## BARRIE & ANOR v THE STATE

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**COURT OF APPEAL FOR SIERRA LEONE**, Criminal Appeal 8 of 1974, Hon Mrs Justice A V Awunor-Renner PJ, Hon Mr Justice S B Davies JA, Hon Mr Justice S C E Warne JA, 11 March 1976

**[1] Criminal Law and Procedure – Evidence – Wrongful admission of evidence – Whether murder conviction ought to be quashed – Whether evidence prejudiced defendant and affected minds of jury – Whether judge's direction adequate**

**[2] Criminal Law and Procedure – Defences – Alibi – Failure of judge to direct jury on meaning of defence and burden of proof – Judge had a duty to make proper direction on defence no matter how weak**

The appellants were convicted of murder and sentenced to death at the Bo High Court on 24 February 1974. In their defence, both appellants claimed that they were somewhere else at the time of the incident. The two main grounds of appeal related to the wrongful admission of evidence at trial and the judge's direction to the jury in relation to the appellants' defence of alibi.

First, the appellants argued that a statement given by the second appellant's landlord to police during investigations into the alleged offence was wrongly tendered into evidence at the trial by the prosecution. The landlord did not give evidence during the trial and when put into evidence the statement had not been objected to by the defence. Counsel for the appellants argued that this statement had been wrongfully admitted and that the judge misdirected the jury on it. Counsel for the State conceded that the statement had been wrongfully admitted but argued that for the convictions to be quashed the court must be of the opinion that the evidence so admitted can reasonably be said to have affected the minds of the jury to have come to their verdict.

Second, the appellants argued that the trial judge failed to put the case for the defence adequately to the jury and that although the judge explained all the general defences like provocation, self defence and fighting, he never explained the defence of alibi which both appellants had raised as their defence.

**Held, per Awunor-Renner PJ, allowing the appeal and quashing the convictions:**

1. Where it is established that evidence has been wrongfully admitted the court will quash the conviction unless it holds that the evidence so admitted could not reasonably be said to have affected the minds of the jury in arriving at their verdict and that they could or must inevitably have arrived at the same verdict if the evidence had not been admitted. In considering this question the most material matters are the nature of the evidence admitted and the direction with regard to it in the summing-up are. The landlord's statement should never have been admitted and contained matters which were prejudicial to the 2nd appellant as it gave the impression that he was not at home on the night of the incident and that he had run away. This piece of evidence may have influenced the jury adversely as regards the 2nd appellant and the judge's direction on this point was inadequate. This was not a proper case in which to apply the provisions of s58(2) of the Courts Act 1965. *R v Parker* (1960) 45 Cr App R 1, *R v Fisher* [1910] 1 KB 149 and *R v Westfall* (1912) 7 Cr App R 176 applied.

2. It was a well known principle of law that a judge in his summing-up is bound to put the case for the defence, however weak, to the jury. The judge should have explained to the

jury what an alibi was and further directed them on the burden of proof when such a defence is raised. When such defence is raised the jury cannot convict unless they definitely reject it. The judge should have treated the defence put forward by both appellants more seriously and directed the jury on this point more adequately than he did. In failing to do so a miscarriage of justice may well have occurred and therefore the appeal must be allowed also on this ground. *R v Dinnick* (1909) 3 Cr App R 77, *R v Kwabena Bio* XI WACA Reports 49 and *R v Thomas Finch* (1916) 12 Cr App R 77 applied.

**Cases referred to**
*R v Dinnick* (1909) 3 Cr App R 77
*R v Fisher* [1910] 1 KB 149
*R v Kwabena Bio* XI WACA Reports 49
*R v Parker* (1960) 45 Cr App R 1
*R v Thomas Finch* (1916) 12 Cr App R 77
*R v Westfall* (1912) 7 Cr App R 176
*Teper v R* [1952] AC 480

**Legislation referred to**
*Courts Act No 31 of 1965 s 58(2)*
*Criminal Procedure Act No 32 of 1965 ss 65, 190(2)*

**Other sources referred to**
*Archbold 36th Edition paragraph 928*

**Appeal**
This was an appeal by Mohamed Barrie and Amadu Barrie against conviction for murder and sentence to death at the Bo High Court on 24 February 1974 for the murder of one Lappia Bindi. The facts appear sufficiently in the following judgment.

*Dr A O Conteh and Mr T Terry for the appellants.*
*Mr Bankole Thompson for respondent.*

**AWUNOR-RENNER PJ:** The appellants were convicted and sentenced to death at the Bo High Court on the 24th February, 1974 for the murder of one Lappia Bindi. The appellants have now appealed against their conviction.

