*Privy Council Appeal No.* 83 *of* 1932.

**Basil Ranger Lawrence** - - - - - - - *Appellant*

*v.*

**The King** - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF NIGERIA.

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REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH JULY, 1933.

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*Present at the Hearing*:

LORD ATKIN.
LORD THANKERTON.
SIR GEORGE LOWNDES.

[*Delivered by* LORD ATKIN.]

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This is an appeal in a criminal case by special leave from a judgment of the Full Court of the Supreme Court of Nigeria affirming on a case stated a conviction and sentence upon the appellant on a trial at the Special Assizes at Lagos before Berkeley J. and a special jury. After the hearing before their Board their Lordships announced that they would humbly advise His Majesty that the appeal should be allowed and the conviction set aside, and that they would give their reasons for their report later which they now proceed to do.

The appellant in November, 1931, was an officer in the Administrative Service of Nigeria of about seventeen years standing. He was at that time, and had been during the year 1931, District Officer in charge of the district of Ilorin in that Province, and was also in charge of the Ilorin Emir's Native Administration. On the 15th November, 1931, he left Ilorin on leave for England. In December he was arrested in England on a warrant in pursuance of the Fugitive Offenders Act charging him with having stolen £150 in two bags of silver, the property of the Nigerian Government. Eventually he was remanded in

this country in order to enable him to return voluntarily to Nigeria to meet the charges. On his return on the 29th February, 1932, he was charged before the Police Magistrate at Lagos both with the theft of the silver and with four other offences of stealing by cheques sums of £25, £35, £10 and £35 in May, June and October, 1931 and also of false accounting in respect of these cheques under Section 439 of the Criminal Code. On the 9th March he was committed for trial at the Assizes of Lagos. On the 18th March an information was filed by the Attorney General containing sixteen counts, being the charges on which the appellant was committed together with six additional charges of false accounting.

On the 29th March the trial began before Berkeley J. and a mixed special jury of Europeans and Natives. The trial occupied twelve days and resulted on the 9th April in the appellant being acquitted on the original charges of stealing the bags of silver, but convicted of the remaining charges. He was sentenced to three years imprisonment. Thereupon the jury were discharged and the Assizes closed. The Judge had been asked to state a case which he was prepared to do upon the points of law relied on being filed within three days. Meanwhile the attention of the learned judge appears to have been called to difficulties in preparing the warrant of commitment. The maximum sentence on the charge of false accounting is two years. On the application of the Solicitor General who conducted the prosecution the learned Judge in chambers, and in the absence of the accused, proceeded to draw up and record a revised sentence according to which on the counts for stealing the accused was to receive two years imprisonment ; on the counts for false accounting, one year's imprisonment ; on the first two counts the sentences were to be consecutive ; on all the other counts the sentences were to be concurrent with the first two. In accordance with this sentence the warrant of commitment upon which the accused has served part of the sentence was drawn up. The case stated by the learned Judge was heard by the Full Court on the 23rd, 25th and 26th April, and on the 29th April 1932 the Full Court delivered a considered judgment affirming the judgment below. Up to this date the accused had been on bail. He served part of his sentence until upon the order giving special leave to appeal being made he was released on bail on the 30th July, 1932 by order of the Acting Chief Justice. He has been on bail since that date.

To appreciate the nature of the charges made against the appellant it is necessary to state generally the ordinary course of administration at the relevant dates. The appellant's pay and allowances amounted to from £60 to £68 a month. His private account was kept at the Bank of British West Africa at Oshogbo. The account of the Native Administration of Ilorin was kept at the Colonial Bank at Ibadan. The appellant kept the cheque book of that account and alone had power to draw. There was

considerable expenditure in the course of the year in connection with the native police and prison equipment and works, and cheques would be drawn in payment of traders' accounts, and also to provide cash for administrative purposes. The appellant moreover, if he desired to remit to his own bank, would on occasions draw a cheque on the Native Administration account, at the same time paying to the cashier of the Native Administration office cash representing the amount. So far as the appellant was concerned apparently the only record made by him of the cheques, and the purpose for which they were drawn, was in the counterfoil of each cheque. The counterfoils were from time to time entered in the Native Administration cash book by the native cashier. It is unnecessary to emphasize the looseness of this system, but it was in existence when the appellant came into office, and has now been altered.

The charges upon which the appellant was convicted range themselves into two groups. The first group comprising counts 3–10 inclusive relate to cheques dated the 9th May, 1931, for £17 1*s.*; the 4th May, 1931, £25; the 18th August, 1931, £35; the 9th May, 1931, £35. In all the cases the cheques were drawn in favour of local tradesmen and the counterfoils respectively recorded "Green Fezzes" (which would be part of the prison warders' equipment), "Blue Drill," "Blue Cloth" and "Khaki Drill."

