N'DOINJE, BULL, NGORKA and GBONDO *v.* REGINAM

COURT OF APPEAL (Sir Samuel Bankole Jones, P., Marke and Luke, Ag. JJ. A.): July 10th, 1967
(Cr. Apps. Nos. 49–51/66 and 1/67)

[1] **Criminal Law—misprision of felony—definition:** A person is guilty of the misdemeanour of misprision of felony if, knowing that a felony has been committed, he fails to disclose his knowledge to the police or a magistrate within a reasonable time and having a reasonable opportunity for so doing (page 208, lines 33–37; page 209, lines 21–27).

[2] **Criminal Law—misprision of felony—evidence—accused's fear of disclosing felony relevant:** In deciding whether a person accused of misprision of felony had reasonable time and opportunity for disclosing his knowledge of the felony, a court may take into consideration evidence that he was afraid to disclose it (page 209, lines 13–18).

[3] **Criminal Procedure—appeals—appeals against conviction—judge's summing-up for acquittal—no interference by appeal court if jury adequately directed on issues and facts:** A jury is not bound to return the verdict the judge invites them to return, and if they convict after being invited to acquit an appeal court will not interfere provided they were so directed as to be fully aware of the issues and in a position to deal with questions of fact (page 209, line 36—page 210, line 4).

[4] **Criminal Procedure—judge's summing-up—accomplices—judge to direct jury what accomplices are, not rule witness accomplice:** It is not for the judge to rule on the question whether a witness is an accomplice, but to direct the jury what kind of persons should be regarded as accomplices, and for the jury to decide whether the witness is in fact an accomplice (page 208, lines 17–21).

[5] **Criminal Procedure—judge's summing-up—jury need not return verdict judge invites them to:** See [3] above.

[6] **Criminal Procedure—verdict—jury need not return verdict judge invites them to:** See [3] above.

[7] **Evidence—accomplices—functions of court—judge to direct jury what accomplices are, jury to find whether witness is accomplice:** See [4] above.

[8] **Evidence—confessions—functions of court—judge to decide admissibility, jury to determine weight and value:** It is for the judge to rule upon the admissibility of a confession, after hearing any evidence in the absence of the jury; if the confession is admitted, no further question of its admissibility arises and it is for the jury then to determine what weight and value they should give to it, but not to decide upon its admissibility or dismiss it from their minds as inadmissible (page 207, line 28—page 208, line 8).

[9] **Evidence—confessions—trial of admissibility issue—procedure—evidence to be heard in absence of jury:** See [8] above.

[10] **Evidence—functions of court—accomplices—judge to direct jury what accomplices are, jury to find whether witness is accomplice:** See [4] above.

[11] **Evidence—functions of court—confessions—judge to decide admissibility, jury to determine weight and value:** See [8] above.

The appellants were brought before the Supreme Court, the first appellant charged with murder and the second, third and fourth appellants charged with misprision of felony, to wit the murder.

The deceased was a young child who was seized and carried into the bush, where she was killed and her body mutilated. A witness gave evidence that the first appellant sent him to the child's mother to offer to buy the child in order to kill her and make medicine. Another witness gave evidence that, on a date a few days after the murder, he was present when the appellants met and the fourth appellant acquired a parcel which, he later told the witness, contained parts of a murdered child which the first and third appellants had brought for the second appellant. The second appellant, who was present, said that if the witness revealed this they would put everything on his head. The witness revealed it three days later, after being arrested. He said he had not revealed it sooner because he was afraid. The first appellant made a statement confessing to the murder which was admitted in evidence without objection.

The Supreme Court (Harding, J.) directed the jury that if the statement was improperly obtained it was inadmissible and they should disregard it. The court also treated the two witnesses as accomplices and directed the jury accordingly. The summing-up was in favour of the appellants and practically told the jury to acquit each of them. The jury found the appellants guilty and the first appellant was sentenced to death and the second, third and fourth appellants to five years' imprisonment each.

The appellants all appealed against conviction, and the second, third and fourth appellants appealed against sentence. The first appellant contended that his statement was wrongly received in evidence. All the appellants contended that the trial court had erred in treating the witnesses as accomplices without directing the jury who was an accomplice in law. The Crown contended that the statement, having been received without objection, was

properly in evidence, and that the appellants had not been prejudiced by the trial court's having treated the witnesses as accomplices.

Cases referred to:

(1) *R.* v. *Attfield,* [1961] 1 W.L.R. 1135; [1961] 3 All E.R. 243, applied.

