CHALLEY & ORS v THE STATE

CA

COURT OF APPEAL FOR SIERRA LEONE, Criminal Appeal 12 of 1974, Hon Mrs Justice A V Awunor-Renner PJ, Hon Mr Justice S Beccles Davies JA, Hon Mr Justice S C E Warne JA, 3 June 1976

[1] Criminal Law and Procedure – Murder – Summing up – Judge entitled to express opinion on facts but issues of fact must be left to jury – Whether proper direction would have resulted in same verdict

The appellants were convicted of the murder of one Boi Sei, who went missing while she was fishing. The deceased's body was never found. There were allegations that the appellants had arranged for the deceased to be captured and murdered in order to obtain her body parts to prepare a certain type of medicine. The appellants were sentenced to death. The appellants appealed against conviction on several grounds:

(i) that the comments of the judge in his summing up about the 3rd appellant when she was told that the deceased was missing gravely prejudiced the appellants and was a misdirection;

(ii) that the judge's direction concerning the common design of the appellants in attacking the deceased was a misdirection on the evidence;

(iii) that the judge failed to put the case for the defence adequately and properly.

Held, per Awunor-Renner PJ, allowing the appeal:

1. A judge is entitled to express his opinion on the facts of the case, however strongly, provided he leaves the issues to the jury to determine. In this case, the judge was expressing his opinion though strongly but was not inviting the jury to form an adverse opinion of the appellants and quite clearly he left the issue of fact to the jury to determine on these particular points. *R v Gerard* (1948) 32 Cr App R 132 and *R v O'Donnell* (1917) 12 Cr App R 219 applied.

2. The absence of a corpus delicti was not material provided there was strong circumstantial evidence to prove that the deceased was dead. However, there was no evidence that the deceased died as a result of an attack on her by the appellants and no evidence that the appellants were anywhere near the scene when the deceased was alleged to have been dragged into the water. The judge's statement complained of in this respect was one which the jury may have attached some importance to and which could not clearly be erased from their minds. There was clearly no evidence to support the judge's statement, as the appellants were somewhere else at the time the deceased was dragged into the water. It could not be said with certainty that the jury if properly directed could have arrived at the same verdict. The appeal must therefore be allowed on the first count. *R v Cohen & Bateman* (1909) 2 Cr App R 197 and *R v Ellsom* 7 Cr App R 4 applied.

Cases referred to

R v Bangura [1968-1969] ALR (SL) 209
R v Chan Wai-Keng [1967] 1 All ER 948
R v Cohen & Bateman (1909) 2 Cr App R 197
R v Ellsom 7 Cr App R 4
R v Gerard (1948) 32 Cr App R 132
R v George Burgess 52 Cr App R 258
R v Naylor 23 Cr App R 177
R v O'Donnell (1917) 12 Cr App R 219

R v Peter Jones Moon 52 Cr App R 12
R v Prater [1960] 44 Cr App 83
R v Sallah 4 WACA 10
R v Williams Ovenell Walter A Cartwright Ltd 52 Cr App R 167

Legislation referred to
Laws of Sierra Leone (Cap 60) s 7(5)

Other sources referred to
Archbold 36th Edition at paras 565, 931, 932

Appeal
This was an appeal by Kain Challey, Pieh Maheteh and Yema Ketekie against convictions for murder and agreement to deal in a person contrary to s 7(5) of Cap 60 of the Laws of Sierra Leone. The facts appear sufficiently in the following judgment.

Dr A O Conteh & Mr T M Terry for the appellants.
Mr Bankole Thompson for the State.

AWUNOR-RENNER PJ: The appellants were convicted at the Moyamba High Court on Wednesday the 10th day of April 1974 for the following offences:

(1) murder and

(2) agreement to deal in person contrary to s7(5) of (Cap 60) of the Laws of Sierra Leone and sentenced to death on the 1st Count. No sentence was passed on the second count.

