magistrate's court should have allowed the brother to make his submissions and should have considered them and made a ruling on them, and then, if the rulings were against him, should have called upon him for his defence. We note that the record states that the brother's behaviour in court was " awfully bad " and that he had to be warned to behave better. But nevertheless he should have been allowed to make his submission and as he was not, but was convicted " out of hand " so to speak, we are of opinion that there was a serious irregularity in the proceedings in the magistrate's court which made the trial unfair. We do not know what the submissions were; there is no note on the record except that he was not allowed to make them. For all we can tell, they might have made the trial result otherwise.

We have reached the same conclusion as did the learned judge, although for different reasons. Consequently this appeal against his order must be dismissed.

[COURT OF APPEAL]

Freetown
July 6,
1961

Ames P.
Marke and
Cole JJ.

COLUMBUS MOSES ANRITI THOMPSON . . . . *Appellant*

v.

REGINA . . . . . *Respondent*

[Criminal Appeal 20/61]

Criminal law—Forgery—Trial with assessors—Whether judge usurped function of assessors—Whether judge misdirected assessors—Weight of evidence—Whether judge gave sufficient consideration to defence.

Appellant was charged with forgery, uttering a forged document, obtaining money on a forged document, obtaining money by false pretences and conversion in an information containing eleven counts. He was acquitted on the first, second, sixth and eleventh counts, and convicted on the others. He appealed on the grounds that " the learned trial judge failed to leave the facts to the assessors to decide," that " the learned trial judge misdirected the assessors as to the facts disclosed in the evidence in support of all the offences charged "; that there was insufficient evidence to support the convictions; and that the judge failed to give sufficient consideration to the defence.

Held, (1) that the judge did not usurp the fact-finding function of the assessors;

(2) that the judge did not misdirect the assessors as to the facts disclosed in the evidence;

(3) that there was sufficient evidence to support the convictions; and

(4) that the defence was presented to the assessors fairly by the judge in his summing-up.

The court also said, obiter, that, " Where there are alternative counts and a conviction is had on one of them, no verdict should be required from a jury, or opinion from assessors, upon any alternative counts."

Cases referred to: *Rex* v. *Frampton* (1917) 12 Cr.App.R. 202; *Rex* v. *Beeby* (1911) 6 Cr.App.R. 138.

James E. Mahoney for the appellant.
John H. Smythe (Solicitor-General) for the respondent.

AMES P. The information filed by the Crown against the appellant contained 11 counts. The appellant was acquitted on the first and second.

The 3rd and 4th, the 7th and 8th and the 9th and 10th counts were three pairs of counts charging him with forgery, contrary to section 4 (1) of the Forgery Act, 1913, and uttering a forged document contrary to section 6 (1) of the same Act.

In the 3rd and 4th counts, the document was a letter, purporting to be a letter signed by C. M. Anthony, dated July 2, 1959, addressed to the Manager, Barclays Bank (D.C. & O.) Freetown, authorising the name of C. M. Anthony in the insurance policy of the motor launch "Ocean Pearl" to be replaced by that of Winifred Thompson. The document in the 7th and 8th counts was a document "purporting to be the Institute of London Underwriters Company combined policy being an insurance policy in respect of the motor launch 'Ocean Pearl' insured in the joint names of the said Columbus Moses Anriti Thompson and Winifred Thompson as owners."

The document in the 9th and as was intended the 10th counts was a document "purporting to be a Lloyd's insurance policy in respect of motor launch the 'Ocean Pearl' insured in the joint names of the said Columbus Moses Anriti Thompson and Winifred Thompson."

The 5th count was for obtaining money on a forged document, contrary to section 7 (*a*) of the Forgery Act, 1913. The particulars were that the appellant "on or about July 2, 1959, at Freetown in the Colony of Sierra Leone with intent to defraud obtained or caused or procured to be paid into his account at Barclays Bank (D.C. & O.) the sum of £3,950 under, upon or by virtue of a forged letter dated July 2, 1959, knowing the same to be forged." This letter of July 2, 1959, of course, was the letter referred to in the 3rd and 4th counts.

