honesty". He had previously told the judge that he intended calling this doctor to give some evidence about the condition of Davies' mind. When Hilbery, J., said that the evidence would not be that of general reputation, counsel for the appellant said: "My Lord, with respect, reputation. I drop the word 'general'"; and later he said: "I am going to call the doctor to prove whether or not he is suffering from a particular mental state. I propose to ask what that mental state is, what the effect of it is, and, my Lord, the question of whether his evidence is to be rejected thereafter is a matter of inference for the jury". The judge held that this evidence would be inadmissible, and accordingly the witness was not called.

The question raised is of some importance on the extent to which evidence may be given to discredit witnesses called by the opposing party. That witnesses can be called to say that they would not believe a particular witness called by the other side, whether for the prosecution in a criminal case or for a party in a civil case, is, in the opinion of the court, undoubted; but the nature of the discrediting evidence and how far the witness can go in stating the grounds for his belief are the matters which the court has to determine.

It does not seem open to doubt that the true rule with regard to the character of a prisoner is that a witness must speak of the prisoner's general reputation and not of particular facts known to the witness on which he bases his opinion. If, for instance, a witness were to say that he knew nothing of the general character of the prisoner but that he had had abundant opportunity of forming an individual opinion as to his honesty, such evidence would be inadmissible. That was expressly decided in Reg. v. Rowton [27] , though the court there did hold that it is open to a witness to say: "I have never heard anything against the character of the person of whose character I have come to speak", since the fact that a prisoner's character has never come into issue or discussion may be the most cogent evidence that his reputation is good.

***607**

The case on which Mr. Pritt principally relied was Reg. v. Brown [28] , where counsel for the defendants proposed to call witnesses to prove that they would not believe the witnesses for the prosecution on their oaths. Counsel for the prisoner cited Mawson v. Hartsink [29] and was then stopped by the court. Counsel for the Crown submitted that to allow such a question would be contrary to Reg. v. Rowton [30] , but the report states [31] : "The court, however, declined to hear any further argument on the subject, observing that all the text-writers were agreed that the evidence could be given, and that the practice was so ancient, and hitherto so undoubted, that it could not be altered now unless by the authority of the legislature". That case, therefore, appears to be a direct authority that a witness called to impeach the credibility of previous witnesses can express an individual opinion and is not confined to giving evidence of the latter's general reputation.

It is to be observed that in Reg. v. Rowton [32] counsel is reported as arguing, "There is no distinction in principle between evidence as to the character of a witness and of a prisoner", to which observation Cockburn, C.J., replied: "The cases are essentially different. In the case of the character of a witness as to his credibility on oath, the individual opinion of another is what is sought. In such case the witness could not say the general opinion is that the man ought not to be believed on his oath. But in the case of a prisoner what is the general opinion of his character is what is to be proved".

The court asked for re-argument in this case with a view to examining other and earlier authorities on the matter and to seeing if the witness called is confined to stating his individual opinion or whether he may go into any reasons which led him to form that opinion. There is no need to consider all the cases to which our attention has been called by counsel on either side although the court is indebted to them for their full and careful survey of the authorities.

The first case to which it is necessary to refer is Rex v. de la Motte [33] , a trial for high treason at which Buller, J., presided. In his charge to the jury, the judge said [34] : "These are the three witnesses called to impeach the credit of Lutterloh. The witness Lappel said he rather doubted whether he would trust or believe him. The counsel for the defendant did not put ***608** the question in the manner the

question always is, and ought to be, put if they mean to impeach the veracity of a witness; and every day's experience teaches the gentlemen at the bar how they ought to put the question, if they think the answer will serve their purpose; for the question was never asked of any witness, whether he thought this man from his general character deserved to be believed upon his oath. The only question at all like that was put to Lappel, with this addition, whether he would trust or believe him". It would therefore seem that the judge's opinion was that a witness called to impeach testimony was confined to giving evidence as to general reputation and could not state his individual opinion.

