SANKOH v THE STATE

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COURT OF APPEAL FOR SIERRA LEONE, Criminal Appeal 9 of 1975, Hon Mr Justice OBR Tejan JSC, Hon Mrs Justice Ava Awunor-Renner JA, Hon Mr Justice SB Davies JA, 30 March 1976

[1] Criminal Law and Procedure – Summing up – Whether trial judge misdirected jury – Judge's comment that defendant's unsworn statement was a refusal to give evidence on oath was misleading – Explanation of "unlawful" and "malicious" to jury were misdirections – General guidelines on summing up

[2] Words and Phrases – "Unlawful" – "Malicious"

The appellant was convicted in the High Court for the offence of malicious damage contrary to s51 of the Malicious Damage Act 1861. He appealed against conviction on the ground that the verdict was unreasonable and unsafe and could not be sustained having regard to the evidence. The main issue was the summing up by the trial judge and whether or not he misdirected the jury.

Held, per Tejan JSC, allowing the appeal:

1. In circumstances where the defendant elected to make an unsworn statement from the dock, the trial judge's comment "that since he has refused to give evidence on oath" might have lead the jury to believe that the appellant had something to hide. It was not a matter of refusal. It is the privilege of an accused to elect either to give evidence or not to give evidence pursuant to s 192 of the Criminal Procedure Act 1965. He had the right to give evidence but no duty whatever to do so.
2. There is no set formula in summing-up on any particular topic, but a judge, in his summing-up, ought to assist a jury, particularly where the trial is such that the jury ought to have such assistance. The summing-up must convey to the jury with sufficient precision the points that it was necessary for them to consider before arriving at their verdict. *R v Clemens* (1898) 1 QBD applied.
3. The trial judge's explanation to the jury on what was meant by the word "unlawful" was a misdirection in law. It was incorrect to say that an act which is prohibited by law is a justifiable act.
4. The trial judge's attempt to explanation of the word "malicious" was also a misdirection in law. An act may be unjustifiable but the commission of the act can be done without malice. In all the circumstances of the case, the verdict of the jury was unsafe and should be set aside. *R v Cunningham* (1957) 41 Cr App R 155 applied.

Cases referred to
R v Clemens (1898) 1 QBD
R v Cooper [1968] 3 WLR 1225
R v Cunningham (1957) 41 Cr App R 155

Legislation referred to
Criminal Procedure Act 1965 s 192
Malicious Damage Act 1861 s 51

Other sources referred to
Archbold 36th Edition para 2257
Kenny's Criminal Law

Appeal
This was an appeal by Abdulai Sankoh against his conviction in the High Court of Sierra Leone for the offence of malicious damage contrary to s 51 of the Malicious Damage Act 1861. The facts appear sufficiently in the following judgment.

Mr A F Serry Kamal for the appellant.
MR A L Wilson for the respondent.

TEJAN JSC: On the 27th of December 1975, the appellant, Abdulai Sankoh, was convicted in the High Court for the offence of malicious damage contrary to s 51 of the Malicious Damage Act 1861 and was conditionally discharged and bound over to keep the peace for 12 months in the sum of Le100.00 in his own recognisance.

It is against this conviction that the appellant has appealed to this Court on the ground that:

"the verdict is unreasonable and unsafe and cannot be sustained having regard to the evidence".

The events which gave rise to the case can be briefly summarised as follows. On the 21st October 1972 at about 1:00 pm the complainant, Sallu Bangura, was working in his garden which was about 500 yards from his house at 126 City Road, Wellington when one Amadu Kamara (PW2) informed him that the appellant, a nephew-in-law of the said Sallu Bangura, had removed the door and window of a room. Sallu Bangura did not react to the information but continued his work in the garden until 5:00 pm when he went home, and saw his boxes outside and noticed that a door and window had been detached from the building. At 7:00 pm on the same day, he reported the matter to the Police. What is not clear about the evidence of Sallu Bangura is when did he institute this proceeding? In his evidence he said inter alia:

"I went to the police at 7 pm even though I came home at 5 pm. I cannot remember receiving a letter from the Solicitor of the accused in December, 1972. I got a letter from the Administrator-General and I went to see him. I consulted a lawyer, Carew, after this visit to the AG and I instituted these proceedings".

Frankly speaking, I do not know what to make out of this piece of evidence. It is not clear whether the visit to the AG and when the appellant removed the door and window took place on the same date. However, Sallu Bangura admitted that the appellant replaced the door and window with the help of the carpenter.

In his unsworn statement, the appellant explained that he obtained the consent of Sallu Bangura to repair the room of his deceased aunt who was the wife of the complainant so that the room would look better to the guests who were attending the "40 day ceremony". The appellant engaged one James Turay, a carpenter, to do the repairs, and informed the complainant that work would start on the next day which was a Saturday. On the Saturday the appellant and the carpenter went to the house. The complainant was not at home, but they started work on the door and window of the room. At about 5 pm the appellant left the carpenter, and on the next morning he saw the carpenter who informed him that Sallu Bangura stopped the work, and was told that the "40 day ceremony" was not going to be held in the house as Sallu Bangura had bought the house from the deceased.

James Turay, the carpenter gave evidence and corroborated the statement of the appellant in every essential point.