I will now try to set out the salient facts of the case as briefly as possible. According to the prosecution on or about the 23rd day of March, 1972, the deceased one Boi Sei was living at Moville Village in the same house as the 2nd and 3rd appellants. The 2nd appellant is the son of the 3rd appellant and the deceased Boi Sei was the grand- daughter of the 3rd appellant. According to one of the prosecution witnesses Ramatu Yeama and Boi Sampha who are inmates of the same house as the deceased and the 2nd and 3rd appellants, two strangers came to the house on a certain day to visit the 3rd appellant who cooked food for them before they went away. The 1st appellant was one of the strangers. On the following day Ramatu Yeama, Boi Sampha and Momowoe went to a fishing ground called Pampally to fish at the request or direction of the 3rd appellant. Ramatu Yeama said that whilst they were fishing she saw a submerged canoe in the water. She saw a hand come out of the canoe (kunkubay) and dragged the deceased Boi Sei into the water. She was never seen again and neither was the body of Boi Sei ever found. When the 3rd appellant was informed about what had happened by Boi Sampha and Ramatu Yeama, it is alleged that she did not say anything. Another prosecution witness Amidu Challey, son of the 1st appellant, who claimed that two strangers came to visit his father, the 1st appellant, and that 1st appellant asked him to escort them to the wharf on one occasion but that he refused as he did not know what they were about. His father he said had told him that he, the 1st appellant, was going to Moville for medicine, but did not tell him what sort of medicine it was. He also alleged that before Boi Sei went missing he had seen the two strangers and a third person in the bush with a pot in their midst.

The 1st appellant, he also claimed, used to visit the 2nd and 3rd appellants at Moville. The appellants also made various statements which were tendered in evidence by the police. This then is the gist of the prosecution's case against the appellants.

The appellants on the other hand, made statements from the dock in which they denied knowing anything about the matter, but their various statements, which were tendered in evidence by the prosecution, is a different matter.

The 1st appellant in his statement, Exhibit "A", denied making any offer to the 3rd appellant for the deceased. He claimed that he went to Moville Village on the 4th day of March 1972 and that it was then that he called at the house of the 3rd appellant where they settled a dispute about a canoe. In a second statement, Exhibit "G", he however admitted that he was a member of a cannibal society. In the same statement he admitted knowing about the offer of Le80.00 which had been made for the deceased to the 3rd appellant and they also made arrangements as to when the girl would be caught with their kunkubay along the river, but that he was not present in the village when the girl was caught. He alleged that he had gone to visit a friend of his at Dembu Village and only heard about the capture of the girl on his return. He further said that he did not know whether Boi Sei, the deceased, was alive or dead and that she may have been caught by some other people.

The second appellant on the other hand, also made statements, which were tendered in evidence by the police. In his statement, Exhibit "J" he alleged that the 1st appellant approached him and said that he liked the deceased. In fact he said that the 1st appellant approached him several times about the deceased and finally said that he wanted the body of the deceased to prepare a certain type of medicine, and that he told him that if anything should happen to the girl he would be held responsible. He said that on the 21st March, two men also came to enquire about the deceased. On the following day he said he went to a village called Mo-John, after that he went to another village called Manu where he spent the night with one Yeama Nao and that it was whilst he was there that he heard that the deceased was missing and had been drowned. He said it was he who explained everything to the Chief when he was arrested.

Again in another statement, Exhibit "H", the 2nd appellant added that he was at his house when his uncle one Abdul Rahman Bundu came to the house and asked his mother and himself to offer him Boi Sei, and he promised to give them the sum of Le80.00. He said he had wanted to explain to the police but that a certain ceremony had been performed on him and he was unable to talk.

The 3rd appellant also made statements which were tendered in evidence by the police. In Exhibit "B" in which she admitted that Kain Challey the 1st appellant had made an offer to her for Boi Sei to use her body to prepare juju. She said that she agreed to the offer. Later on she said that two men came to see her and that Boi Sei was later on caught along the river when she went to fish.

Again in another statement, Exhibit "H", she admitted that her brother one Abdul Bundu was the first person who approached her about the deceased. She agreed to offer the deceased for Le80.00 which she claimed was never given to her before the deceased was caught along the river.

A number of interesting points have been argued in this appeal and I now propose to deal with these grounds of appeal which in my view are the most substantial ones.