The prosecution's case briefly is as follows. On the night of the 20th May 1973, the deceased was at home with some women and so was one of the witnesses for the prosecution Francis Allie. Allie said he heard some people who were walking down the street talking .He later on saw them walking towards the house of the deceased. His house he claimed was 30 yards away from that of the deceased and the moon was shining that night so he could see clearly.

Not long after he heard gunshots and some women shouting in the house of the deceased. He claimed he stood by his window and saw two men enter the house of the deceased whilst the others were hurling stones at his house. Later on he heard the sound of gunshots again and the voice of the deceased exclaiming in Mende that he had been killed and a voice asking for money. He continued to narrate the conversation he heard between the deceased and the men in the house. At one stage he claimed he heard the deceased ask for him and he opened his door and took his sword to go out. Then he said the 1st appellant became abusive and pointed a pistol at him and also shot and killed his dog. The 2nd appellant was standing close by with a matchet. He threw a stone at the 1st appellant which hit him and the 1st appellant fell to the ground then got up and ran away. The 2nd appellant also ran away. When he went into the deceased's house

the deceased he said was covered with blood and he advised his people to take him to the hospital in Bo. Later on he collected some people and they went to look for the appellants. The 1st appellant was arrested in a bush by one Joseph Massaquoi. The 2nd appellant was later on arrested also. At the time he hit the 1st appellant before he ran away 1st appellant had dropped his torchlight and one of his shoes, which this witness alleged he was able to identify. Both appellants were subsequently pointed out at an identification parade.

The 1st appellant denied being at the scene. In his statement from the dock he claimed that he had gone to Menjena hospital to look for someone and was arrested when he was returning home. This was also what he more or less said in his statement, Exhibit "E" which was tendered in evidence by the prosecution.

The 2nd appellant also claimed to have been working in his shop at the material time in his statement from the dock. In his statement to the police Exhibit "G" however he claimed that he had gone to Freetown to buy nails and leather and that on his return he heard that a man had been killed at the village of Kpetema. He denied all the allegations made against him.

The appellants have appealed against their conviction on several grounds but we only propose to deal with the grounds, which in our opinion we think were substantial grounds. One such ground under which the appeal was based was that inadmissible evidence was admitted on behalf of the prosecution at the trial of the appellants. The evidence in this case was Exhibit "J" a statement taken from one George Ansumana the landlord of the 2nd appellant by the police during investigations into the alleged offence. Ansumana never gave evidence at all during the whole case. This statement although not objected to was tendered in evidence by the prosecution. Counsel for the appellants argued that this statement had been wrongfully admitted and that the judge's direction on it was woefully inadequate to the extent that it was tantamount to a misdirection.

The other substantial ground of appeal raised by counsel for the appellants was that the learned trial judge failed to put the case for the defence adequately to the jury and that although the learned trial judge explained all the other general defences like provocation, self defence and fighting which are applicable in cases of this nature to the jury, he never put forward the defence of alibi which both appellants had raised to the jury. Finally he said that the learned trial judge usurped the functions of the jury and directed the court's attention to several passages in the judge's summing-up.

The other grounds of appeal we do not feel we ought to bother with.

Counsel for the state more or less argued that most of the grounds of appeal were without merit. He claimed that the case for the defence was adequately put to the jury. He conceded that Exhibit "J" had been wrongfully admitted but for the conviction to be quashed the court must be of the opinion that the evidence so admitted can reasonably be said to have affected the minds of the jury to have come to their verdict. The matter contained in Exhibit "J" could not have affected their minds at all having regards to the nature of the direction given by the learned trial judge in his summing-up.

In a case where evidence has been wrongfully admitted the test to apply is laid down in *Archbold* 36th Edition at paragraph 928 as follows: – I quote:

> "Where it is established that evidence has been wrongfully admitted the court will quash the conviction unless it holds that the evidence so admitted could not reasonably be said to have affected the minds of the jury in arriving at their verdict and that they could or must inevitably have arrived at the same verdict if the evidence had not been admitted. In considering this question the nature of the evidence so admitted and the direction with regard to it in the summing-up are the most material matters."

In the case of *R v Parker* (1960) 45 Cr App R 1 the appellant had been charged with wounding his wife with intent to cause grievous bodily harm. At the trial the licensee of the public house where the incident took place gave evidence for the prosecution and before he could be stopped said: "she came in her face was all bleeding and she said he shot me, he said he would." The judge did not hear the remark and it seemed to counsel that the jury probably had not heard it. At the conclusion of the summing-up when the jury was about to retire a juror put a question to the judge which indicated that he had heard the whole of the above mentioned evidence. The judge did not discharge the jury but gave them a strong direction that they were not to attach any weight to the evidence of the licensee. It was held by Lord Justice Ashworth applying the test laid down by Lord Normand in the case of *Teper v R* [1952] AC 480 that the fair test in deciding whether the admissible evidence was so prejudicial and so likely to influence the jury that the matter would not be cured by the judge's direction was whether there was a probability that the improper admission of the evidence had turned the scale against the accused person.

