

The Attorney-General

Appellant

v.

Wong Muk Ping

Respondent

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 19TH FEBRUARY 1987

Present at the Hearing:

THE LORD CHANCELLOR
LORD BRIDGE OF HARWICH
LORD TEMPLEMAN
LORD GRIFFITHS
LORD ACKNER

[Delivered by Lord Bridge of Harwich]

The Proceedings

In November 1977 the respondent was committed for trial together with eight others on charges of conspiracy to traffic in dangerous drugs. The indictment contained nine counts alleging different conspiracies of which the respondent was concerned in three. When the matter came to trial in October 1978 the respondent and another defendant, named Wong Ping Fai, who had both been on bail, had absconded. Nothing more was heard of them until 28th September 1983 when, somewhat surprisingly, they presented themselves at the headquarters of the Hong Kong Police Narcotics Bureau accompanied by their solicitor. The two men were tried together before Deputy Judge O'Dea and a jury in January and February 1984. The respondent was acquitted on two counts, but convicted on the conspiracy which was the subject of the ninth count in the original indictment. His appeal against conviction was allowed by the Court of Appeal of Hong Kong (Sir Alan Huggins, V-P, Li and Yang J.J.A.) on 18th October 1984. The Attorney General now appeals from that decision to Her Majesty in Council by special leave.

The Undisputed Facts

The case for the prosecution against the respondent on the ninth count related exclusively to an importation of opium on the night of 21st/22nd February 1971. In the early hours of 22nd February a van carrying approximately 1.3 metric tonnes of opium was stopped by the police after a high speed chase at the Lion Rock Tunnel near Shatin. The opium had been landed at Shatin from a fishing vessel. Following some distance behind the van was a private car driven by the respondent and carrying two passengers who were in fact members of the crew of the fishing vessel which had landed the opium. This car was also stopped by the police and the three occupants were arrested. But they were later released for want of any evidence available to the police at that time to connect any of them with the opium importation. The respondent was not re-arrested until 25th August 1977. The facts so far recited were not in dispute.

The Issues

What the prosecution set out to prove was that the respondent attended a meeting at which the opium importation was planned, was present supervising the transfer of the opium from the fishing vessel to the van and that he was following the van with the intention of reporting in due course to the leader of the gang responsible for the drug importing operation that the consignment of opium had been safely delivered to the warehouse which was its intended destination. The respondent gave no evidence before the jury, but the case put on his behalf in cross-examination was, in effect, that he had no connection with the matter other than that he had, by coincidence, given a lift in his car to the two fishermen who were arrested with him when his car was stopped early on 22nd February 1971. The disputed evidence falls for consideration under two headings.

The Accomplice Evidence

The Attorney-General had given immunity to three accomplices in the conspiracy, who were called as witnesses for the prosecution. These were Chan Man Hin and Wong Chin Kai, the two fishermen from the vessel which brought the cargo of opium to Shatin who were in the respondent's car when it was stopped in February 1971 and a third man named Leung Chan Yung. In the event only the evidence of Chan and Leung supported the prosecution case. The evidence of Wong Chin Kai, so far as it went, supported the respondent's defence.

The Confession

The prosecution proposed to tender in evidence a written record signed by the respondent of what purported to be the respondent's answers to questions put to him under caution at an interview with police officers immediately following his arrest in August 1977. The admissibility of this was challenged. The case for the defence was that the incriminating answers did not record anything said by the respondent, but that he had been forced to sign the document without reading it. The police officers concerned and the respondent gave evidence on the voir dire. The judge admitted the document as a voluntary confession. This decision was unsuccessfully challenged in the Court of Appeal. As already indicated, the jury did not have before them any evidence from the respondent to contradict the police evidence relating to the circumstances in which the confession statement was made. The statement, on its face, amounted to an unequivocal, detailed and circumstantial admission of the part the respondent played in the opium importation in 1971.

The Summing Up

The trial judge had to give the jury directions about the way in which the jury should approach the evidence of accomplices with reference not only to the count of which the respondent was eventually convicted, but also to the two counts of which he was acquitted and a further count which concerned only the co-accused, Wong Ping Fai, all of which the prosecution had sought to prove in reliance, in whole or in part, on accomplice evidence. These directions, so far as they went, were quite unexceptionable. The judge adequately warned the jury of the danger of convicting on the uncorroborated evidence of accomplices. He explained accurately and lucidly what was meant by corroboration and specifically pointed out that accomplices could not corroborate each other. He told the jury of their entitlement to convict on the uncorroborated evidence of accomplices if, with due regard to his warning, they were nevertheless satisfied beyond reasonable doubt that it was true.