One of the grounds of appeal raised by counsel for the appellants was that the learned trial judge made unfair and prejudicial remarks in his summing-up on the conduct of the accused which gravely prejudiced their case. The first of the statements complained of read as follows:

> "Ramatu Yeama reported matter (that is the disappearance of the deceased) to the third accused and others. The 3rd accused did nothing about the matter but perhaps this is understandable. However the matter was reported to the Chief who organized a search party, he organized a search party which searched the creek but was unable to trace the body of Boi Sei who has since not been found".

The next statement of the judge, complained of also reads as follows:

"Further, the witness said she told the 3rd accused that they had caught Boi Sei but that the 3rd accused said nothing. Gentlemen of the jury put yourself in that position, your relative or more so your grandchild, you are informed that where the child went to fish something had happened to her and you remain so complacent and you did nothing, that is, provided you believe the evidence of PW1. To quote the witnesses words "she did not say a word".

The third statement complained of reads thus:

"These two strangers according to the witness went again to the 1st accused. The witness continues, the 1st accused then asked me to accompany the two strangers, again I refused. Do you blame him? He had to disobey his father".

Counsel for the respondent argued that the judge was entitled to take comments and that the comments complained of did not in anyway prejudice the accused. I must say at this stage that as regards the second statement complained of although the judge had commented on the silence of the 3rd appellant, and the 3rd appellant not doing anything when he was informed of what had happened to Boi Sei, he had ended up by saying provided you believe the evidence of PW1. Again in his summing-up the judge had directed the jury as follows:

"But I must remind you that you have to consider the entire evidence, both the case of the prosecution and the defence before you can say that the accused persons are not-guilty or that they are guilty".

Counsel for the appellant is inviting this court to say that the comments made by the judge in his summing-up about the 3rd appellant when she was told that Boi Sei the deceased was missing was a misdirection. In the case of *R v Gerard* (1948) 32 Cr App R 132 at page 134, where the appellant on being arrested said what I have to say I will say to the court and the trial judge in his summing-up commented to the effect that if the appellant was innocent it was somewhat curious that he had made that statement when he had not been charged. Humphrey J had this to say:

"It could be a misdirection only if it was an invitation to the jury to form an adverse opinion against the applicant because he did not then give an explanation".

Held: comment was proper and not a misdirection. Again in the case of *R v Naylor* 23 Cr App R 177, where the accused refused to say anything after he had been arrested and the judge had commented on this fact. In *Naylor's* case, the conviction was quashed. There are in my view a number of cases, some of which fall on one side of the line and some on the other and each case will depend entirely on the circumstances surrounding it. In *Archbold* 36th Edition at para 565 it is stated that a judge is entitled to express his opinion, however strongly, in a proper case provided he leaves the issues to the jury. See the case of *R v O'Donnell* (1917) 12 Cr App R 219 and at page 221 where the Lord Chief Justice said:

"A judge when directing a jury is clearly entitled to express his opinion on the facts of the case provided he leaves the issue of facts to the jury to determine. A judge obviously is not justified in directing a jury or using in the course of his summing-up, such language that leads them to think that he is directing them that they must find the facts in the way which he indicates".

In this case I feel that the judge was expressing his opinion though strongly and I do not think that he was inviting the jury to form an adverse opinion of the appellants and quite clearly he left the issue of fact to the jury to determine on these particular points.

The next ground of appeal raised by counsel for the appellants which this court ought to give consideration to was that the learned trial judge failed to direct the jury that, where a material witness may well have a purpose to serve in testifying, in this case PW1, it was desirable for the jury to look for corroboration in deciding the issue of guilt or innocence of the

accused and that when the learned judge talked about corroboration, he failed to indicate to the jury the type of evidence given that might amount to corroboration and in doing this might have led the jury to treat irrelevant matters as corroboration.

