Lejzor Teper - - - - - - - - - - - *Appellant*

v.

The Queen - - - - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF BRITISH GUIANA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

DELIVERED THE 28TH MAY, 1952

Present at the Hearing:

LORD NORMAND
LORD OAKSEY
LORD TUCKER

[*Delivered by* LORD NORMAND]

This is an appeal by special leave against the conviction of the appellant in the Supreme Court of British Guiana on the charge that he maliciously and with intent to defraud set fire on 9th October, 1950, to a shop belonging to his wife in Regent Street, Georgetown, in which he carried on the business of dry goods store. It was clearly proved that the shop had been maliciously set on fire. Upon the intent to defraud the Crown's case was that the appellant having insured the building and stock for sums considerably above their real value, set fire to them with the intention of claiming against the insurance companies.

The grounds of the appeal are that hearsay and incompetent evidence was admitted for the purpose of identifying the accused as the man who set the premises on fire, that this evidence was in a high degree prejudicial to the appellant, and that the other evidence against him was such that no reasonable jury properly directed could have convicted him on it alone, or at least that it was so flimsy and inconclusive that it must have been outweighed by the hearsay evidence in the jury's consideration of the evidence as a whole. The contentions for the Crown were that the impugned evidence was properly admitted as part of the *res gestae*, that even if it was inadmissible the appellant suffered no real prejudice and that the other evidence was amply sufficient to entitle a reasonable jury to convict.

An important question of principle is involved in the issue on the admission of the evidence, and their Lordships propose to deal with it at once. That approach to the appeal carries with it no inconvenience for this evidence is concerned with an incident which stands apart from the matters dealt with in the rest of the evidence.

The witness is police constable Cato. He came on duty about 2 a.m. on 9th October and then went along a street named Camp Street towards Regent Street. He heard a shout of fire, and then one fire engine passed

and after it a second fire engine both going along Regent Street. He stopped at the corner of Regent and Camp Street. His evidence continues, "There were crowds going east and west along Regent Street to and from the fire. I heard a woman's voice shouting 'Your place burning and you going away from the fire'; immediately then a black car which was proceeding west along Regent Street turned north into Camp Street; in the car was a fair man resembling accused. I did not observe the number of the car. I could not see the fire from where I was standing." In cross examination he said he did not know who or where the woman was. She was not a witness at the trial. It is common ground that the incident took place at a distance of more than a furlong from the site of the fire and that it happened not less than 26 minutes after the fire was started.

In British Guiana provision has now been made for a Court of Criminal Appeal, but at the date of this conviction the only means of bringing it under judicial review was by a case stated by the judge of the Court before whom the cause had been tried for the opinion of the Court of Appeal (Criminal Law (Procedure) Ordinance Title 12). The appellant applied to the judge to state a case on the admissibility of Cato's evidence, but the application was refused. It is not necessary to consider the reasons for the refusal, and the decision of the learned judge is not under appeal.

The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross examination, and the light which his demeanour would throw upon his testimony is lost. Nevertheless the rule admits of certain carefully safeguarded and limited exceptions, one of which is that words may be proved when they form part of the *res gestae*. The rules controlling this exception are common to the jurisprudence of British Guiana, England and Scotland. It appears to rest ultimately on two propositions, that human utterance is both a fact and a means of communication, and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words and the dissociation of the words from the action would impede the discovery of truth. But the judicial applications of these two propositions, which do not always combine harmoniously, have never been precisely formulated in a general principle. Their Lordships will not attempt to arrive at a general formula, nor is it necessary to review all of the considerable number of cases cited in the argument. This at least may be said, that it is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it, in time, place and circumstances, that they are part of the thing being done, and so an item or part of real evidence and not merely a reported statement. (*Queen* v. *Bedingfield* [1879] 14 Cox CC. 341. *O'Hara* v. *Central S.M.T* Co. 1941 S.C. 363.) How slight a separation of time and place may suffice to make hearsay evidence of the words spoken incompetent is well illustrated by the two cases cited. In *Bedingfield's* case a woman rushed with her throat cut out of a room in which the injury had been inflicted into another room where she said something to persons who saw her enter. Their evidence about what she said was ruled inadmissible by Cockburn C.J. In *O'Hara's* case, a civil action, the event was an injury to a passenger brought about by the sudden swerve of the omnibus in which she was travelling. The driver of the omnibus said in his evidence that he was forced to swerve by a pedestrian who hurried across his path. Hearsay evidence of what was said by a man on the pavement at the scene of the accident as soon as the injured party had been attended to was held to be admissible in corroboration of the driver's evidence. But what was said twelve minutes later and away from the scene by the same man was held not part of the *res gestae*. In *Christie's* case [1914] A.C. 545 the principle of the decision in *Bedingfield's* case was