The facts in the case are simple and straightforward, but we are really worried about the summing-up by the learned trial judge. The appellant elected as of right to make an unsworn statement from the dock, and although a judge is perfectly right to comment on this aspect, his direction to the jury was:

> "I must warn you that he has a right to make statements from the dock, it is not tantamount or synonymous with guilt, it is not tantamount to guilt of the offence for which he is charged. But if he offers to say anything he can either say it from there or from the witness box; that should not exercise your mind that since he had refused to give evidence on oath therefore he must have committed the offence".

It is necessary to point out that it is the privilege of an accused to elect either to give evidence or not to give evidence. This privilege is granted to him by an Act of Parliament. He had the right to give evidence but he has no duty whatever to do so. But the use of the expression "that since he has refused to give evidence on oath" might well lead the jury to believe that the appellant had something to hide. It is not a matter of refusal. It is the privilege of the appellant given to him under our Criminal Procedure Act 1965 s 192.

It seems that the defence of the appellant is that, having obtained the consent of the first prosecution witness to change the door and window of the room, he had the right to remove the old door and window. In this regard the learned judge directed the jury thus:

> "Again, if in fact, this was an act which he did without the consent of the house owner or the occupier as counsel for the state has pointed out this is more a question of occupation, and if he gave his consent then he cannot turn round and say that this man did this wrongful act. And if he did not do it according to the agreed terms he cannot turn round and say this thing is done maliciously, it can only be maliciously done if he had no claim of right to do the repairs". Indeed, it is recognised that there is no set formula in summing-up on any particular topic, but a judge, in his summing-up, ought to assist a jury, particularly where the trial is such that the jury ought to have such assistance. The summing-up must convey to the jury with sufficient precision the points that it was necessary for them to consider before arriving at their verdict. Lord Russell of Killowen CJ had this to say in the case of *R v Clemens* (1898) 1 QBD at page 559:
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> > "It seems to me that the proper direction to give to a jury in such a case is that they should ask themselves this question: Did the defendants do what they did in the exercise of a supposed right? Adding that if, on the facts before them, the jury came to the conclusion that the defendants did more damage than they could reasonably suppose to be necessary for the assertion or protection of that right, then the jury may properly and ought to find the defendants guilty of malicious damage under s51".

Again, the learned trial judge went on to explain to the jury what was meant by the word "unlawful" in these words:

> "and unlawfully is something that is prevented by law, that is, you are justified in doing it and the prosecution must prove that in fact the act which they say was done, was in fact done, that is the destruction of the window and the door; and in that regard in order to prove the act which they have alleged, they must lead evidence that the door and the window were either wrenched from the frame or were broken up into pieces; you have heard evidence that in fact the window was made of wood and the door was also of wood; so that if they were wrenched from the frame or they were wrenched with the frame, or removed or broken up into pieces that is split up either into entire pieces or even a piece so broken up, then the act would have been committed".

With respect it is incorrect to say that an act which is prohibited by law is a justifiable act. This, of course, is what we understand the learned trial Judge to mean. The entire passage is in our opinion, misdirection in law.

In the learned judge's attempt to explain the word "malicious" he said as follows:

> " ... and in order that the prosecution should succeed they must prove that the conduct of the accused was not justifiable and also that in fact he did it intentionally".

Here again there is a material error in the summing-up. An act may be unjustifiable but the commission of the act can be done without malice. The trial judge went on to say:

> "maliciously in this sense does not mean wickedness or ill-will, it only means the intention to do an act and that act is done through recklessness in doing something whereby the consequences result, and disregarding whether in fact the end result comes out or not".

It seems to us that in his attempt to elucidate the word "malice" to the jury, the learned judge misunderstood the passage in *Archbold* 36th Edition para 2257, and in particular the quotation of *Kenny's Criminal Law* by Byrne J in *R v Cunningham* (1957) 41 Cr App R 155 at page 159 when he said:

> "In any statutory definition of a crime, malice must be taken not in the old vague sense of wickedness in general but as requiring either:
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> (1) an actual intention to do the particular kind of harm that in fact was done; or
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> (2) recklessness as to whether such harm should occur or not (ie, the accused has forseen that the particular kind of harm might be done and yet has gone on to take the risk of it. It is neither limited to nor does it indeed require any ill will towards the person injured ... we think this is an accurate statement of the law. It derives some support in *Pembleton's Case* (1874) LR 2 CCR 119. In our opinion the word "maliciously" in statutory crime postulates foresight of consequence".

There are other passages in the summing-up which in our view, are undoubtedly misdirections but we do not consider it necessary to deal with these in addition to those already dealt with. We have read the evidence very carefully, and it seems to us that this is a case where we are compelled to adopt the attitude of the English Criminal Court of Appeal in the case of *R v Cooper* [1968] 3 WLR 1225 when we have to ask ourselves a subjective question – whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has not been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it. We have given thought to the matter as to whether it is a case in which we ought to set aside the verdict of the jury, notwithstanding the fact that they had the advantages which we do not have. And after due consideration and under all the circumstances of the case, the verdict of the jury is unsafe and should be set aside. The appeal is therefore allowed ....

Reported by Anthony P Kinnear