As a general rule there are a number of cases where corroboration is required by law or by statute. Counsel for the appellants argued that the category of cases for which corroboration is required has not been closed but has been extended to cover cases where a material witness may well have a purpose of his own to serve. In the case of *R v Prater* [1960] 44 Cr App 83 it was held that where a witness in a criminal case may be regarded as having some purpose of his own to serve whether he be a fellow prisoner or a witness for the prosecution, it is desirable that the judge should warn the jury of convicting on the witness' evidence unless it is corroborated, but if there be such clear and convincing evidence as satisfies the Court of Criminal Appeal that no miscarriage of justice has occurred by reason of the omission of the warning, the Court will not interfere.

The witness whose evidence that is being referred to by counsel for the appellants in this case is PW1 Ramatu Yeama. Who then was Ramatu Yeama? Ramatu Yeama lived in the house of the 2nd and 3rd appellants. To quote her evidence she said:

> "The 2nd and 3rd accused are not my relations. They took me there for the purpose of marriage. I was married to Pieh Moheteh at the time he was my husband but he is not now my husband, we severed marriage at the time Boi Sei was caught."

Assuming that I accept what counsel for the appellants states, her evidence could not need corroboration as far as the 1st appellant is concerned and in any case looking at her evidence on the whole and her past and present relationship with the 2nd and 3rd appellants at the time she was given evidence, I do not feel that the principle as laid down in *R v Prater* supra could be extended to cover her. Having come to this conclusion, I do not feel that it is incumbent on me to deal with the other matters raised in this particular ground of appeal.

Another ground of appeal raised by counsel for the appellants was that the learned trial judge misdirected the jury on the evidence and also confused the jury at page 124 lines 1-9 when he stated as follows. I quote:

> "If you are satisfied that she died as a result of the plan and by the attack on her by these accused persons then say that they are all guilty of the offence of murder as laid in the indictment. It does not matter who actually dragged the child into the water, if you are satisfied and feel sure that she was dragged into the water as a result of the execution of the common design of the accused persons, then they are all guilty."

At this stage I must ask myself the question where in the whole trial is there any evidence to support this direction by the learned trial judge, as stated by counsel for the appellants? There was no corpus delicti and he referred to the case of *R v Sallah* 4 WACA at page 10. I must however say that the absence of corpus delicti is not material even on the case relied on by counsel for the appellants provided there is strong circumstantial evidence to prove that the deceased is in fact dead. His other points however are quite substantial, there is no evidence that the deceased died as a result of the attack on her by the appellants. There is also no evidence whatsoever that the appellants were any where near the scene when Boi Sei was alleged to have been dragged into the water. All that was seen was a mysterious hand. In *Archibald* Thirty-Sixth Edition at page 339 paragraph 932 it is stated that misdirection as to the evidence to be of any avail to an appellant must be of such a nature and the circumstances of the case must be such that is reasonably probable that the jury would not have returned their verdict had there been no misdirection. The burden of establishing this lies upon the appellants not on the prosecution. See *R v Cohen & Bateman* (1909) 2 Cr App R 197 more so at page 207 where Channell J said I quote:

"A mistake of the judge as to fact or an omission to refer to some point in favour of the prisoner or an omission to refer to some point in favour of the prisoner is not however a wrong decision on a point of law but merely comes within the very wide words "any other ground" so that the appeal should be allowed according as to whether there is or there is not a miscarriage of justice. There is such a miscarriage of justice not only when the court comes to the conclusion that the verdict of guilty was wrong but also when it is of the opinion that the mistake of fact or omission on the part of the judge may reasonably be considered to have brought that verdict and when on the whole facts and with a correct direction the jury might fairly and reasonably have found the appellant not guilty. If however the Court comes to the conclusion in such a case on the whole of the facts and with a correct direction the only reasonable proper verdict would be one of guilty when there is no miscarriage of justice notwithstanding that the verdict actually given by the jury may have been due to some error of the judge."

In the case of *R v Ellsom* 7 Cr App R 4 a conviction was quashed because of a misdirection on the part of a judge that a statement of a witness contained particulars of grave importance to the issue based on mistaken assumption, that statement had been in the hands of the defence when this was not so in that case. Justice Darling said at p 11:

"We have to consider the effect on the Jury of all those mistakes. It is impossible to suppose that they had no effect in view of the observations repeated many times with emphasis and supported by reference to the supposed statements and to Fletcher's evidence that was a matter to which the jury must have attached the greatest importance."