(2) *R.* v. *Francis* (1959), 43 Cr. App. R. 174; [1959] Crim. L.R. 594.

(3) *Sykes* v. *D.P.P.,* [1962] A.C. 528; [1961] 3 All E.R. 33, *dicta* of Lord Goddard, C.J. applied.

Short for the first and second appellants;
Michael for the third and fourth appellants;
Chenery, Senior Crown Counsel, for the Crown.

SIR SAMUEL BANKOLE JONES, P., delivering the judgment of the court:

Four men were convicted by the Supreme Court (Harding, J.) at the Bo November 1966 sessions, of the offences of murder and misprision of felony. They have appealed to this court against their respective convictions. The first appellant was charged with and convicted of murder, and the other appellants, namely the second, third and fourth, were each charged with and convicted of misprision of felony, to wit murder. These three have also each appealed against their sentences of five years' imprisonment.

The facts briefly were that a child of about two-and-a-half to three years of age, by name Fatmata Mapo, was caught by someone with the outward appearance of a baboon near a native farm at the village of Gbatema and taken to a nearby bush, where she was murdered. Parts of the child's body were removed, some after being dismembered; for example, a portion of the left ear was missing, the whole of the left eyeball was absent, and the left big toe was missing. There were also incised wounds on the front and left side of the chest, perforating it and breaking the fourth cartilage; on the left side of the abdomen with a loop of small intestine, etc., protruding through the wound; on both the right and left feet, etc. The medical evidence was to the effect that the child died as a result of the incised wounds, which the doctor stated could not have been inflicted by a baboon.

It would appear that one Foday Sami, the grandfather of the murdered child, had been sent by the first accused (so he said) to offer the sum of Le6 to the mother of the child to purchase

the child for the purpose of killing her and "making medicine." It is not at all quite clear when this happened—on the evidence it may have been the previous dry season or the day before the child was missing. The mother however rejected the offer. A few days after the murder, which was then unknown to the witness Edward Ngaoja, this witness obtained a lift in the car of the second accused, who was on his way to Bo from Moyamba. Edward Ngoaja asked to be dropped at Mano, his home town, a town midway between Moyamba and Bo. They started their journey at dusk. This was on November 24th, 1965. According to Edward Ngoaja, this was what happened:

"On our arrival at Njama junction he stopped the car. I asked him why he had stopped and he said that he had sent Gbondo —*i.e.*, the fourth accused—to his brothers-in-law, Ngorka and Akote—*i.e.*, the third and first accused. He drove along the Njama road for a short distance and stopped again at a village junction where he saw the fourth accused. The second accused stopped the car and alighted. I saw him and the fourth accused walk towards the direction of the village. After a while they returned together with the first and third accused. I saw the second accused take out a bottle of whisky and give it to the third accused, saying that it was their cold water. I observed that the fourth accused was holding a parcel; I did not observe the parcel at the time when I saw the second accused and himself walking towards the village. The first and third accused returned towards the direction of the village with the bottle of whisky. The second and fourth accused entered the car, after which the second accused drove towards Mano direction. On our way going I noticed that there was something smelling like rotten meat. I asked the fourth accused what he had in the parcel that was smelling like rotten meat, and he said that the parts of the child who had been killed at Gbatema are what the first and third accused had brought for the second accused. I asked them whether they were not afraid, and the second accused replied that one should not be afraid if he wants position. The second accused further said that if I should reveal to anyone whatever I had known and not let it stop here they would put everything on my head, and that what they will do to me will make me never again to reveal the affairs of anyone. I did not say a word; I was afraid. On arrival at Mano, the fourth accused handed over

the parcel to the second accused and I then alighted from the car. I heard the second accused telling the fourth accused that wherever he was going to send him to work he was going to be the supervisor. The second accused then drove off towards the direction of Bo. I parted company with the fourth accused and went to my house. On November 27th, 1965, I was arrested by the police and placed in the lock-up at Njama Town. On November 29th, 1965, the second, third and fourth accused and I were in custody when at meal-time the second accused told me that I should repudiate my statement and say that it was the officer-in-charge, Kamara, who had forced me to make it. He said that if I said this they would be released. One Albert Poli (identified) was the person who brought the meal and he was present and he heard when the second accused was telling me to repudiate my statement. I did not agree to the second accused's suggestion. I later told Kamara what the second accused had told me. I was finally released after the completion of investigation.