After reviewing the evidence relevant to other counts in the indictment the judge turned to the evidence against the respondent on the ninth count. Short of directing the jury as a matter of law to reject the accomplice evidence, which would have been an unjustified usurpation of the jury's function, the judge could hardly have gone further than he did in inviting the jury to share his own undisguised opinion that the accomplice evidence of Chan and Leung, in so far as it tended to incriminate the respondent, was worthless. Their Lordships need only

quote a few extracts from the summing up to demonstrate this. Of both witnesses the judge said:-

"... you will, I am sure, exercise great caution in deciding whether to place any reliance on their evidence at all."

Of part of Chan's evidence he said:-

"I personally regard his identification of the first defendant in the dock [sc. the respondent] as meaningless and I would strongly suggest that you disregard it completely."

After reading a substantial extract from Chan's incriminating evidence he said:-

"Well, members of the jury, that evidence, you may think, is so totally unreliable that it ought to be completely disregarded. That course is open to you if you wish to adopt it."

Of Chan he finally said:-

"He has admitted to an act of armed piracy and his evidence, as I have indicated, is undermined with contradictions and numerous inconsistencies, but in the end it is for you to decide whether his evidence has any value or not."

The judge described Leung as "a witness whom you may have felt was experiencing considerable difficulty in recalling these events which occurred so long ago". After reviewing the evidence of Leung he said:-

"... when cross-examined, this witness became totally confused and admitted that there was a great deal he could not remember. Well, on the basis of this admission and the conflicts which his evidence has had with other witnesses, you will have to decide what weight can be attached to this man's evidence ..."

The judge at no point invited the jury to consider the evidence of the confession statement as corroborative of the evidence of the accomplices which tended to incriminate the respondent. He dealt with the confession quite separately. He reminded the jury fully of the suggestions put in cross-examination as to how the statement had been taken, but forbore to point out that no evidence had been called by the defence to substantiate these suggestions. He concluded in the following terms:-

"... When you do deliberate on where the truth lies, you must keep it uppermost in your mind that it is for the Crown to prove beyond reasonable doubt that the statement is a voluntary, accurate and truthful record of what the defendant said.

So if you are unsure about the manner in which it was taken, if you are unsure as to the truth of its contents, you should disregard it completely. On the other hand, if you are satisfied so as to feel sure that the evidence of the two police officers is truthful, reliable, then you can take the statement into account and attach what weight to it you think is proper when considering the defendant's guilt of this ninth charge."

The Judgment of the Court of Appeal

The ground of appeal on which the appeal succeeded was that "the judge erred in failing to direct the jury that the evidence of an accomplice must be credible before any question of corroboration can arise". The judgment of the Court of Appeal, delivered by Sir Alan Huggins, V-P., upheld this ground in the following passage:-

"... What is said is that the evidence of these two accomplice witnesses was so bad that it fell of its own inanity and could not be corroborated: *Director of Public Prosecutions v. Hester* (1972) 57 Cr. App. R. 212, 229. The jury was not warned that such a situation might arise and in the present case we think it was vital that it should be, for it might have thought that the evidence of the accomplices could in some way be resurrected by other evidence.

We take the view that it is upon this second aspect of ground two that the appeal of the first Defendant must succeed. Mr. du Cann rightly submits that the fact that there was other evidence upon which the jury could (if it believed that evidence) properly have convicted the first Defendant is no answer: it is impossible for us to know with certainty how the jury approached the matter and, if there remains a possibility that it approached the matter wrongly, the verdict cannot stand."

A short, but sufficient, refutation of this conclusion is, in their Lordships' respectful opinion, to be found in the following considerations: first, that the judge, in reviewing the accomplice evidence, not only made it clear that the jury should reject it if they did not find it credible, but gave them every encouragement to do precisely that; secondly, that the signed confession, attested as an accurate record of the respondent's voluntary statement by uncontradicted evidence, afforded an amply sufficient and independent ground on which the respondent could be convicted; thirdly, that, in the circumstances, the overwhelming probability is that the jury based their conviction on the confession in

the light of the undisputed facts and there is no reason to suppose that they attached any significance to the evidence of the accomplices.

However, special leave to appeal having, no doubt, been granted to enable the Board to consider whether, in addition to the conventional directions regarding corroboration of accomplices' evidence, it was necessary for the judge to give the further direction which he is alleged to have erroneously omitted, it is appropriate that their Lordships should address that issue.