But later cases show that the rule has at any rate been relaxed, though Lord Ellenborough seems to have taken much the same view in Mawson v. Hartsink, where, after some discussion, he allowed the question to be put in this way [35] : "Have you the means of knowing what the general character of this witness was? and from such knowledge of his general character, would you believe him on oath?" That case was decided in 1802, and that years afterwards, in Carlos v. Brook [36] , Lord Eldon said that a witness may be asked whether he would believe a man on his oath, but it is not competent to ask him the ground of his opinion.

This question was again much discussed in Rex v. Watson [37] . The main question seems to have been whether, for the purpose of discrediting a witness, it could be asked if he had been convicted of an offence without producing a record of the conviction. That question can no longer arise as the matter is covered by s. 6 of the Criminal Procedure Act, 1865 , usually referred to as Denman's Act. But the judgments in Rex v. Watson [38] clearly show that all the judges were of opinion that, while a witness could be called to say that he would not believe a previous witness on his oath, he cannot in chief give evidence of particular facts as justifying his opinion.

There is certainly nothing inconsistent with this view in Reg. v. Brown [39] , and in our opinion the effect of the cases is thus correctly stated in Stephen's Digest of the Law of Evidence (12th ed.), Art. 46: "The credit of any witness may be impeached by the opposite party, by the evidence of persons who swear that they, from their knowledge of the witness, believe him to be *609 unworthy of credit upon his oath. Such persons may not upon their examination in chief give reasons for their belief, but they may be asked their reasons in cross-examination, and their answers cannot be contradicted".

The reason for the limitation which is imposed upon the evidence that the witness can give is obvious. Were it otherwise an issue would at once arise whether the facts upon which the witness stated he based his opinion were true or otherwise. The issue before the court in a criminal trial is simply whether or not the prisoner has committed the offence with which he is charged. The court cannot at the same time have to try the question whether or not certain facts spoken to with regard to a witness were true or not, nor would there be any means of obtaining the opinion of the jury upon that question.

In the present case, had counsel at the appellant's trial called the doctor, the most that he could have asked him in chief was: "From your knowledge of the witness Davies would you believe him on his oath?" But this was not what counsel desired to do. He was perfectly frank with the judge and told him that he wished to call the doctor to say that he, as a medical man, had examined the witness and had come to the conclusion that the man was suffering from a disease of the mind and that therefore he regarded his testimony as unreliable. In our opinion that is exactly what the cases show cannot be done. He can state his individual opinion, but not the facts upon which it is founded, and this case is a good illustration for the reason of the limitation placed upon this class of evidence to which we have already referred. In common fairness to the witness, if that evidence were given he might have wished evidence called to prove that he was not suffering from any disease of the mind, and the case against the prisoner could not be complicated by having a trial of this wholly irrelevant issue as to the sanity or insanity of a particular witness.

This case does, perhaps, illustrate the desirability of adhering strictly to the rule that no ruling should be given upon the admissibility or otherwise of evidence until the particular question is asked; but, bearing in mind the avowed reason which counsel gave for desiring to call the witness, we do not, in this particular case, wish to be thought to be making any unfavourable comment on the course adopted. It is abundantly clear that if the witness had been called the only object in calling him was to have evidence by a medical man as to the result of an examination he had made of a witness and the opinion he had formed thereon *610 which, as we have already said, was inadmissible. In our opinion, both on principle and authority, such evidence was inadmissible.

We now turn to the second of the main questions argued on behalf of the appellant. As we have said, there is no doubt that the statement made by the prisoner Hanson incriminated the appellant in a high

degree. This is a mutter of very frequent occurrence where two or more prisoners are charged with complicity in the same offence. This state of affairs is no doubt a ground upon which the judge can be asked to exercise his discretion and order a separate trial, but no such application was made in the present case. If no separate trial is ordered it is the duty of the judge to impress on the jury that the statement of one prisoner not made on oath in the course of the trial is not evidence against the other and must be entirely disregarded, and that warning was emphatically given by Hilbery, J., in the present case. But it would be impossible to lay down that whore two prisoners are being tried together counsel for the prosecution is bound, in putting in the statement of one prisoner, to select certain passages and leave out others.