I think that the statement complained of in this case is one which the jury may have attached some importance to and which could not clearly be erased from their minds. This statement I feel must have had some effect on their minds. There was clearly no evidence to support this as the appellants at the material time even on their statements tendered in evidence and upon which the prosecution is clearly relying on mentioned that they were somewhere else at the time the deceased was dragged into the water. The question now operating in my mind is whether the jury if properly directed could have arrived at the same verdict. I do not feel that with certainty that they could have. The appeal must therefore be allowed on the first count.

Counsel for the appellants also contended that the learned trial judge failed to put the case for the defence adequately and properly. Each of the accused persons made statements to the police which were tendered in evidence by the prosecution and also made statements from the dock. In both their statements tendered in evidence by the prosecution and also those made from the dock, none of the appellants admitted to being anywhere near the scene at the material time, in fact they all stated that they were somewhere also at the time thus raising an alibi. The fact that they had known about the arrangement to sell the deceased or that some people were after the deceased is not material at this point. No one knows or there is no evidence to show that the deceased had been caught by any of the people who had contacted the third appellant to sell the deceased to them. In fact even the prosecution witnesses could not say that the appellants were anywhere near the scene of the incident, so that quite clearly this should have been put to the jury. It is a well known principle of law that a defence no matter how weak should be left to the jury to decide upon. It is not enough I feel to merely read the statements of the accused and more so when a defence of an alibi is raised it is for the learned trial judge to direct the jury as the burden of proof required when such a defence is raised. Since this was not done I find it quite impossible to say what the jury would have done and I have no intention of speculating. Having come to this conclusion there is one other matter to which reference ought to be made and which was also one of the grounds of appeal argued by counsel for the appellants. Counsel for the appellants had argued that the learned trial judge had admitted certain exhibits, that is Exhibits "G", "H" and "N", confession statements of the appellants which were inadmissible as they had been taken in the form of questions and answers and that the learned trial judge having

admitted this evidence failed to direct the jury in his summing-up that before they could convict on these confessions they must be satisfied that they were voluntary and referred the court to the case of *R v Bangura* [1968-1969] ALR (SL) 209. Let me at once say here and now that there is no evidence in the whole report to support counsel's allegation that the statements had been taken down in the form of questions and answers. However for one moment let us assume that this was the case of *R v Chan Wai-Keng* a Privy Counsel decision reported in [1967] 1 All ER at page 948. In that case at the trial of an accused for murder, the evidence against the accused consisted of two written statements or confessions made by him to the police after caution. The admissibility of those was challenged and in the absence of the jury the trial judge held that they were admissible. Whether the statements were voluntary was again challenged. Subsequently, in the evidence given before the jury, the trial judge did not add to his direction on the onus of proof of the crime a further direction that the jury must be satisfied that the statements were voluntary and if not so satisfied should give no weight to them. It was held that the judge's direction to the jury was not open to objection and that the jury must be satisfied beyond reasonable doubt as to the voluntariness of the statements before given them consideration. The question of voluntariness was a matter for the judge and not the jury. In the latter cases of *R v Williams Ovenell Walter A Cartwright Ltd* 52 Cr App R 167 and *R v George Burgess* 52 Cr App R 258 the principle as laid down in *Chan Wai-Keng* was followed. It therefore stands to reason that counsel's submission on the duty of the judge to direct the jury as to the voluntariness of the statements of the appellants cannot be sustained.

It only remains now for me to deal with the grounds of appeal relating to the second count. The appellants' final ground of appeal was that the learned trial judge's direction to the jury on the law relating to the second count was so defective as to deprive the appellants of the protection of the law to which they were entitled in that

(1) he failed to state the ingredients necessary to constitute the offence charged,

(2) he erred in law when he stated that the prosecution need not adduce evidence of overt act in respect of the second count on the part of the accused persons.