Cross-examined by Mr. Mahoney: I returned to Moyamba on November 25th, 1965 and I slept there. I returned to Mano on the 26th, and on the following day I was arrested in Mano. I saw the second accused on the 26th at Moyamba. I had heard whilst I was in Moyamba that a child had been killed. I knew that when the second accused spoke to me whilst I was in the car, he was referring to the child who had been killed, and I knew at once that they were implicated with the death of the child. I did not reveal to anyone what I had learnt until I was arrested by the police; the reason was because I was afraid. I knew that it was my duty to have reported."

All four accused were subsequently arrested and charged. The first accused made a statement confessing to the murder. This was what he said, among other things:

"I went alone, having with me my raffia handbag, the baboon dressing, the knife (*monyeyei*—means Okapi penknife). On arrival very close to Lassie's farm, I entered into the bush by the farm and wore the baboon dressing. I did not go straight to the farm-house, but went near it and arrived close to the farm-house. The mother was standing with her back turned against the position where the child was. The child

was outside sitting down in front of the farm-house. I then snatched the deceased and placed her under my left arm pit and went back to the direction where I came from and went into the bush. The deceased had on a small cotton frock. Sooner entering into the bush, I tore the frock by the fence which they made to catch animals (called *kokolie* in Mende) and killed her with the stab wound—I stabbed her on the right-hand side of her abdomen. I took the deceased's body under a young palm tree by a swamp and took all the parts from her person in haste, so that I might not be caught on the height. I put the parts in the bag and went across the swamp and I came to the main foot-path at Ngobehun Road. By then I have taken off the baboon dressing from my body and remained only the *gara* shirt and the khaki shorts I am now wearing. This is the *gara* shirt I wore on that day I killed the deceased Fatmata. On arrival near my farm, I hid the raffia bag in the bush and I called my wife Gandi Akote and told her to go back to Gbatema village."

This statement was admitted in evidence. The other accused persons, namely the second, third and fourth accused, each made a statement denying all knowledge of the murder.

Counsel for the first appellant complained that the learned trial judge was wrong in law to have admitted the alleged confession. We find it difficult to appreciate this contention in a case where the statement was tendered and admitted in evidence without any challenge coming from eminent counsel in the court below. It certainly cannot, we opine, be argued that the learned judge was wrong in law in admitting a confession not opposed. However, we find to our amazement the learned judge in his summing-up directing the jury as follows:

"It is the duty of the prosecution to satisfy you that the statement was not improperly obtained; if it was improperly obtained, that is, if it was obtained as a result of duress, pressure, undue influence, threats, or intimidation or the accused was coerced or was tricked into making it, then such a statement would not be admissible and you are to dismiss it entirely from your minds when considering the case for the prosecution against the accused."

With respect, this was a misdirection. The learned judge was telling the jury that they could do something which they had no power to do. The statement having once been admitted, there

was no question ever arising again of its admissibility. The law is, and has always been, that where an objection is raised as to the admissibility of an alleged confession it is for the judge to hear evidence in the absence of the jury and to rule upon that evidence as to whether or not the confession should be admitted: *R.* v. *Francis* (2). Once an alleged confession has been admitted in evidence, it is then the function of the jury to determine what weight and value they should place on it. It is however our view, that although the learned trial judge's misdirection was an error in law, it did not in any way whatever adversely affect the case of this appellant.

Another matter for complaint was that the learned trial judge treated Foday Samai and Edward Ngoaja as accomplices without directing the jury who an accomplice is in law. If he was correct in so treating them, we find that he gave the proper direction. He warned the jury several times that if they were satisfied with their evidence they could convict on their uncorroborated evidence. It would however have been better, we think, if he had directed the jury, firstly, what kind of persons should be regarded as accomplices, and then left it to them to determine whether these witnesses were in fact accomplices. Without giving any reasons, because we think it is unimportant for the purposes of this judgment, we do not think that either Foday Samai or Edward Ngoaja were accomplices to the offence of murder. Suffice it to say, that if the learned trial judge made a mistake, it was all in favour of this appellant. He appears to have bent himself over backwards to assist him. For example, his comment to the jury that all exhibits found in the first appellant's house, namely a blood-stained knife, a blood-stained *gara* shirt and a raffia bag, were evidentially valueless. It still however rested with the jury to exercise their unfettered judgment on the facts, which they did. This court therefore cannot interfere with their verdict of guilty of murder.

