

UGANDA / JUDGMENT

Rex v Brabin and Another (Criminal Appeals Nos. 127 and 128 of 1947) [1947] EACA 29 (1 January 1947)

[1947] EACA 29

COURT

East African Court of Appeal

BEFORE

Bartley J, Edwards CJ, Graham Paul CJ

CASE / FILE NUMBER

Criminal Appeals Nos. 127 and 128 of 1947

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COURT OF APPEAL FOR EASTERN AFRICA

Before SIR G. GRAHAM PAUL, C. J. (Tanganyika), EDWARDS, C. J. (Uganda) and
BARTLEY, J. (Kenya)

REX, Respondent (Original Prosecutor)

(1) JAMES CLIFFORD BRABIN, (2) RAM PRATAP KHOSLA, Appellants (Original
Accused)

Criminal Appeals Nos. 127 and 128 of 1947

(Appeals from decision of H. M. Supreme Court of Kenya)

Criminal Law—Evidence of previous similar offences—Indian Evidence Act.

The appellants were convicted of corrupt practices contrary to section 383 of the Kenya Penal Code. The particulars of the offence were that they, being persons employed by the Commodity Board, obtained a sum of money from one Hasham Kara for forbearing to show disfavour to him in relation to the affairs of the Commodity Board. At the trial evidence was admitted under section 7 Indian Evidence Act of a previous corrupt transaction by the appellants with Hasham Kara.

Section 7 Indian Evidence Act reads as follows: -

"Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Held (22-7-47).—(i) That as the evidence of the previous corrupt transaction also concerned Hasham Kara such evidence was admissible. For it showed the "state of things" under which the offence in issue happened. There was a nexus between the previous similar offence and the offence charged.

(2) That although the Indian Evidence Act is in the main a codification of the English law of evidence, where a deviation occurs the Act must prevail over English case law.

Cases referred to: Wallace Johnston v. The King (1940) A. C. 231; Rex v. Sims (1946) 1 K. B. 531; Rex v. Boyle and Merchant (1914) 3 K. B. 339.

Brian Figgis for appellant Brabin.

Salter for appellant Khosla.

Stacey, Acting Solicitor-General (Kenya) for the Crown.

JUDGMENT (delivered by SIR G. GRAHAM PAUL, C. J.).—The two appellants were jointly charged under two counts of corrupt practices contrary to section 383 of the Penal Code. The jury found each accused guilty on the first count and on that finding a Nolle Prosequi was entered in respect of the second count in regard to both appellants. Each appellant was sentenced to twelve months' simple imprisonment.

The particulars of offence under the first count were as follows:-

"James Clifford Brabin and Ram Pratap Khosla on or about the 21st day of February, 1947, in the Central Province, being persons employed by the Central Commodity Distribution Board of the Government of the Colony and Protectorate of Kenya obtained from Hasham Kara the sum of Sh. 1,000 as an inducement for forbearing to show disfavour to the said Hasham Kara in relation to the affairs or business of the Central Commodity Distribution Board."

From the convictions the appellants appeal to this Court. A memorandum of appeal was filed by each appellant; the appeals were consolidated; the appellants' advocates were heard at length and the Acting Solicitor General was heard for the Crown.

Before an examination of the specific grounds of appeal (which are substantially the same for each appellant) some observations of a general nature may well be made. First of all, from our perusal of the record and from the very exhaustive analysis of the evidence by the advocates before us, one thing is abundantly clear, namely that there was ample evidence, if believed, to justify the verdicts of the jury.

In the second place two propositions were very clearly stated in the very exhaustive summing-up by the learned Chief Justice. First that the case for the prosecution could not succeed unless the evidence of Hasham Kara were believed. Second, that if the evidence of Mrs. Mockridge were accepted that disposed of the case against the first appellant. The learned Chief Justice also made it clear that if the case against the first appellant fell, the case against the second appellant fell with it.

Furthermore, the learned Chief Justice most gravely warned the jury about the kind of witness Hasham Kara was. On this point the words of the Chief Justice may be quoted. He said "I think you may go even further and come to the conclusion that he (Hasham Kara) belongs to the class of person who would not hesitate to commit perjury if he thought that his own interests or his own skin were at stake".

By their verdicts of guilty against each accused the jury, in face of these clear directions in the summing-up must have come to the conclusion that Hasham Kara's evidence should be accepted and that Mrs. Mockridge's evidence should be rejected. These were decisions on questions of the relative credibility of witnesses, and upon the evidence as it appears on the record before us it is quite impossible for us to say that the jury, who saw and heard the witnesses give their evidence, were wrong in their decisions as to relative credibility.