As Alice Hanson had pleaded not guilty, counsel for the prosecution was bound to prove the case against her, and, so far as she was concerned, the evidence mainly consisted in the statement which she had made. The judge not only warned the jury that they must not regard her statement as evidence against the appellant but was at pains not to read, in his summing-up, the whole of the statement which she made, confining himself to those parts which bore on her guilt and not on that of the appellant, though he did read one passage which implicated the appellant, again warning the jury that it was not evidence against him. He went so far as to advise the jury not to ask for the woman's statement when they retired, so that they should not have before them mutter prejudicial to the appellant.

If we were to lay down that that statement of one prisoner could never he read in full because it might implicate, or did implicate, the other, it is obvious that very difficult and inconvenient situations might arise. It not infrequently happens that a prisoner, in making a statement, though admitting his or her guilt up to a certain extent, puts greater blame upon the co-prisoner, or is asserting that certain of his or her actions were really innocent and it was the conduct of the co-prisoner that gave them a sinister appearance or led to the belief that the prisoner making the statement was implicated in the ***611** crime. In such a case that prisoner would have a right to have the whole statement read and could, with good reason, complain if the prosecution picked out certain passages and left out others. The statement was clearly admissible against Hanson and was read against her, and although in many cases counsel do refrain from reading passages which implicate another prisoner and have no real bearing on the case against the prisoner making the statement, we cannot say that anything has been admitted in this case which was not admissible, and the judge gave adequate and emphatic directions to the jury on the subject.

For these reasons we have come to the conclusion, on both grounds, that the appeal fails and must be dismissed, but in the circumstances the sentence will date from conviction.

Representation

Solicitors: Darracotts ; Director of Public Prosecutions .

Appeal dismissed. (S. C.)

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1. (1867) L. R. 1 C. C. R. 70 .
2. (1802) 4 Esp. 102 .
3. (1867) L. R. 1 C. C. R. 70 .
4. (1802) 4 Esp. 102 .
5. (1865) 34 L. J. (M. C.) 57 .
6. Ibid. 59.
7. 4 Esp. 102 .
8. (1817) 2 Stark. 116 , 152.
9. (1817) Holt, N. P. 541.
10. (1805) Peake Add. Cas. 232 .
11. (1899) 63 J. P. 138 .
12. 4 Esp. 102 .
13. (1808) 31 St. Tr. 99 .
14. 34 L. J. (M. C.) 57 .
15. (1830) 4 C. & P. 392 .

16. (1696) 13 St. Tr. 139 .
17. (1722) 16 St. Tr. 94 .
18. (1847) 11 Jur. 478 .
19. Ibid. 482.
20. (1794) 24 St. Tr. 199 .
21. 34 L. J. (M. C.) 58 .
22. (1742) 2 Atk. 337 .
23. (1776) 2 Cowp. 437 .
24. (1809) 31 St. Tr. 251 .
25. 4 C. & P. 392 .
26. (1851) 5 Cox C. C. 284 .
27. 34 L. J. (M. C.) 57 .
28. L. R. 1 C. C. R. 70 .
29. 4 Esp. 102 .
30. 34 L. J. (M. C.) 57 .
31. L. R. 1 C. C. R. 71 .
32. 34 L. J. (M. C.) 59 .
33. (1781) 21 St. Tr. 687 .
34. Ibid. 811.
35. 4 Esp. 103 .
36. (1804) 10 Ves. 49 .
37. 2 Stark. 116 , 149.
38. 2 Stark. 116 , 149.
39. L. R. 1 C. C. R. 70 .

*23 George Cecil Rhodes

Court of Criminal Appeal

9 November 1959

(1960) 44 Cr. App. R. 23

Lord Chief Justice , Mr. Justice Cassels and Mr. Justice Edmund Davies

October 26; November 9, 1959

Summing up—Statement by One Prisoner Implicating Co-Prisoner—Warning to Jury Not to Regard it as Evidence Against Co-Prisoner—Evidence of Association Between Prisoners at Material Time—Jury Invited to Consider Case Against First Prisoner in Light of Alleged Admission—Jury Invited if They Convicted First Prisoner then to Consider Case Against Co-Prisoner on Footing they were in Association—Conviction Quashed.