approved by Lord Reading with whom Lord Dunedin concurred, and no criticism of it is to be found in the speeches of the other noble and learned Lords who sat with them. In the *Queen* v. *Gibson* [1887] 18 Q.B.D. 537 the prosecutor gave evidence in a criminal trial that, immediately after he was struck by a stone, a woman going past pointing to the prisoner's door said " the person who threw the stone went in there." This evidence was not objected to at the trial but it was admitted by counsel for the prosecution in a case reserved that the evidence was incompetent. The conviction was quashed and from their judgments it is clear that the learned judges who took part in the decision were far from questioning the correctness of counsel's admission. In *Gibson's* case the words were closely associated in time and place with the event, the assault. But they were not directly connected with that event itself. They were not words spontaneously forced from the woman by the sight of the assault, but were prompted by the sight of a man quitting the scene of the assault and they were spoken for the purpose of helping to bring him to justice.

The special danger of allowing hearsay evidence for the purpose of identification requires that it shall only be allowed if it satisfies the strictest test of close association with the event in time, place and circumstances. " Identification is an act of the mind, and the primary evidence of what was passing in the mind of a man is his own testimony, when it can be obtained. It would be very dangerous to allow evidence to be given of a man's words and actions in order to show by this extrinsic evidence that he identified the prisoner, if he was capable of being called as a witness and was not called to prove by direct evidence that he thus identified him." (*Christie's* Case cit supra, per Lord Moulton.)

There is yet another proposition which can be affirmed, that for identification purposes in a criminal trial the event with which the words sought to be proved must be so connected as to form part of the *res gestae*, is the commission of the crime itself, the throwing of the stone, the striking of the blow, the setting fire to the building or whatever the criminal act may be. The respondent's counsel submitted that any relevant event or action may be accompanied by words which may have to be proved in order to bring out its true significance. There is a limited sense in which this is true, but it is not always true, and much depends on the use to be made of the evidence. In *Christie's* case (supra) hearsay evidence of certain words uttered by a child, the victim of an indecent assault, in the presence and hearing of the accused were held to be admissible in explanation of the demeanour of the accused in response to them. But the evidence was held inadmissible for the purpose of showing that the child identified the accused as his assailant. In the present case identification is the purpose for which the hearsay was introduced, and its admission goes far beyond anything that has been authorized by any reported case.

Before assessing the prejudice caused by the wrongful admission of the hearsay evidence and deciding whether it affected the substantial justice of the trial, the nature and effect of the other evidence must be looked at.