But the appellants in this Court rely broadly on two grounds of appeal. Firstly that evidence of previous corrupt transaction between Hasham Kara and the appellants was wrongly admitted by the learned Chief Justice. The evidence in question related to a transaction (some five months previous to the transaction in the charge) whereby it was alleged that the appellants had demanded and Hasham Kara had paid to each of them Sh. 500 as bribes to get his sugar supply (which had been stopped by or through the appellants) restored.

When that evidence was tendered in the trial Court learned and experienced Counsel for the appellants intimated that he did not object, but, of course, that does not preclude this Court on appeal from examining the question whether the evidence in question was inadmissible.

The learned Chief Justice ruled that the evidence was admissible and admitted it. He based his ruling upon section 7 of the Indian Evidence Act which is in the following terms: \$-\$

"Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant."

In our opinion the ruling of the learned Chief Justice was correct. The main fact in issue in the case was the obtaining of a bribe by the appellants jointly from Hasham Kara. In examining that issue one of the most importantly relevant elements in the "state of things" under which the bribe was given was the relationship which existed at the time between the parties. If, for instance, the "state of things" were that the persons charged with demanding the bribe were at the time they demanded it total strangers to the person from whom they demanded it, that would be a very different "state of things" from the position as alleged to be here, namely that the parties

demanding the bribe were on such terms with Hasham Kara that on a previous occasion only five months earlier bribes had been demanded and successfully extracted. It seems to us that under section 7 the fact that the appellants had on a previous and comparatively recent occasion successfully demanded and extracted bribes from Hasham Kara was relevant as showing the "state of things" under which the fact in issue happened. Evidence of that fact was therefore by section 7 admissible.

As regards the application of the Indian Evidence Act it has been argued rather tentatively that it was intended to be merely a codification of the English law of evidence and that, in interpreting it, English decisions must be followed. As regards that argument the position is quite simple. It is true that the Indian Evidence Act is in the main a codification of the English law of evidence and, in so far as it is so, English decisions are of course most useful. But undoubtedly here and there in the Act are definite deviations from the English law and where these occur the Act must prevail over the English case law as the Act has become part of the legislation of the Colony as a comprehensive Evidence Code. See *Wallace Johnston v. The King* (1940) A. C. 231.

But apart from that consideration it does not appear to us that the terms of section 7 of the Act as applied by the learned Chief Justice in this case are inconsistent with English law as defined by the recent case of *Rex v. Sims* (1946) 1 K. B. 531.

It is quite true that the English law does not permit the prosecution to prove previous similar offences by an accused person only to show that he is a person likely to have committed the offence with which he is charged. There must be something more than that. There must be some definite nexus between the previous similar offence and the offence charged. Applying that principle to the present case it might exclude as inadmissible evidence of exactly similar offences committed by the accused in the transactions with other people than Hasham Kara. But, in that the previous similar transaction in this case was with Hasham Kara, the necessary nexus is present, and evidence of the previous similar transaction becomes therefore relevant and admissible not only under section 7 of the Indian Evidence Act but under English law.

The following passages from the judgment in *Sims* case illustrates how the English law agrees with the terms of section 7 of the Indian Evidence Act as it has been applied in this case: -

"Evidence is not to be excluded merely because it tends to show the accused to be of a bad disposition, but only if it shows nothing more." (p. 537.)

"It has often been said that the admissibility of evidence of this kind depends on the nature of the defence raised by the accused: see, for instance, the observations of Lord Sumner in **Thompson v. Rex**, and of this Court in *\$\text{Rex} \} v \\$* . *Lewis Cole*. We think that that view is the result of a different approach to the subject. If one starts with the assumption that all evidence tending to show a disposition towards a particular crime must be excluded unless justified, then the justification of evidence of this kind is that it tends to rebut a defence otherwise open to the accused; but if one starts with the general proposition that all evidence that is logically probative is admissible unless excluded, then evidence of this kind does not have to seek a justification but is admissible irrespective of the issues raised by the defence, and this we think is the correct

view. It is plainly the sensible view."

The law as laid down in Sims case is no new departure. In the case of Rex v. Bogle and Merchant (1914) 3 K. B. 339, the late Lord Reading, giving the judgment of the Court of Criminal Appeal, said:-

"There is, as is apparent from a consideration of the authorities, an essential difference between evidence tending to shew generally that the accused has a fraudulent or dishonest mind, which evidence is not admissible. and evidence tending to shew that he had a fraudulent or dishonest mind in the particular transaction the subject-matter of the charge then being investigated, which evidence is admissible. It has been laid down that there must be a nexus or connexion between the act charged and the facts relating to previous or subsequent transactions which it is sought to give in evidence to make such evidence admissible."