Directions as to Credibility

The rule requiring a warning to be given to a jury of the danger of convicting on uncorroborated evidence applies to accomplices, victims of alleged sexual offences and children of tender years. It will be convenient to refer to these categories as "suspect witnesses". The submission made for the respondent is that, at least in some cases, it is essential for a judge to direct a jury with reference to the evidence of a suspect witness to consider whether the witness is credible before considering any other evidence capable of providing corroboration. The implication of this submission and the sense in which it must have been understood by the Court of Appeal of Hong Kong is that, in such a case, the jury must be directed first to assess the credibility of the evidence given by the suspect witness in isolation from any other evidence in the case. If at this stage they find the evidence not to be credible, they are to reject it in limine. Only if, at the first stage, they find that the evidence is credible, are they to proceed to the second stage, which will involve an examination of any material capable of providing corroboration, a decision whether it does so and finally a decision whether the evidence of the suspect witness is, in the event, to be accepted and relied on.

It is said that this two stage approach is implicitly indicated by passages from speeches in the House of Lords in two of the leading authorities. In *Reg. v. Hester* [1973] A.C. 296, Lord Morris of Borth-y-Gest said, at p. 315:-

"... One of the elements supplied by corroborative evidence is that there are two witnesses rather than one. The weight of the evidence is for the jury - in cases where there is a trial by jury. It is for the jury to decide whether witnesses are creditworthy. If a witness is not, then the testimony of the witness must be rejected. The essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said. Any risk of the

conviction of an innocent person is lessened if conviction is based upon the testimony of more than one acceptable witness. Corroborative evidence in the sense of some other material evidence in support implicating the accused furnishes a safeguard which makes a conclusion more sure than it would be without such evidence. But to rule it out on the basis that there is some mutuality between that which confirms and that which is confirmed would be to rule it out because of its essential nature and indeed because of its virtue. The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible: and corroborative evidence will only fill its role if it itself is completely credible evidence."

In *Reg. v. Kilbourne* [1973] A.C. 729, Lord Hailsham of St. Marylebone L.C. said at p. 746:-

"... Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness's testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroboration in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed. If a witness's testimony falls of its own inanity the question of his needing, or being capable of giving, corroboration does not arise. ... Of course, the moment at which the jury must make up its mind is at the end of the case. They must look at the evidence as a whole before asking themselves whether the evidence of a given witness is credible in itself and whether, if otherwise credible, it is corroborated."

Before examining these passages further, their Lordships find it helpful first to consider whether the suggested two stage approach is one which good sense or judicial experience in assessing the credibility of evidence supports. There may, of course, be extreme cases where a witness under cross-examination is driven to admit that his evidence-in-chief was false. Such triumphs for the cross-examiner are more frequently seen in fictional courtroom dramas than in real life. But in such an extreme case, if it should happen, there would no longer be any question of credibility. Evidence which a witness first gives and then admits to have been false is no longer his sworn testimony and, if a criminal prosecution depends on it, the judge should direct an acquittal. But, apart from such extremes,

any tribunal of fact confronted with a conflict of testimony must evaluate the credibility of evidence in deciding whether the party who bears the burden of proof has discharged it. It is a commonplace of judicial experience that a witness who makes a poor impression in the witness box may be found at the end of the day, when his evidence is considered in the light of all the other evidence bearing upon the issue, to have been both truthful and accurate. Conversely, the evidence of a witness who at first seemed impressive and reliable may at the end of the day have to be rejected. Such experience suggests that it is dangerous to assess the credibility of the evidence given by any witness in isolation from other evidence in the case which is capable of throwing light on its reliability; it would, to their Lordships' minds, be surprising if the law requiring juries to be warned of the danger of convicting on the uncorroborated evidence of a witness in one of the suspect categories should have developed to the point where, in some cases, the jury must be directed to make such an assessment of credibility in isolation.

The concluding sentence in the passage which their Lordships have cited from the speech of Lord Hailsham in *Kilbourne* seems to point directly against the suggested two stage process. The passage as a whole, their Lordships think, is primarily emphasising what is plainly correct, viz. that the evidence of a suspect witness, even though it receives some independent support in a form capable of providing corroboration, cannot found a conviction unless itself accepted as true.