In respect of the first mentioned cheque there was evidence by the tradesman representative that the amount due for green fezzes was £7 1*s.*, and that he handed the balance of the cheque to the appellant personally. In respect of the cheques of the 4th May, £25, and the 18th August, £35, the evidence of the tradesmen who had received the cheques was that there were no sums owing to them at that time for "Blue Drill" and "Blue Cloth," that the cheques appeared to be for cash, but no evidence was given of any payments to the appellant. In respect of the cheque, the 9th May, £35, the evidence of the tradesman was that no amount was owing for "Khaki Drill" and that the cheque was exchanged for cash which the witness handed to the appellant himself. The appellant was unable to remember the actual transactions, and could only say that he denied receiving any cash. It is obvious that in the case of the first and fourth cheques there was evidence upon which a jury properly directed could find a verdict against the appellant of misappropriating £10 and £35, and necessarily, in consequence, of falsely accounting in the counterfoils.

The second group of charges is on counts 11 to 16 inclusive. They contain no charge of stealing, and it is significant that the Crown did not make it part of their case that in these cases any money had been stolen or lost. The charges relate to cases where in respect of two cheques of different dates the amount of the one has been entered in the counterfoil of the other. In all cases

the earlier cheque was a cheque in favour of the appellant's bank for £30 paid into his account, but the cheque is entered on the later counterfoil. The later cheque was for a tradesman's account and is entered on the earlier counterfoil. Neither counterfoil could have been filled up until the later date, and the appellant's case was that in the stress of work he had neglected to fill up the counterfoils at the time and had carelessly filled them up later from memory. If the appellant had no right to draw the cheque in his favour when he did the obvious suggestion is that he misappropriated the proceeds of the cheque at the time, concealed the transaction until he drew correctly the later cheque, where out of his own funds he made good to the cashier the amount he had previously stolen. This suggestion was directly made before their Lordships by counsel for the Crown. But at the trial this suggestion apparently was not made and no question was directed in cross-examination to the appellant to support it, nor was any evidence given that the cheques drawn by the appellant in favour of his bank were unauthorised. In these circumstances the appellant's defence of carelessness appears to have been worthy of close consideration, and it was especially important that the jury should have been adequately directed as to the meaning of "knowingly furnishing a false statement or return of money" which is the offence charged; and as to the importance of the absence of motive if the suggestion of misappropriation was not put forward by the Crown.

The grounds for appeal put forward by the appellant are :— 1. The absence of any adequate direction to the jury as to the issues they had to try. 2. The invalidity of the recorded sentence. It is evident from what has been said that the case was complicated. The issue of larceny had to be kept separate from that of knowingly furnishing a false statement; and in view of the lax system which existed in the Native Administration office, it was important to distinguish between carelessness and intentional wrongdoing. Moreover, the information consisted of at least three groups of charges; and each count in each group had to be separately considered. The appellant objected that the second and third groups ought not to have been joined with the two separate felonies of stealing the bags of silver charged in the first two counts. Their Lordships are inclined to agree, but they would not be prepared to interfere with the conviction on this ground. The appellant was in fact acquitted on these charges, and there is nothing to indicate that any substantial injustice was done by the error in procedure. The appellant, nevertheless, is entitled to say that the number of the various charges required careful separate consideration, and on this point he criticises the summing up. The learned Judge in his direction to the jury styles the various groups of counts as charges First, Second and Third, and in dealing with them though he points out that the facts in each pair of counts are

different, as far as their Lordships see he nowhere directs the jury that in respect of each charge the jury might convict on one pair of counts and acquit on the others. It has already been pointed out that on counts 5 and 7 any direct evidence of larceny was absent. Moreover, the learned Judge took a general verdict of the jury on first charge, second charge and third charge, and though the verdict appears to have been put in order by taking the assent of the jury to a verdict of "guilty on counts 3 to 16," it is difficult to resist the impression that the jury were to consider all the counts in the second charge all or none, and so as to the counts in the third charge. Inasmuch, however, as there would be evidence to support counts 3 and 4 and 9 and 10, it would not be in accordance with their Lordships' principles in dealing with criminal appeals to interfere with the conviction if the appeal rested upon this objection alone.