Also in the case of *R v Fisher* [1910] 1 KB 149 a conviction was quashed where evidence was wrongfully admitted and it was felt that the evidence may have influenced the jury. Again in the case of *R v Westfall* (1912) 7 Cr App R 176, where evidence was wrongfully admitted of a prisoner's bad character which was greatly prejudicial to the defence the conviction was quashed.

Now let us look at Exhibit "J" and see what can be made of it. I have already stated what it was above but not how it came to be admitted in evidence nor what its contents were and the judge's direction on it, and finally what in my opinion would have been the effect on the jury and whether the provision of s 58(2) of the Courts Act No 31 of 1965 could properly be applied in this instance.

Exhibit "J" was tendered in evidence by PW6 Lamin Vandy a Police Corporal who said that when he was investigating the matter he checked with the landlord of the 2nd appellant who made a statement to him. He said he took down the statement on the 4th June 1973 he then produced this statement as Exhibit "J" and no objection was raised as to its production or as to it being tendered in evidence. I now propose to quote certain portions of Exhibit "J" which reads as follows:

> "On one Sunday morning the day of the Kpetema incident I was in my house as I am sick when one of my wives called Theresa informed me that Mohamed who was staying with Barrie has reported to her that his brother (Barrie) has not been seen since Saturday night before the Kpetema incident. I was at home for the whole Sunday up to the afternoon hours when Barrie came home. Barrie greeted me and I answered but I did not talk to him. I did not ask him about his whereabouts. On Monday night again Mohamed who was staying with Barrie told me that Barrie had removed all his property from the room and that his whereabouts was not known. I went into the room and observed that some of his belongings had been removed. Since then I did not see Barrie until the 29th May 1973."

Quite clearly this evidence should not have been admitted in the first place. The maker of Exhibit "J" George Ansumana never gave evidence in the whole case. This is also not the case where we could apply s 65 of the Criminal Procedure Act No 32 of 1965 or s 190(2) of the Criminal Procedure Act No 32 of 1965. Further more the whole statement Exhibit "J" is full of hearsay evidence. Under the circumstances one could quite rightly say that Exhibit "J" was wrongfully admitted.

As regards the judge's direction on Exhibit "J", this is contained in page 93 of the record. I quote from his summing-up:

"Mr Kebbie re-examined the witness (PW6) who said that he checked with the landlord of the 2nd accused who made a statement which was received in evidence and marked Exhibit "J" (here the Court Clerk reads the exhibits.) Gentlemen of the jury any part of the statement where the maker refers to somebody else should be disregarded by you because the maker is making a statement based on what he has been told by somebody."

In our view we feel that Exhibit "J" contained matters which were prejudicial to the 2nd appellant as it gives the impression that he was not at home on the night of the incident and that he had run away. Applying the principles laid down in the cases of *R v Parker, R v Fisher* and *R v Westfall*, referred to above, we feel that this bit of evidence may have influenced the jury adversely as regards the 2nd appellant and that the judge's inadequate direction on this point was of no help at all and therefore we do not feel that this is a proper case in which to apply the provisions of s 58(2) but would quash the conviction.

Counsel for the appellants had also contended that the learned trial judge failed to put the case for the defence adequately and sufficiently to the jury. The defence of both appellants he said was an alibi. Both appellants had claimed that they were somewhere else at the time of the incident. It is well known principle of law that a judge in his summing-up is bound to put the case for the defence however weak to the jury. See *R v Dinnick* (1909) 3 Cr App R 77, *R v Kwabena Bio* XI WACA Reports 49 and more so at page 50 where Chief Justice Harragin in his judgement said: "it cannot be reiterated so often by this court that a defence however stupid must be considered for what it is worth."

The defence of both appellant's is an alibi. The judge we feel should have explained to the jury what an alibi was and further directed them on the burden of proof when such a defence is raised. In fact when such defence is raised they cannot convict unless they definitely reject it. See *R v Thomas Finch* (1916) 12 Cr App R 77. In our opinion therefore we feel that the judge should have treated the defence put forward by both appellants more seriously and directed the jury on this point more adequately than he did and that in failing to do so a miscarriage of justice may well have occurred and this court has therefore come to the conclusion though reluctantly that the appeal must be allowed also on this ground.

As regards the other grounds of appeal we feel that since we have exhaustively dealt with the two above we do not think it necessary to consider the others. As stated above we also do not think that we could safely apply the provisions of s 58(2) of the Courts Act No 31 of 1965. The conviction of both appellants is therefore quashed and the appeal is allowed and the sentence set aside.

Reported by Anthony P Kinnear and Victoria Jamina