As regards the second, third and fourth appellants, we find that the learned trial judge fully and adequately directed the jury as to the ingredients necessary to constitute the offence of misprision of felony, namely, firstly, knowledge that a felony has been committed, and secondly, concealment of such knowledge. The learned trial judge in his summing-up had this to say about these appellants:

> "The only evidence or direct evidence which has been adduced is that of the witness Ngaoja, and, as I have explained before, he is an accomplice to the offence of misprision of felony."

We agree that Edward Ngaoja's evidence was the determining factor in deciding the guilt or otherwise of these appellants. The learned trial judge elected to treat him as an accomplice. But, with respect, it is doubtful whether he was right to have done so. It is true that Ngoaja knew about the commission of the murder only on November 24th, 1965 in the circumstances which have been narrated above. It is also true, as the judge pointed out, that he had opportunities of communicating his knowledge to the police or to someone in lawful authority and he failed to do so. Ngaoja said he knew that it was his duty to have done so, but he said he did not do so because he was afraid. Not until he was arrested on November 27th, 1965, that is, three days later, did he come out with his story. The law appears to be that in circumstances such as these, it is for the jury to determine whether the witness had a reasonable time and opportunity within which to perform the duty cast upon him by law. And we take it that in the course of determining this issue they would have taken into consideration the factor of fear which the witness said kept his mouth shut for three days. In the case of *Sykes* v. *D.P.P.* (3) Lord Goddard adverted to this point when he said, *inter alia* ([1962] A.C. at 569; [1961] 3 All E.R. at 45):

> "In my opinion, therefore, misprision of felony is today an indictable misdemeanour at common law, and a person is guilty of the crime if knowing that a felony has been committed he fails to disclose his knowledge to those responsible for the preservation of the peace, be they constables or justices, *within a reasonable time and having a reasonable opportunity for so doing. What is a reasonable time and opportunity is a question of fact for a jury. . . .*" [Emphasis supplied].

We are therefore of the opinion that the question whether the witness was an accomplice should have been left to the jury. However, the judge thought that he was, and he proceeded to give the proper direction and on such direction the jury convicted. There can therefore be no complaint on this score.

Throughout the entire summing-up, the learned trial judge summed up in favour of all the appellants. He practically told the jury to acquit each of them. But a jury is not bound to return the verdict a judge wants. In *R.* v. *Attfield* (1) the judge, at the close of the case for the prosecution, invited the jury to stop the case and acquit the accused, but the jury expressed the desire that the case should proceed and at the end of the trial they convicted. The Court of Appeal refused to interfere with the verdict because

even though the judge did not refer to the salient points of the evidence in his summing-up, yet after having been directed on the law the jury were fully aware of the issues which they had to decide and were in a position to deal with questions of fact.

We do not consider that the jury in the present case went wrong in any manner whatever. As to the second, third and fourth appellants, we are of the opinion that the sentences imposed were not inordinate and we therefore refuse to interfere with them. We would dismiss all the appeals.

Appeals dismissed.

WELLESLEY-COLE *v.* WELLESLEY-COLE

COURT OF APPEAL (Sir Samuel Bankole Jones, P., Marke and Luke, Ag. JJ. A.): July 12th, 1967
(Civil App. No. 10/67)

[1] **Civil Procedure—appeals—matters of fact—trial by judge alone—appellate court to differ only if plainly satisfied judge has not taken proper advantage of seeing and hearing witnesses:** An appellate court will be justified in finding that a judge sitting without a jury has come to a wrong conclusion on a question of fact only on the rarest occasions and when it is convinced by the plainest considerations, and before so finding the court, and each of its members, should be clearly satisfied that the judge's conclusion cannot be explained or justified by any advantage enjoyed by him from having seen and heard the witnesses, and that he was plainly wrong; but the court will be free to differ if it is satisfied that the judge has not taken proper advantage of his having seen and heard the witnesses, either because that unmistakably so appears from the evidence or because the judge's reasons are unsatisfactory (page 217, lines 21–36; page 218, lines 23–37).

[2] **Civil Procedure—appeals—matters of fact—trial by judge alone—judge's advantages from seeing and hearing witnesses particularly important in matrimonial causes, especially cruelty cases:** For an appellate court considering a finding of fact by a judge sitting without a jury, the advantages enjoyed by the judge from having seen and heard the witnesses are particularly important in a matrimonial cause, and even more so in a case of alleged cruelty (page 217, line 39—page 218; line 3).

[3] **Evidence—burden of proof—standard of proof—divorce—not as in criminal case but petitioner must satisfy court on more than preponderance of probabilities:** The standard of proof in a divorce case is that the court must be satisfied on the evidence that the case for