One important observation falls to be made at the outset. There was no other evidence of identification that was of any value, and the effect of this on the jury's mind would not improbably be to throw into relief the hearsay evidence and to give it prominence. Another result is that the Crown has to rely on circumstantial evidence only to connect the appellant with the commission of the crime. Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined if only because evidence of this kind may be fabricated in order to cast suspicion on another. Joseph commanded the steward of his house, " put my cup, the silver cup, in the sack's mouth of the youngest ", and when the cup was found there Benjamin's brethren too hastily assumed that he must have stolen it. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

Over-insurance of the stock or building by the appellant would, if proved, have been a most material circumstance, and the Crown therefore made every effort to prove it. Their Lordships have carefully considered the evidence about the policies of insurance entered into by the appellant, and they are satisfied that the Crown's case on over-insurance completely broke down. There was no attempt to obtain insurance without the inspection of the subjects insured by the companies' agents ; and there was no concealment of previous policies when further cover was being negotiated. There was no evidence of irregular disposal of stock after insurance was effected, and no evidence that the appellant could have had any expectation of recovering more than the value of stock or buildings destroyed. Furthermore it was proved that the appellant had purchased and received delivery of goods for stock up to the eve of the fire, and that his dealings with wholesalers had been honest and above board. It was also proved that he had in bank at the time of the fire a sum of about $12,000. It was truly said that evidence of over-insurance goes to motive and that it is not necessary for the Crown to prove the motive of a crime. But the failure to prove motive in this case left the Crown with the heavy *onus* of satisfying the jury that the appellant wilfully destroyed his property without any proved prospect of gain.

The Crown relied greatly on evidence that the back door of the building, which had been locked by a padlock on the outside and also fastened by a bar fixed by nails on the inside when the shop was closed at 4 p.m. on the afternoon before the fire, was found at the time of the fire to be neither padlocked nor barred. The appellant had volunteered to the police a statement that he had returned to the shop at about 5.30 p.m. to get a satchel for his daughter. The suggestion is that he went back to the shop at that time to unfasten the bar on the inside and so to make it possible, when he returned at night to set fire to the premises, to enter quietly by the back door instead of by the front door, which made a noise when it was opened. There would have been great force in this if it had been proved that the windows were all securely fastened, but that was not proved. It cannot be left out of account that someone other than the accused may have entered by a window after taking the precaution of unlocking the padlock of the back door so that he would have a ready means of escape after he started the fire. The evidence leaves the matter in a state of suspicion and doubt but it is inconclusive.

On the other hand the appellant had the opportunity, and perhaps a better opportunity than anyone else, of preparing and carrying out the crime. There is evidence that, with the exception of some petrol, all the combustible materials, such as wooden boxes and straw, used to start the fire had been kept in the premises and that pains had been taken by the criminal to ensure the destruction of the stock book, cash book and some other business documents. These are circumstances of suspicion pointing to the appellant, but an intelligent jury ought not to omit to consider that any criminal who maliciously set fire to the appellant's premises might naturally have first acquainted himself with their contents and might also have maliciously tried to make sure of the destruction of the appellant's business books, either in order to embarrass the appellant or to throw suspicion on him.

Lastly the Crown relied on the appellant's conduct. He does not appear to have been told by anyone that a fire had occurred on his premises. He said in his statements to the police that he spent the night 8th to 9th October at home with his wife ; he then said :—" At 8 a.m. I was going to the Esso filling station to get gasolene when I saw a crowd standing opposite my store ; I went up and noticed the building was gutted with fire and my stock destroyed by fire. It was only then that I learnt of the disaster." It was submitted that this shows a very casual attitude on the part of an innocent man whose property has been burnt. But if the meaning of the statement is that the appellant gave only a cursory glance to his gutted store, it is almost equally inexplicable whether he was himself the cause of the fire or not. It is not profitable to speculate about the

meaning which the jury may have attached to this piece of evidence or about the inference which they may have drawn from it. There is more cogency in the point that, if his story was true, he had a good alibi and yet no member of his household was called to testify that he was at home in bed when the fire occurred. That is a circumstance which might well have caused the jury to doubt the appellant's innocence. The appellant did not give evidence, but the question is whether the Crown proved its case by competent evidence and in a trial which was not vitiated by the admission of incompetent evidence.