The relation of the three pairs of counts and the 5th count to each other is shown by stating, very briefly for this purpose, the case for the prosecution. C. M. Anthony and one Mrs. Harding and the appellant put up money to build and run as a business enterprise, called the Freetown Coastwise Marine Transport Company, a launch called the "Ocean Pearl"; it was agreed that the appellant should arrange to have the launch insured; he did so and had it registered in the name of his wife and insured for £4,000 in the names of C. M. Anthony and himself; that was done by Barclays Bank on his instruction, the premium of £343 being paid by increase of the appellant's overdraft (then nearly £3,000). Soon after, the appellant wrote the letter of July 2, 1959, signed it himself and forged Anthony's signature, instructing the bank to have Anthony's name removed from the insurance policy and the appellant's wife's name substituted. This instruction was forwarded by the bank to London, where the insurance was done by Lloyd's, and the wife's name was substituted for Anthony's in the policies referred to in the 7th, 8th, 9th and 10th counts—the case for the prosecution as to these four counts being that the appellant procured the making false of these policies and the uttering of them by means of innocent agents here and in London. Having done this, the appellant mortgaged the launch to the bank in order to secure further overdraft with the bank, which the bank had declined to give without his providing further security (his house was already mortgaged to them to secure a permitted overdraft of up to £3,000). After the mortgage of the launch, the overdraft increased and at one time reached £4,000 (so the bank statements show).

The connection of the 5th count with the others is this. About a year later the launch had a collision and was a total loss. This was reported to the insurers and they paid up £4,000 (less £50, presumably being charges) sending it to the Bank in Freetown because a note as to their interests as mortgagees has been indorsed on each policy, as the result of a letter dated July 3, 1959, signed by the appellant and his wife instructing that they should be so indorsed. The bank paid the £3,950 into the appellant's account in reduction of his overdraft.

On all these seven counts, the appellant was found guilty.

It remains to mention the 6th and 11th counts. These were concerned with the £3,950 and were alternative to the 5th count. The alternative charge in the 6th count was that that sum of money was obtained by false pretences contrary to section 32 (1) of the Larceny Act, 1916, and that of the 11th count was that it was money which in truth belonged to C. M. Anthony and the appellant but was fraudulently converted by the appellant to his own use contrary to section 20 (1) (iv) (*b*) of the same Act. The appellant was found not guilty on each of these two counts. In our opinion this should not have been done, having regard to his conviction on the 5th count. Where there are alternative counts and a conviction is had on one of them, no verdict should be required from a jury, or opinion from assessors, upon any alternative counts. The trial in this case was by the Supreme Court with the aid of three assessors.

Section 45 (1) of the Jurors and Assessors Ordinance, Cap. 38, provides that where assessors are unanimous in their opinions, their opinions shall be the judgment of the court. These assessors, who gave their opinions at greater length than many assessors do, were unanimous on each count.

Five grounds of appeal were filed with the application for leave to appeal, of which the first was abandoned by Mr. Mahoney who argued the appeal for the appellant. At the start of the argument an additional ground was allowed to be filed.

It will be convenient to start by considering the additional ground and the second ground together. The former reads: "Additional *ground* of appeal: That the learned trial judge failed to leave the facts to the assessors to decide." This is followed by references, by page, number and line of the appeal record to 15 passages in the summing-up, which are complained of.

The second ground of appeal reads: "That the learned trial judge misdirected the assessors as to the facts disclosed in the evidence in support of all the offences charged." This is followed by three passages complained of in the summing-up indicated in the same way and by incorporating also under this ground all of the 15 passages complained of in the additional ground.

Of course, every judgment must be read as a whole. One of the passages "which accused well knew was not true" (on p. 37, lines 6–8) appears to us to be part of the learned judge's statement to the assessors as to what had to be proved by the prosecution in count 3. Some of the passages complained of are statements of what was the case for the prosecution. When summing-up orally it is not necessary to preface every sentence with a phrase such as "the case for the prosecution continues" or "as the evidence was." When listened to this is not necessary. When read in the record it may appear to be stating the facts and may appear to be objectionable.