In the present case it would in our view be against all common sense that a jury, or any other tribunal, charged with the investigation of the question whether the appellants on 21st February, 1947, obtained a bribe from Hasham Kara, should be deprived of the most importantly relevant evidence as to the relationship existing between the appellants and Hasham Kara in matters of that kind. It does not appear to be the English law that the jury should be deprived of that important evidence and it is certainly not the law under section 7 of the Indian Evidence Act. In our view the evidence was rightly admitted.

It was also argued that the admission of evidence of allegations made against the second appellant before the Standing Finance Committee of the Legislative Council was wrongful. This evidence was elicited by counsel for the prosecution in cross-examination of a witness for the defence who had given evidence that he had always found the character of the two accused morally satisfactory. In our opinion it was quite proper for counsel in cross-examination to find out what the witnesses knew of allegations made by other people against the appellants, and as the result of the cross-examination it did not appear that there were any grounds in the Finance Committee incident for rejecting the evidence of the witness in examination in chief as to the moral character of the two accused in his experience. Where an accused person gives or calls evidence as to his good character he must expect close cross-examination on that evidence. We find no substance in that ground of appeal.

We come to the second broad ground of appeal in this case, misdirection by the learned Chief Justice as to the evidence in his summing-up to the jury. We have examined with care the criticisms of the summing-up which have been urged so strenuously before us by the appellants' advocates. The criticisms show great industry and ingenuity on the part of the appellants' advocates, and it is no doubt true that, as always in jury cases, if the presiding Judge at the end of a long and arduous trial could sit down at his desk for an unlimited time to examine meticulously the record of the evidence, his summing-up might be more meticulously free from the slightest inaccuracy. The trial Judge, unfortunately, has not that opportunity to anything like the extent that is enjoyed by advocates for the appellants in preparing an appeal. As an Appeal Court however we are concerned only to see whether the summing-up substantially and fairly put to

the jury the case for the prosecution, and more particularly the case for the defence. In this case we are satisfied that the learned Chief Justice quite clearly and fairly put the cases of both sides to the jury.

It is true that there was a definite inaccuracy in the summing-up as regards the demand by the appellants for an amount of Sh. 2,000. That happened, not, as the learned Chief Justice said, *before* the complainant's visit to Mr. Mangat but *afterwards*. What drove the complainant to his advocate, according to the evidence, was not a definite demand for a bribe of Sh. 2,000 but the clear indication given by the appellants that the matter must be settled by a bribe. The complainant and his solicitor came to the conclusion that such a bribe would have to be about Sh. 1,500. Their conclusion according to the prosecution evidence

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turned out to be an under-estimate, but that affected not at all the logical and common-sense soundness of the learned Chief Justice's statement to the jury
on this point. The complainant went to his advocate because he knew he was being asked to settle by meeting what he thought would be an extortionate demand. The learned Chief Justice treated the exact amount of the demand as immaterial; he used the expression "I think Sh. 2,000". We agree that the exact amount was immaterial, and we can find no substance in that criticism of the summing-up. The learned Chief Justice by including in his summing-up Mr. Mangat's evidence verbatim made it quite clear to the jury exactly what the position was on this point.

As regards the other criticisms put before us with skill and assiduity by the appellants' advocates we can find no substance in them. Mrs. Mockridge's evidence was of course important for the defence and any misdirection in regard to it would call for careful examination. The only criticism of the summing-up about this point is that the learned Chief Justice drew attention to the fact and it was a fact—that the first appellant did not see Mrs. Mockridge at the vital time when she says she saw him. The learned Chief Justice and the jury had the advantage of seeing for themselves the office premises where the incident happened and they were therefore in a much better position than we are to decide upon the weight to be given to the fact that the first appellant never saw Mrs. Mockridge at the vital time. It is therefore not for us as an Appeal Court to say that the learned Chief Justice in his observations in his summing-up, or the jury in the conclusion represented by their verdicts, were wrong on this point. The same considerations apply to the criticisms as to the evidence of the finding of the notes in the drawer.

The other matters alleged in the memorandum of appeal as misdirections are in our opinion of no importance. In this case, as in all jury cases, the prosecution and the defence might quite correctly state that there were numbers of points in the evidence with which the summing-up did not specifically deal, but where, as in our opinion happened here, the case for the prosecution and the case for the defence were clearly substantially and fairly put to the jury, we, as an Appeal Court, have no justification to interfere with the verdicts.

For these reasons the appeals are dismissed.

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