

UGANDA / JUDGMENT

Rex v Saleh (Criminal Appeal No. 608 of 1947) [1948] EACA 65 (1 January 1948)

[1948] EACA 65**COURT**

East African Court of Appeal

BEFORE

De Lestang J, Nihill P

CASE / FILE NUMBER

Criminal Appeal No. 608 of 1947

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APPELLATE CRIMINAL

Before SIR BARCLAY NIHILL, C. J. and DE LESTANG, J.

REX, Respondent (Original Prosecutor) $\mathbf{v}$ **ALI SALEH, Appellant (Original Accused No. 1). Criminal Appeal No. 608 of 1947**

Criminal Law—Appellant charged with theft contrary to section 269, Penal Code— Convicted of theft contrary to section 274, Penal Code—Incorrect conviction -Criminal Procedure-Accessory after the fact-Whether an accomplice-Whether corroboration of his evidence required— Sentence.

The appellant was charged jointly with four others with theft of seven lorry tyres contrary to section 269 of the Penal Code for which the maximum period of imprisonment is three years. The Magistrate found as a fact that the tyres were Government property and the appellant a person employed in the public service at the time of the theft and convicted him of theft contrary to section 274 of the Penal Code for which the maximum period of imprisonment is seven years. The only witness to establish a case against the appellant was one Pasca, and whilst the Magistrate considered that it might be contended that he was an accomplice, he held that as the theft was completed before he was asked by the appellant to find purchasers for the stolen property he was not an accomplice to the theft. The appellant was sentenced to three years' imprisonment with hard labour.

On appeal

Held (28-6-48).—(1) That as the appellant was charged with theft contrary to section 269 of the Penal Code, the Magistrate was not entitled to convict him of an offence against section 274 of the Penal Code, for although an offence against this section is *ejusdem* generis with section 269, it is of a graver nature carrying with it liability to a heavier penalty.

- (2) (a) That it is certainly not the law of Kenya that the mere fact that a person is an accessory after the fact to any crime makes him necessarily an accomplice to that crime.
- (b) Whilst it has been held by the Court of Appeal that there may be special circumstances in such a case when a Court should look for corroboration before acting on the evidence of such a witness, and that the question whether or not such a witness needs corroboration must depend upon the facts disclosed in each particular case, it is quite impossible to lay down any hard and fast rule on the subject.
- (c) That in all the circumstances of this case the learned Magistrate was right in his view that the witness Pasca was not a person to whom the rule regarding corroboration had necessarily to be applied, as he was not an accomplice to the offence with which the appellant was charged.

Rex v. Kinyangabwaru 9 E. A. C. A. 90 and Rex v. John s/o Ngonga and others 11 E. A. C. A. 119 referred to and discussed.

A conviction under section 269 of the Penal Code substituted. Sentence of three years' hard labour to stand. Appeal dismissed.

Swaraj Singh for the Appellant.

Todd, Crown Counsel. for the Crown.

JUDGMENT.—In this case the appellant was charged with theft of tyres contrary to section 269 of the Penal Code. It was clearly proved that the tyres, the subject of the charge, were the property of the Crown and that the appellant was employed in the public service. On these facts the learned Magistrate after hearing the evidence convicted the appellant of an offence against section 274 of the Penal Code which he was not entitled to do since an offence against this section, although ejusdem generis with section 269 is of a graver nature carrying with it liability to a heavier penalty. To that extent therefore the judgment of the learned Magistrate erred and must be corrected. It remains to be examined whether there was evidence before the learned Magistrate which if accepted justified the appellant's conviction for the offence with which he was charged.

Without the evidence of the witness Pasca (P. W.6) it is clear that no case, other than one of suspicion, was made out against the appellant. The basis of the appeal now before us is that this witness should have been treated as an accomplice whose evidence required corroboration and that such corroboration is lacking.

There is no doubt that this witness is a person of bad character since on his showing, if his story is true; he received the stolen tyres and assisted in their removal and disposal at a place on the roadside outside the camp. There is no evidence, however, that he aided or abetted the actual theft of the tyres but he was certainly an accessory after the fact. Counsel for the appellant has cited certain Indian cases in order to establish the proposition that an accessory after the fact is in the same position as an accomplice to which the rule regarding corroboration must be applied. Whatever be the law in India it is certainly not the law of Kenya that the mere fact that a person is an accessory after the fact to any crime makes that person necessarily an accomplice to that crime. This was stated by the East African Court of Appeal in *Rex v. Kinyangabwaru* 9 E. A. C. A. 90 and affirmed by the same Court in *Rex v. John s/o Ngona and others* 11 E. A. C. A. 119. Both these judgments, however, stressed the fact that there may be special circumstances in such a case where a Court should look for corroboration before acting on the evidence of such a witness and in the latter case the Court declared that the question whether or not such a witness needs corroboration must depend upon the facts disclosed in each particular case and it is quite impossible to lay down any hard and fast rule on the subject. If there was any circumstance in the present case which suggested a possibility that the evidence of the witness Pasca, being a person of indifferent character, might not be true it would certainly be dangerous to convict the appellant without corroboration on some material particular pointing to his guilt but on the evidence taken as a whole we cannot find any such possibility—on the contrary every circumstance in the case is not only not inconsistent with the story told by Pasca but is consistent with its truth. It is impossible to believe that the theft of the tyres and their removal from the camp could have been carried out without the privity and aid of the guards at the camp who were under the control and directions of the appellant—furthermore on the appellant's own showing he was in association with Pasca because he lent him his bicycle, the bicycle that was found at the house of the Indian whom Pasca had obtained to receive the tyres. Again Pasca was able to describe accurately the place above the rafters in the roof of the hut occupied by the appellant and from which according to Pasca the tyres were taken down in the presence of the appellant just before their removal from the camp. On an inspection of the appellant's hut by Chief Inspector May he found a place in the ceiling which had been broken open, which gave access to the rafters and which was big enough to admit the passage of the tyres. Taking into account all these circumstances together with the fact that the learned Magistrate was right in his view that the witness Pasca was not a person to whom the rule regarding corroboration had necessarily to be applied (as he was not an accomplice to the offence with which the appellant is charged) we cannot find that he erred in convicting the appellant since Pasca's evidence once accepted clearly establishes his guilt.

We have already indicated that the conviction should have been entered under section 269 of the Penal Code and not under section 274. There remain to be considered whether this substitution should lead us to make a reduction in the sentence of 3 years' imprisonment imposed by the learned Magistrate. The maximum penalty for the offence of stealing by person in the public service is imprisonment for 7 years whereas the general punishment for theft under section 269 cannot exceed 3 years. The learned Magistrate did not impose the maximum sentence for the

offence under section 274 but he did impose the maximum within his jurisdiction. It is clear from his judgment that he considered. a deterrent sentence was called for and in that he is manifestly right. The appellant occupied a position of trust and responsibility and his dishonesty was a source of corruption to the men under his command. His learned counsel has stressed his good military record but we cannot regard this as a mitigating circumstance, in fact it tends to enhance the criminal character of his behaviour. In substituting a conviction under section 269 we feel that this is a case where the imposition of the maximum penalty under that section is fully justified. The sentence imposed by the learned Magistrate will therefore stand.

The appeal is dismissed.

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