

UGANDA / JUDGMENT

Rex v Jetha (Criminal Appeal No. 291 of 1945) [1946] EACA 27 (1 January 1946)

[1946] EACA 27

COURT

East African Court of Appeal

BEFORE

Graham Paul CJ, Sheridan CJ, Whitley CJ

CASE / FILE NUMBER

Criminal Appeal No. 291 of 1945

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COURT OF APPEAL FOR EASTERN AFRICA

Before Sir Joseph Sheridan, C. J. (Kenya), Sir Norman Whitley, C. J. (Uganda), and SIR G. GRAHAM PAUL, C. J. (Tanganyika)

REX, Respondent (Original Prosecutor)**GULAMHUSSEIN DHARAMSI JETHA, Appellant (Original Accused) Criminal Appeal No. 291 of 1945****(Appeal from decision of H. M. High Court of Tanganyika)**

Practice-Joinder of charges--S. 132 (A) (1) Criminal Procedure Code (Tanganyika)-Misjoinder-No failure of justice-S. 335 C. P. C. (Tanganyika)-Indian Evidence Act, S. 8.

The appellant was tried on an information containing five counts. Four were for obtaining money by false pretences and the fifth for giving false information. He was convicted on all five counts. The High Court on appeal quashed the convictions on the first, second and fifth counts and dismissed the appeals on the third and fourth counts, enhancing the sentences thereon.

The appellant appealed to H. M. Court of Appeal for Eastern Africa on the ground *inter alia* of misjoinder of charges in that the fifth charge was improperly joined with the other four charges.

The facts alleged were that on or before 27th June, 1945, the appellant had obtained money by false pretences with intent to defraud four persons and that on 8th July he made a false report that his house had been burgled and the money stolen.

Held \$(11-2-46)\$ —(1) Since some ten days elapsed between the obtaining of the money and the alleged false report of burglary it is at least doubtful whether the charge in respect of the false report can be said to be founded on the same facts as the other charges and it might more properly have been made the subject of a separate trial.

- (2) Such an irregularity, however, is curable under S. 335 C. P. C. unless it has in fact occasioned a failure of justice.
- (3) The test whether a failure of justice has been occasioned or not is whether such an irregularity has caused or not any prejudice or embarrassment to the accused.

Appeal dismissed.

Cases referred to: R. v. Dalip, Singh 10 E. A. C. A. 121; R. Ngidipe 6 E. A. C. A. 118; R. v. Mashiki 7 E. A. C. A. 50.

Houry for appellant.

Phillips, Crown Counsel (Kenya), for the Crown.

JUDGMENT (delivered by SIR NORMAN WHITLEY, C. J.).—The appellant was convicted by the District Court, Singida, on four counts charging him with obtaining money by false pretences with intent to defraud contrary to Section 287 of the Penal Code, 1930, and on a fifth count charging him with giving false information contrary to Section 115A. On appeal the High Court quashed the convictions on the first, second and fifth counts and dismissed the appeals against the third and fourth counts whilst enhancing the sentences.

The appellant now appeals to this Court against the convictions on these two counts. Being a second appeal it lies only on a matter of law, not including severity of sentence.

The first ground of appeal is based upon the learned Magistrate's refusal to allow the adjournment to enable the appellant to engage Counsel. Whilst of opinion that Courts should not be too strict in such matters we agree with the learned Judge of the High Court, that the fact that the appellant had from the 17th July to the 29th August in which period he could have engaged Counsel, is sufficient answer to this ground of appeal, and up to 29th August he had taken no steps to employ an advocate (see top of page 24 of Record).

The second ground of appeal is that there was misjoinder of charges in that the appellant could not legally be tried on the fifth charge at the same trial with the first four charges.

Section 132 (A) \$(1)\$ of the Criminal Procedure Code, 1930, provides that any offences may be charged together in the same charge or information if the offences charged are founded on the same facts or form or are a part of a series of offences of the same or a similar character.