More difficulty arises from the passage cited from the speech of Lord Morris of Borth-y-Gest in *Hester*, particularly the last sentence. It is possible to read the sentence as supporting the proposition that corroborative evidence cannot "give validity or credence to evidence which is ... suspect". If this was indeed a proposition which Lord Morris of Borth-y-Gest intended to enunciate, it is one from which their Lordships feel constrained respectfully to dissent. It is precisely because the evidence of a witness in one of the categories which their Lordships for convenience have called "suspect witnesses" may be of questionable reliability for a variety of reasons, familiar to generations of judges but not immediately apparent to jurors, that juries must be warned of the danger of convicting on that evidence if not corroborated; in short because it is suspect evidence. The corroborative evidence will not, of course, necessarily authenticate the evidence of the suspect witness. But it may at least allay some of the suspicion. In other words it may assist in establishing the reliability of the suspect evidence.

Their Lordships attach particular significance to the words of Lord Reid in *Kilbourne*, at p. 750:-

"There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; the better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in."

This passage was relied on by Lord Hailsham of St. Marylebone in *Reg. v. Boardman* [1975] A.C. 421, at p. 454 to refute a misinterpretation of his own observations in *Kilbourne* which had been advanced in an argument which seems to have been not dissimilar from the argument advanced on behalf of the respondent in the instant case.

If, as Lord Reid's dictum suggests, the presence or absence of corroborative evidence may assist a jury to resolve, one way or the other, their doubts as to whether or not to believe the evidence of a suspect witness, it must, in their Lordships' judgment, be wrong to direct them to approach the question of credibility in two stages as suggested in the submission made on behalf of the respondent.

A very familiar situation where directions as to corroboration are required is where the case for the prosecution cannot succeed unless an accomplice witness is believed, but where there is some evidence capable of providing corroboration. Just such a case was *Reg. v. Turner and Others* [1975] 61 Cr. App. R. 67. This was a case where the prosecution of a number of defendants charged with a series of bank robberies depended essentially on the evidence of a so called "supergrass" named Smalls. Counsel for one of the defendants named Salmon "argued that the learned trial judge fell into error in his direction to the jury as to corroboration in that he failed to make it clear that the jury had to be satisfied that Smalls was a credible witness before they considered the question whether there was evidence which corroborated Smalls in a material particular implicating Salmon in the crime charged". James L.J. delivering the judgment of the Court of Appeal (Criminal Division), after rehearsing this argument and referring to some of the passages from the speeches of Lord Morris of Borth-y-Gest in *Hester* and Lord Hailsham of St. Marylebone L.C. in *Kilbourne* which have been quoted earlier in this judgment, said at page 84:-

"The credibility of the witness whose evidence requires corroboration is judged not on his evidence alone but on all the evidence in the case. In some cases that which adds credence to the evidence of the witness also serves to corroborate his evidence. In other cases evidence capable of providing corroboration is more clearly distinguishable from evidence which only goes to credibility. Some cases may call for a more emphatic or more elaborate direction than others. In the present case it must have been obvious to the jury from the start of the trial that, if they did not find Smalls to be a credible witness, that was the end of the case for the prosecution. This must have been even more obvious after the attack that was made upon the credibility of Smalls in the course of the trial."

Their Lordships can find no error in this passage. Where the prosecution relies on the evidence of an accomplice and where (in contrast with the instant case) the independent evidence capable of providing corroboration is not by itself sufficient to establish guilt, it will have become obvious to the jury in the course of the trial that the credibility of the accomplice is at the heart of the matter and that they can only convict if they believe him. The accomplice will inevitably have been cross-examined to suggest that his evidence is untrue. The jury will have been duly warned of the danger of relying on his evidence without corroboration. Their Lordships can see no sense in the proposition that the jury should be invited, in effect, to reject his evidence without first considering what, if any, support it derives from other evidence capable of providing corroboration.

Conclusion

A further ground of appeal argued before the Court of Appeal of Hong Kong to the effect that the verdict in this case was unsafe and unsatisfactory was not considered in the judgment of the Court of Appeal. No argument in support of that further ground was addressed to the Board, but it was suggested that it might be open to the respondent to re-open the matter before the Court of Appeal of Hong Kong. Their Lordships think the suggestion is erroneous. In the light of the advice tendered by the Board, the Order of Her Majesty in Council will finally dispose of the appeal against conviction. The separate appeal against sentence, on the other hand, which has never been determined, will now require to be considered and decided by the Court of Appeal of Hong Kong.

For the reasons indicated their Lordships will humbly advise Her Majesty that this appeal should be allowed and the respondent's conviction restored.