The appellant and one M. were jointly indicted and tried for burglary. It was not disputed that they were together during the whole of the material time. A substantial part of the case against M. consisted in a statement implicating the appellant which M. was alleged to have made and which M. denied having made. The Chairman, after warning the jury that the statement could not be evidence against the appellant, invited the jury first to consider the case against M. in the ***24** light of his alleged admission and then, if they convicted M., to consider the case against the appellant on the footing that the two men were together at the material time. The jury convicted both M. and the appellant.

Held, that by the way in which he invited the jury to consider the case against the appellant, the Chairman was, for all practical purposes, negativing and nullifying his previous warning that M.'s alleged admission was not evidence against the appellant; that it was a misdirection to tell the jury that the conviction of M. could be regarded as forming any part of the case against the appellant; and that the appellant's conviction must be quashed.

Appeal against conviction.

The appellant was convicted at Lancashire Quarter Sessions on May 15, 1959, of burglary and larceny and was sentenced by the Chairman (His Honour Judge Steel) to seven years' preventive detention.

The appellant was indicted and tried together with a man named Mills. The offence was committed by gaining access to a cellar. Evidence was called by the prosecution to prove that the appellant and Mills had been together in the neighbourhood soon before and soon after the householder was disturbed by the noise of entry being effected. The appellant and Mills, in the course of their evidence, both said that they had been at all material times in the company of each other, but denied all complicity in the offence. The evidence against the appellant consisted of scientific evidence with regard to fragments of paint and other material found adhering to his coat which, it was said, corresponded with material found in the cellar. The evidence against Mills included a statement to a detective officer which he was alleged to have made and which he denied having made. The statement was to the following effect: "Look, if you let me go to-night, I'll put you on to some big stuff. ... I only pulled George [Rhodes] out. If you let me go, I'll get him for you on some bigger stuff."

The Chairman directed the jury that Mills' statement was not evidence against the appellant. He continued: "If you believe that Mills made the alleged admission and consequently ***25** come to the conclusion that Mills is guilty of this burglary, you now note (because both the accused have said it to you on oath) that they were together the whole of the evening ... and they never parted company. If you come to the conclusion that Mills was taking part in this burglary, where was Rhodes? Rhodes doesn't say 'I left Mills and he may have done the burglary while I was away...' The evidence shows that they were together before the offence was committed, together after the offence was committed, and both state on oath they were together the whole time. ... If you are not satisfied the admission was made, the case against Mills goes, and the case against Rhodes goes also, because the case against Rhodes is not as strong as the case against Mills. But if you are satisfied Mills committed the offence and made this admission, that admission, as I told you, is not evidence against Rhodes. Once satisfied that Mills is guilty, you know that he and

Rhodes were together the whole evening; that has been their evidence in this case ... What you have to make up your minds about is, what is Mills' admission? Did he make it? Is it an admission? If he made it and you are satisfied he is guilty, both have given evidence that they did not part company that night. ... Wherever Mills went, Rhodes went. They denied having anything to do with the burglary. But, wherever they were, they were together."

John Ward for the appellant. After correctly warning the jury that Mills' statement could not be evidence against the appellant, he nullified the effect of that warning by inviting the jury to convict or acquit the appellant according as whether they accepted it as proved that Mills' admission had been made, simply because Mills and the appellant agreed to having been in each other's company on the material evening. This amounted to a misdirection.

Ian Webster for the Crown. The Chairman made it sufficiently clear to the jury that they must consider the case against Mills and against the appellant separately, and was careful to point out twice that, even if they found that Mills ***26** had made the alleged admission, it could not be evidence against the appellant.

At the conclusion of the argument the court quashed the conviction and said that reasons would be given for their decision at a later date.

Cur. adv. vult .