Other passages undoubtedly are expressions of the learned judge's own opinion. All of them were justified by the evidence, and so cannot be said to be unfair comments. A judge is not prohibited from expressing his opinion but it behoves him to be very careful how he does it. He should make it

clear that it is the opinion of the jury or the assessors which is decisive and not his own opinion. The learned trial judge explained this several times in the course of his summing-up.

There remain four passages, which are clearly expressions of opinion but of such forcefulness as to make it necessary to consider whether it can be fairly said that they are findings of fact and the usurpation of the functions of the assessors, or may have made the assessors think so.

In *Rex* v. *Frampton* (1917) 12 Cr.App.R. 202, Reading L.C.J. giving the judgment of the court said:

> "It was a question of identity, and the appellant called evidence to prove an alibi. We cannot allow a summing-up which puts the case so strongly against the prisoner to stand, so the conviction must be quashed."

The judges' comments in that case, which are set out in the report, go far beyond those of the judge in the instant case.

In the case *Rex* v. *Beeby* (1911) 6 Cr.App.R. 138, Reading L.C.J. said (at p. 141):

> "I agree with the words of Lawrence J. in *West* (above): 'A judge must not put himself in the position of the jury as regards the decision of facts. The proviso to section 4 (1)' of the Criminal Appeal Act 'does not apply where the judge decides facts instead of the jury.' If we had come to the conclusion on the evidence that there was any doubt whether these expressions of opinion could have misled the jury or really have withdrawn from them anything that they might have considered, we should not have allowed this conviction to stand. But we are satisfied that upon this evidence the jury could have come to no other conclusion except that these fires were the work of an incendiary. Their questions shewed that they appreciated the issue."

Notwithstanding these expressions of opinion, which with all respect we cannot but regard as regrettably categorical and downright, we are not of opinion that the learned judge was withdrawing any issue from the assessors.

He said (at p. 45, line 26—p. 46, line 1):

> "Accused by his forgery was able to get moneys which were belonging to Anthony and himself, to get into his coffers."

In its context this is in a passage where he is explaining to the assessors that an argument put forward by counsel for the defence, that had the bank not withdrawn the overdraft facilities, the appellant would not have got into difficulties, does not apply and refers to the case of *Grundwald* which had been cited by counsel for the prosecution.

Later he said (at p. 46, lines 10–12):

> "You will find that the evidence for the Crown has been corroborated in more ways than one. Needless for me to recount them."

This follows the direction to the assessors to consider "the evidence given in the case"—meaning all the evidence.

Later he said (at p. 46, line 18): "The prosecution story is a concrete one. . . ." This is certainly a forcefully expressed opinion, and comes very near the end of the long summing-up. But it is only the first few words of a sentence. The rest of it, and the next sentence are:

> "although there may be differences on some minor and unimportant points. You saw all the witnesses in the witness-box, and you will say

having seen them which side you believe—the story of the prosecution or the story of the defence."

The summing-up there refers to the alternative counts and giving the appellant any element of doubt "on any of these counts." And finally:

"If you are satisfied that the Crown has proved its case on each of these counts, then you are to say that the accused is guilty on each of the counts in which he is found guilty other than the alternative ones. I must thank you for being so patient with me, and will now ask you to consider your verdict."

Earlier in the summing-up the learned judge had put before the assessors the appellant's case very fairly, reading to them long portions of his evidence.

We have no doubt that the assessors fully realised that they were the judges of the facts. Their opinions show that they applied their own minds to the evidence.

After all has been said about it, to what other conclusion could the assessors have come, if they believed the complainant and the other prosecution witnesses, and disbelieved the appellant?

The crux of it all was the letter of July 2, 1959. Did Anthony sign it or was it a forgery? The assessors had before them (as we have) that letter itself, with its disputed signature. They also had before them (as also we have) the specimen signature, which Anthony wrote in court, eighteen cheques with his signatures indorsed on them, his signatures on two depositions which were put in evidence, his signature on his "Noting Protest," as it was called, and also the particulars of the launch (exhibit 2) which he wrote, and which contains several letters "h"—an important letter when comparing the signature on the letter of July 2.