The circumstantial evidence falls short of conclusiveness and a properly instructed jury having it alone before it would have had a more than usually difficult decision to make. There were several circumstances pointing to the appellant's guilt, and though not one of them alone was of great moment, yet *juncta juvant* and it could not have been said that there was no legal evidence to support a verdict of guilty. That, however, does not decide the issue of the appeal. It is now necessary to consider whether the admission of Cato's hearsay evidence was, having regard to the weakness of the other evidence "something which deprived the accused of the substance of fair trial and the protection of the law" (*Ibrahim* v. *The King* [1914] A.C. 599. *Renouf* v. *The Attorney-General of Jersey* [1936] A.C. 445. *Dharmasena* v. *The King* [1951] A.C. 1.) It is a principle of the proceedings of the Board that it is for the appellant in a criminal appeal to satisfy the Board that a real miscarriage of justice has occurred. In *Dal Singh* v. *The King Emperor* [1917] 44 I.A. 137 it was observed in a case where this Board had no ground for doubting that the appellant had been properly convicted, that the mere admission of incompetent evidence, not essential to the result, is not a ground for allowing an appeal against conviction. In the same case it was stated that "the dominant question is the broad one whether substantial justice has been done" and that in the particular case the question was "whether looking to the proceedings as a whole, and taking into account what has properly been proved, the conclusion come to has been a just one."

Their Lordships have therefore in the end to decide whether the appellant has shewn that the improper admission of the hearsay evidence of identification was so prejudicial to the appellant, in a case where the rest of the evidence was weak, that the proceedings as a whole have not resulted in a fair trial. The test is whether on a fair consideration of the whole proceedings the Board must hold that there is a probability that the improper admission of hearsay evidence turned the scale against the appellant.

Their Lordships are satisfied that the hearsay evidence was in a high degree prejudicial. Its effect may be gauged by considering what Cato's evidence would have amounted to if it had been excluded. He could then only have said that in consequence of something heard by him his attention was directed to a man driving a black car who resembled the appellant. This evidence would have been worthless for the purpose of identifying the appellant with the man who set fire to a building a furlong away and 26 minutes earlier. It is the hearsay and the hearsay alone which gives dramatic force to Cato's otherwise valueless evidence of identification, and confers on it a specious importance. It is impossible to avoid the conclusion that the jury might well and probably did regard Cato's hearsay evidence as sufficient to turn the scale. Counsel for the Crown sought to belittle the prejudice. It was said that the fact that no objection was taken to it at the trial should be allowed "to have some bearing on the question whether the accused was really prejudiced." (*Stirland* v. *Director of Public Prosecutions* [1944] A.C. 315.) That is a consideration which weighs in a case where the evidence improperly admitted would not by its nature cause serious prejudice or where the other evidence left little or no reasonable doubt of the appellant's guilt. But it is of no real moment in the present case. It was also submitted that the direction of the learned judge in his charge sufficiently safeguarded the appellant. The jury were directed that the evidence was not conclusive, but that it could be taken along with other evidence, and that if

from other facts the jury found that the accused was there, this evidence "tied up with it." Cato's whole evidence was accordingly left to the jury's consideration to make of it what they could along with the other evidence. It is not necessary to decide what would have been the result if there had been a clear direction to disregard entirely the hearsay evidence. But no direction short of that could avail to save the verdict, and the appeal must succeed.

The result was intimated to the parties at the conclusion of the argument. Thereupon the appellant's counsel asked for the costs of the appeal and of the proceedings in the Supreme Court. The practice of the Board is against giving expenses to the successful appellant in a criminal appeal save in very special circumstances (*Johnson* v. *The King* [1904] A.C. at p. 825) and special circumstances were found in *Waugh* v. *The King* [1950] A.C. 203. In the present case there are no circumstances which would justify a departure from the ordinary rule of practice.

Their Lordships have therefore humbly advised Her Majesty that the appeal should be allowed. There will be no order as to costs.

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In the Privy Council

LEJZOR TEPER

v.

THE QUEEN

DELIVERED BY LORD NORMAND

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