A more important objection is that throughout the Judge's charge he did not give the jury any direction at all as to the onus of proof, or that the accused was entitled to the benefit of a reasonable doubt. Their Lordships have no doubt that this was due to inadvertence, for when the learned Judge stated a case for the Full Court he states in it that though he has to rely on his memory he is able to say "that the jury were sufficiently instructed by me that the onus of proof rested on the prosecution and that the accused should be given the benefit of the doubt." Unfortunately the learned Judge's memory failed him, for there is not a word of either topic in the shorthand record of the summing up which was adopted in the Full Court as accurate. Indeed, so far as the charge dealt with the matter at all it seems to have suggested to the jury that the accused in two cases had the money, and that if he could not account for it the Crown had made out their case. The true direction would be that the onus was always on the Crown but that if the jury believed that the accused had the money, and were not satisfied that his reason for not accounting for it was true, there was evidence upon which they might if they chose find him guilty of stealing. Before the Full Court the Crown had to fall back upon the contention that as the defence had laboured the question of onus and counsel for the prosecution had, while dealing with two of the counts, said that the jury must give the accused the benefit of any reasonable doubt the defect in the summing up was cured. Their Lordships cannot accept this view in this case. It often happens that the issues have been so clearly stated and agreed to by counsel on both sides that the trial Judge and a Court of Appeal is satisfied that the jury can have been under no misapprehension on the point of onus, and that further comment by the Judge is unnecessary. But, speaking generally, it has to be remembered that it is an essential principle of our criminal law that a criminal charge has got to be established by the prosecution beyond reasonable doubt: and it is essential that the

tribunal of fact should understand this. Unless the Judge makes sure that the jury appreciate their duty in this respect his omission is as grave an error as active misdirection on the elements of the offence, and a verdict of guilty given by a jury who have not taken this fundamental principle into account is given in a case where the essential forms of justice have been disregarded. In such a case unless it can be predicated that properly directed the jury must have returned the same verdict a substantial miscarriage of justice appears to be established. In the present case it appears to their Lordships quite insufficient that a statement on this point should have been made by counsel for the defence. Jurors are apt to be suspicious of law as propounded by the defence ; they look to the Judge for authoritative statement of it, and in the present case there appears to be no sufficient ground for supposing that the jury had present to their minds the governing principle of our law as to onus of proof. Nor are their Lordships satisfied that in any case the jury must have returned a verdict of guilty. It is true that there was evidence against the accused, but a close scrutiny of the evidence fails to satisfy them that upon a proper direction the jury might not reasonably have come to the conclusion that the guilt of the accused was not established beyond a reasonable doubt.

But in addition to this vital defect in the procedure up to verdict there has to be considered the alteration and recording of the sentence in the absence of the accused. It is an essential principle of our criminal law that the trial of an indictable offence has to be conducted in the presence of the accused ; and for this purpose trial means the whole of the proceedings, including sentence. There is authority for saying that in cases of misdemeanour there may be special circumstances which permit a trial in the absence of the accused, but on trials for felony the rule is inviolable, unless possibly the violent conduct of the accused himself intended to make trial impossible renders it lawful to continue in his absence. The result is that sentence passed for felony in the absence of the accused is totally invalid. In the present case a double error has been made. In the first place the general sentence of three years' imprisonment is invalid, for it is applicable to each count, and for the offences charged in the counts for false accounting the maximum punishment is two years. If the matter rested here it would appear that upon case stated the Appeal Court under Section 171 of the Criminal Procedure Ordinance would have had power to reverse, affirm or amend the judgment. But unfortunately the learned Judge in Chambers in the absence of the accused and apparently at the request of the Solicitor-General varied the sentence on the record, by substituting on the record a sentence of one years imprisonment on the third count and two years' imprisonment on the fourth count to run consecutively, and corresponding sentences on the remaining counts

for false accounting and larceny all to run concurrently with the sentences on the counts 3 and 4 and with each other. The warrant of commitment recites this sentence as being that which the Sheriff is directed to carry into execution according to law. This is the sentence which it was necessary to appeal against. Their Lordships cannot agree with the Appeal Court that it was merely an elaboration of a previous sentence. It was a new and different sentence passed in circumstances in which the Judge had no possible jurisdiction to pass any sentence even if, which is doubtful, in point of time his power to pass sentence at all still continued. There appears to have been no sentence at all which could be amended, and their Lordships find themselves in accord with the decision on this point of the Court of Criminal Appeal in *Rex* v. *Hales* (17 Cr. Ap. R. 193 (1923)) where a reserved sentence was passed in the absence of the accused convicted in a different county, and the Court quashed the conviction. But without finally deciding whether the case could have been remitted to the Appeal Court for the sentence to be amended their Lordships are clearly of opinion that in the circumstances which they have detailed no such order should be made. In their opinion there has been disclosed, in the words of Lord Watson expressing the judgment of the Board in re *Dillet* 12 App. Cas. 459, a disregard of the form of legal justice by which substantial and grave injustice has been done, and they therefore, after the hearing, humbly advised His Majesty that the conviction and sentence should be set aside.

**In the Privy Council.**

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BASIL RANGER LAWRENCE

*v.*

THE KING,

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DELIVERED BY LORD ATKIN.

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