It was common to the case for the prosecution and the defence, that the company had no money to pay the insurance premium and that the appellant was to get a loan of the amount. At that point he had an overdraft of nearly £2,900, secured by a mortgage of his house to the bank. £343 was needed for the premium and it was lent by the bank on June 27. His case was that the bank would not advance it without further security, that he told Anthony and that the two of them agreed that the launch should be hypothecated to the bank, that the bank objected that they did not know Anthony and would not agree unless the appellant was "more or less the sole owner of the launch." "More or less," we suppose, was because the appellant had registered the launch in his wife's name as sole owner, because, as the appellant alleged, the Comptroller of Customs (who was not a witness, having left Sierra Leone) said that the launch could not be registered in the unincorporated company's name (which may be so) nor in the names of the appellant, and Anthony without there being a partnership agreement, that the (appellant) discussed the difficulty with Anthony and that Anthony suggested that it should be registered in the name of the appellant's wife.

All this sounds very improbable to us; and as it resulted in the bank's becoming the legal owners of the launch and the appellant and his wife the owners of the equity of redemption and Anthony being left with nothing at all, we are not surprised that the assessors were satisfied that an intent to defraud had been proved. It is not to be supposed that on July 2, 1959, the appellant expected or hoped that the launch would become a total loss before the end of the first year's insurance. He was thinking of his overdraft, and had achieved

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his object—and was able to increase his overdraft, which grew to be over £4,000. As the consequence of what he had done, it was inevitable that, should the launch become a total loss, the money would be paid to the bank, who could do no other thing with it than pay it into his heavily overdrawn account. The £3,950 nearly squared the appellant's account, and then the bank refused to allow him any more credit. This seems to have much aggrieved the appellant, according to the evidence; but the matter was quite irrelevant to proof or rebuttal of the charges.

One of the particulars of misdirection (p. 35, lines 9–11) was made the basis of a complaint that the learned judge commented adversely to the appellant on his silence when being interviewed by Superintendent Wray of the C.I.D. The learned judge does not seem to us to have done so; he was reminding the assessors that in reply to a question by the judge asking the appellant if he had told Wray that Anthony had signed the letter of July 2, the appellant had replied "yes." The judge then reminded them that Wray's evidence, which had already been read to the assessors, was otherwise. (Wray had said that he was investigating a case of forgery and the appellant had asked if Anthony had seen the letter.)

We can briefly dispose of the remaining grounds of appeal. Grounds 3 and 4 are both about the weight of evidence and we find that there was ample evidence to support the convictions. The last ground complained that the learned judge failed to give sufficient consideration to the defence. We have already said that the defence was put to them fairly in the long review of the evidence in the first 26 pages of the summing-up.

The appeal is dismissed in so far as it relates to counts 3, 4, 5, 7, 8 and 9. The appellant was also convicted on count 10. This was very clearly intended to refer to the uttering of the document referred to in count 9, namely, the Lloyd's policy. When considering our judgment, however, we noticed that it does not do so, but refers to the document which was the subject-matter of counts 7 and 8, namely, the Institute of London Underwriters' Company's Policy. This appears to have been a clerical error in preparing the information. It could have been amended at any stage of the trial: but the mistake went unnoticed by anyone and was not amended. Consequently we cannot have a conviction on two identical and unamended counts and so quash the conviction on count 10 and direct that an entry be made that that count should not have been proceeded with owing to the finding on count 8 of which it was a duplicate.

Freetown
July 11,
1961
Ames P.
Bankole
Jones Ag.C.J.
Marke J.

[COURT OF APPEAL]

ARTHUR MASSALLY . . . . . *Defendant/Appellant*

v.

THERESA BECKLEY . . . . . *Plaintiff/Respondent*

[Civ. App. 15/61]

Tort—Negligence—Automobile accident—Quantum of damages—Method of assessing damages—Relevance of English decisions.

Plaintiff was injured in an automobile accident and obtained a judgment against defendant for £88 special damages and £2,500 general damages. Defendant