I need not go into all the other points argued by counsel on this point. There is no doubt in my mind that the learned trial judge failed to assist the jury in directing them on this count and clearly misdirected them when he said in his summing-up, I quote:

> "The prosecution need not adduce evidence of overt act in respect of the second count on the part of each of the accused persons, all they are charged with is the agreement to execute the crime of murdering Boi Sei."

As stated above, this is no doubt a misdirection in law and the law on the point is quite clear. In *Archibald* Thirty-Sixth Edition at paragraph 931 it is stated as follows:

> "Where misdirection as to the law is established the conviction will be quashed unless the prosecution can show that on a right direction the jury would inevitably have come to the same conclusion."

This was not done. I am not saying that there is no evidence here or expressing the view that there was absolutely no evidence here regarding the second count which a jury properly directed might have come to the same conclusion had they been properly directed, but to quote the words of Edmund Davies LJ in the case of *R v Peter Jones Moon* 52 Cr App R 12 and more so at page 20. They were misdirected in a manner which is quite incurably defective. Accordingly the appeal on the second count is allowed. As stated earlier the appeal is allowed on both counts. Conviction quashed and the sentence of death is set aside.

Reported by Anthony P Kinnear and Victoria Jamina

OSMAN THOMAS SONS & BROS LTD v HASSAN

CA

COURT OF APPEAL FOR SIERRA LEONE, Civil Appeal 38 of 1976, Hon Mr. Justice M E A Cole PJ, Hon Mr Justice S T Navo JA, Hon Mr Justice M S Turay JA, 29 June 1976

[1] Contract – Breach of contract – Sale of goods – Failure by seller to present purchaser's cheque for deposit – Repudiation of contract by seller – Concerns about purchaser's ability to perform insufficient

[2] Contract – Breach of contract – Damages – Sale of goods – Basis for award of damages – What reasonable businessmen would contemplate as natural and probable consequences if contract broken

On 11 December 1975 the appellant and respondent concluded a contract for the sale of 700 mattresses to the respondent at Le38 each. The respondent by way of deposit gave the appellant a post-dated cheque for Le15,200 dated 24 December 1975. The cheque was neither presented on 24 December nor returned to the respondent. While retaining the respondent's cheque the appellant refused to carry out the terms of the original contract. The respondent sued the appellant for breach of contract and was awarded damages by Idogu J in the High Court on 3 December 1976. The appellant argued that it did not perform the contract because of the respondent's suspected inability to pay.

Held, per Turay JA, dismissing the appeal:

1. The repudiation of a contract by one of the parties before the time for performance does not of itself put an end to the contract. There must be two to a rescission though it discharges the other and entitles him at once to sue for a breach. A contract is a contract from the time it is made and not from the time that performance of it is due. *Hochester v De La Tour* (1853) 2 Ellis & Bl 678 applied.
2. The appellant failed to present the respondent's cheque on 24 December and did not provide a convincing reason for its failure to do this. It was not the function of the Court of Appeal to review the trial judge's findings of fact or to test or weigh evidence. If there was, as in this case, evidence upon which the court of trial could find as it did, the Court of Appeal would not interfere. There was ample evidence to justify the conclusion at which the trail judge arrived and there was no reason for interfering with his decision *Chief Kweku Serbeh v Ohene Kobina Karikari* (1938) 5 WACA 34 applied.
3. The assessment of damages for breach of contract in cases such as this was based on what reasonable businessmen must be taken to have contemplated as the natural and probable result if the contract should be broken. As reasonable businessmen, each must be taken to understand the ordinary practice and exigencies of the others' trade or business which need not generally be the subject of special discussion. In the instant case the possibility of the non-availability of manufactured mattresses in the country at the material time must have been present in the minds of the parties. The trial judge was well justified in reaching the conclusion that he did in relation to damages. *A/B Karlhamns Oljefabriker v Monarch Steamship Co* (1949) SC (HL) 1 applied.

Cases referred to

A/B Karlhamns Oljefabriker v Monarch Steamship Co (1949) SC (HL) 1
Chief Kweku Serbeh v Ohene Kobina Karikari (1938) 5 WACA 34
Frost v Knight (1872) LR 7 Ex 111