The prosecution seeks to justify the joinder of the fifth count with the first four on the ground that they were founded on the same facts. Their case at the trial was that the appellant with intent to defraud falsely pretended that he had in stock certain gum available for the fulfilment of

contracts which he entered into with four traders; that by that false representation he induced each of them to make substantial advances of money which they would not have advanced if it had not been for the false representation; and that having thus obtained Sh. 24,250 on or before the 27th June, 1945, he on the 8th July, 1945, made a false report that his house had been broken into and a box containing Sh. 30,191 in cash stolen. The connexion alleged between the false report and the frauds upon the traders is that in order to cover up his frauds and get away with the money without supplying the gum which he had contracted to deliver he staged a bogus burglary. The false report of burglary to the authorities is a separate offence. Can it be said to be founded on the same facts as the false pretence charges?

In *R. v. Dalip Singh* (10 E. A. C. A. 121) the appellant was charged with stealing railway property and in the second charge with offering a bribe to a Police Officer a very short time after his arrest in order to procure his release from arrest and to avoid prosecution for the theft. We extract the following passage from the judgment of the Court of Appeal:-

"Undoubtedly the two offences were different in character, but in our opinion both were, in the circumstances of this case, founded on the same facts, for the evidence showed that the bribe was offered within a very short time after the appellant and Sikanda had been arrested with the wood and the suffuria in their possession, and while they were still on their way to the Police Station. It may be that if a person at a substantial interval of time after his arrest offers a bribe in order to secure his release, a charge under section 93 (2) of the Penal Code should properly be made the subject of a separate trial, but, as we have just said, that was not the case here. Even if there had been a technical irregularity the appellant could not have been in any way prejudiced by it, for even if he had been tried only on the charge of theft, evidence of the attempt to bribe could have been given in support of the charge under section 8 of the Indian Evidence Act as evidence of subsequent conduct tending to establish his guilt. And this disposes of another of the appellant's grounds of appeal, that the prosecution sought to prove the theft in order to prove the charge of official corruption and vice versa."

Applying the same reasoning here we are disposed to think that since some ten days elapsed between the obtaining of the money and the alleged false report of burglary, it is at least doubtful whether the charge in respect of this false report can be said to be founded on the same facts and that it might more properly have been made the subject of a separate trial. It might however be argued that inasmuch as the false report was a direct outcome of the swindling and a device to enable him to keep possession of his ill-gotten gains it was sufficiently founded on the same facts. Proceeding on the assumption that the fifth count should have been tried separately, we have to consider the effect of section 335 of the Criminal Procedure Code, 1930.

This section provides that no error, omission or irregularity in the charge or other proceedings during a trial shall be reversed on appeal unless such error, omission or irregularity has in fact occasioned a failure of justice, and the test which has to be applied here is whether any such illegality or irregularity has caused any prejudice or embarrassment to the accused (*R. v. Ngidipe* 6 E. A. C. A. 118 and *R. v. Mashiki* 7 E. A. C. A. 50). As in the *Dalip Singh* case we cannot see that there can have been any such prejudice or embarrassment since, even if the appellant had been

tried only on the charge of obtaining money by false pretences, evidence of his burglary report could have been given under section 8 of the Indian Evidence Act as evidence of subsequent conduct tending to establish fraudulent intent. The learned Magistrate who tried the case was careful in his judgment to consider first the evidence on the first four counts, and it was only after he had analysed this evidence and arrived at his conclusion that he proceeded to open his consideration of the fifth count with the words "The question of the fifth count now remains". It is accordingly clear that the view which he took on the fifth count was not a determining factor nor indeed a contributing factor in his decision to convict on the first four counts. Our view is that had there never been a fifth count, the Magistrate would have arrived at the same conclusion on the third and fourth counts.

The only question which remains for consideration is whether there is evidence to justify the convictions on these two counts. As we have already pointed out, no second appeal lies to this Court on matters of fact. We should only be entitled to interfere if, in our opinion, there were no evidence upon which the Magistrate could in law convict. All we need say is that the two complainants whose evidence was believed, deposed to having been induced to part with their money to the appellant by representations made to them by him which were proved to be false and that the circumstances were such as to justify inferring an intent to defraud.

The last ground of appeal is that the sentences on these two counts should not have been enhanced. Section 308 (a) (ii) of the Criminal Procedure Code, 1930, gives the High Court in its appellate jurisdiction power to increase sentence, and we see no ground for interfering.

The appeal is dismissed.

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