November 9, 1959. The judgment of the court was delivered by:

Edmund Davies J.:

At Lancashire Quarter Sessions in May 1959 George Rhodes and Martin Mills were jointly charged with burglary and both were convicted. Thereafter, by leave of the full court, Rhodes appealed against his conviction on the grounds of misdirection by the learned Chairman. On October 26 this court, being of opinion that misdirection in one respect had been established in an otherwise admirable summing-up, quashed the conviction and Rhodes was accordingly discharged.

The burglary charged had been effected by gaining access to a cellar, and evidence was called that the two accused persons had been together in the neighbourhood shortly before and shortly after the householder was disturbed by the noise of someone entering the premises. Furthermore, in the course of their evidence, both accused persons, while denying any complicity in the offence charged, said that they had at all material times been throughout in the company of each other.

The evidence against the appellant Rhodes consisted of the testimony of a witness from the Forensic Science Laboratory with regard to fragments of paint and other material adhering to his coat which, it was asserted, corresponded with material found in the cellar. As against Mills, however, the evidence was entirely different, and was to the effect that, while under arrest, he sent for a detective officer and said to him: "Look, if you let me go to-night, I'll put you on to some big stuff. ... I only pulled George [Rhodes] out. If you let me go, I'll get him for you on some bigger stuff." Mills denied having said ***27** this, but he was convicted, and no point arises in this appeal regarding that conviction; but it was urged on Rhodes' behalf, and in the opinion of this court rightly urged, that the learned Chairman misdirected the jury regarding the way in which they were entitled to treat the aforementioned statement by Mills as affecting Rhodes.

The jury were indeed properly directed that, Mills' alleged statement having been made in the absence of Rhodes, "where a man makes a statement in these circumstances, it is evidence against him, but it is not evidence against anybody else he may have mentioned." [His Lordship then referred to the passages in the summing-up set out above and continued:] Counsel for the appellant submitted that there was here a misdirection in that, despite the twice-repeated direction that Mills' alleged admission (being made in Rhodes' absence) was not evidence against Rhodes, that direction was in effect nullified by the invitation to the jury to acquit or convict Mills according as to whether they rejected or accepted the evidence of his alleged admission and, if they convicted Mills, to convict Rhodes also, inasmuch as the appellant had himself sworn that he had been in Mills' company at all material times. In the judgment of this court, that submission was well founded. Although the learned Chairman was careful to point out that each accused person was entitled to a verdict based on the evidence admissible against him alone, it by no means followed that the conviction of Mills necessarily involved the conviction of

Rhodes. The matter may be quite simply tested in this way. If Mills had already been separately tried and convicted, in the later trial of Rhodes could proof of Mills' conviction be admitted and (if so), by coupling this with evidence that the two men spent the evening together, would this be sufficient to justify the conviction of Rhodes even though he asserted that they had committed no crime? The question, in our judgment, permits only a negative answer. Indeed, any other answer would make for great injustice, for in the circumstances postulated Rhodes would have had no opportunity of challenging any of the evidence given in the trial of Mills. It is true that, ***28** in the present case, the two men were jointly tried, but even so the position of the appellant was no better than it would have been had they been tried separately, for he could make no effective challenge of the police evidence with regard to the admission alleged to have been made in his absence, and no cross-examination of Mills was called for on his behalf, since Mills denied ever having made the alleged admission as well as denying the offence charged.

This court has accordingly come to the conclusion that, by inviting the jury first to consider the case against Mills in the light of his alleged admission and then, if they convicted Mills, to proceed to deal with the case against Rhodes on the footing that the two men were together throughout the material time, the learned Chairman was, for all practical purposes, negativing and nullifying his previous warning that Mills' alleged admission was not evidence against the appellant. Alternatively, and more simply stated, it was a misdirection to tell the jury that the conviction of Mills could be regarded as forming any part of the case against Rhodes.

Although at first sight it might appear odd that, in the light of the evidence given by the two co-defendants themselves, one should go free while the other is convicted, proof must precede conviction, and in our judgment the offence charged, while proved against Mills, was not proved against Rhodes. For these reasons we thought it right to allow Rhodes' appeal and to quash his conviction.

*Conviction quashed . **29*