KAMARA v. REGINAM

COURT OF APPEAL (Sir Samuel Bankole Jones, P., Dove-Edwin and Marcus-Jones, JJ. A.): April 21st, 1967
(Cr. App. No. 34/66)

[1] **Evidence—confessions—confession by one of two or more accused—inadmissible against co-accused:** A statement by an accused person is evidence only against himself and not against his co-accused and should therefore not be considered by a jury in respect of the charge against the co-accused; it is particularly important to make this clear to the jury in a case where the statement was not made in the presence of the co-accused, he was not given a copy of it and he had no opportunity to cross-examine the maker of the statement (page 111, lines 30–34).

The appellant and five others were charged in the Supreme Court with murder.

The appellant took reprisals against the deceased who had been having a sexual relationship with the appellant's wife. He brought the deceased back to his house tied with rope, allegedly round his neck and chest so tightly that he could not speak. After the rope had been removed the appellant allegedly beat the deceased several times, but the evidence on the severity of the beating was conflicting. The pathologist's report following the deceased's death and a post-mortem examination was unhelpful, and at the trial neither the pathologist nor any other medical witness was called.

In his summing-up, the trial judge instructed the jury to consider the defences of the several accused separately, but went on to say that statements made by the accused persons incriminating their co-accused were admissible though they should be considered with the greatest caution since they were all accomplices. Three of the accused in fact made statements that the appellant tied a rope around the deceased's neck and chest. The statements were not made in his presence, no copy of them was supplied to him and he did not have the opportunity of cross-examining those who made them. Two of the accused were acquitted, two were found guilty of manslaughter, and the appellant was found guilty of murder and sentenced to death.

On appeal, the court considered whether there had been a misdirection on the question of the admissibility of the statements of the co-accused against the appellant.

Pratt for the appellant;
Fewry, Sol.-Gen., for the Crown.

DOVE-EDWIN, J.A., delivering the judgment of the court:

The appellant and five others were charged with the murder of one Konah Kamara. They were tried at Makeni by a judge sitting with a jury. The appellant was found guilty of murder on the unanimous verdict of the jury. Two of the other five were found not guilty of murder but guilty of manslaughter and the rest acquitted and discharged. Against his conviction for murder and sentence of death the appellant has appealed to this court.

The facts of the case put simply were these: The deceased was at one time or another living with the appellant and there arose between himself and the appellant's wife an association which culminated in his having sexual relations with her. It was alleged that the intercourse happened when the appellant's wife was actually expecting a baby. When the baby was born it fell ill almost immediately, and it was then that the appellant's wife confessed her misconduct to the appellant, who became angry and went in search of the deceased who had gone away from the village. The appellant found him and brought him back to their village and to his house, tied round the waist with rope. It was alleged that the appellant had tied the deceased round the neck and chest so tightly that he could not speak. The rope was later removed. The appellant beat him with a stick while he was tied, and this he is alleged to have done several times. A few days after this, the deceased died. There was a post-mortem but the result of this was not helpful. The body had to be exhumed, and although the post-mortem was said to be on March 30th, 1966, the deceased died on a date between March 1st, 1966 and March 21st, 1966 and the pathologist said in his evidence before the committing magistrate: "Decomposition of the body was extreme; skin, fat and muscles were decomposed. All bones present and in good condition. No injury found." The pathologist did not give evidence at the trial and only his deposition was used, so that the cause of death was unknown. The witnesses spoke of severe beatings but the appellant admitted only that he had whipped the deceased. He denied any severe beatings. There are four grounds of appeal, mainly against the learned judge's summing-up.

It is a matter for regret that in this case the pathologist was unable to give evidence although he was in Freetown and could very easily have appeared to assist the court. His opinion or that

of a qualified medical man could have been of immense help as to what could have caused the death of the deceased. On the evidence of the witnesses, however, the case was concluded without medical aid. In the court below and in this court the appellant was represented by counsel.

We have read the whole of the evidence and the summing-up, and we think that the appellant had cause for complaint against the verdict of guilty of murder and the sentence of death passed on him.

In his summing-up the learned judge said this to the jury:

> "I will put their several defences to you in turn and you are to examine these defences individually. I will also let you have them when you retire to consider your verdict, the several statements made by each of them respectively."

He then went on to say:

> "Then there are the several statements made by different accused, some containing statements tending to incriminate one or other of their co-accused. Though such statements are admissible in evidence, and you are entitled to consider them in arriving at your verdict, yet I must warn you, you must generally know that the accused are all accomplices and their respective statements should be taken with the greatest caution. If with this warning in mind you consider such statements trustworthy you may act upon them in arriving at your verdict."

We think that in dealing with the statement of each co-accused the learned judge, with respect, was in error. We think he should have made it clear to the jurors, particularly when he was going to give them the statements when they retired to consider their verdicts, that each accused's statement was only evidence against himself and no other person, particularly in this case where the statements were not made in the presence of the appellant, nor was he given a copy of them and did not have an opportunity of cross-examining any of the makers of the statements.

With this direction to the jury the judge went on to state what the case for the prosecution was. He said:

> "The grievous bodily harm the prosecution says was the tying of the rope round the neck and chest of the deceased in such a way as to render him incapable of speech, and when the rope was removed from the deceased's neck and chest he was

later severely beaten. . . . [I]f you find that the deceased was so tied . . . that is grievous bodily harm."

In the statements of the second accused, the fourth accused and the sixth accused there were allegations against the appellant of his tying a rope round the deceased's neck and chest. In the way the members of the jury were directed, these statements must have influenced their verdict and we think the appellant did not have a fair trial.

There are other instances of misdirection to which we need not refer as we feel the misdirection on the statements must be fatal to the conviction. The appeal is allowed.

Appeal allowed.

HASSAN *v.* HARDING

COURT OF APPEAL (Sir Samuel Bankole Jones, P., Dove-Edwin and Marcus-Jones, JJ. A.): April 24th, 1967
(Civil App. No. 21/67)

[1] **Civil Procedure—appeals—appeals on admissibility of evidence—reception of evidence of express malice without particulars pleaded not ground of appeal where malice in issue by plea of qualified privilege:** Where the plaintiff in a defamation action, in which malice has been put in issue by a plea of qualified privilege, seeks to adduce evidence of express malice without having delivered particulars of express malice, he should not be denied a hearing on the merits if that would entail hardship to him; he may be required to amend his pleadings on terms, and even without that, admission of the evidence will not entitle the defendant to succeed on appeal (page 116, line 20—page 117, line 21).

[2] **Civil Procedure—pleading—amendment of pleadings—amendment on terms to ensure hearing on merits of defamation action where particulars of express malice not pleaded:** See [1] above.

[3] **Civil Procedure—pleading—defective pleadings—hearing on merits—absence of particulars of express malice not to prevent hearing of defamation action on merits:** See [1] above.

[4] **Civil Procedure—pleading—particulars—express malice to defeat qualified privilege—absence of particulars not to prevent hearing on merits—reception of evidence of express malice in absence of particulars not ground of appeal:** See [1] above.