*Privy Council Appeal No. 57 of 1942*

**Otto George Gfeller** - - - - - - - - *Appellant*

*v.*

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

FROM

## THE WEST AFRICAN COURT OF APPEAL

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## JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH JUNE, 1943

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*Present at the Hearing:*

LORD MACMILLAN
LORD PORTER
LORD CLAUSON
SIR GEORGE RANKIN
SIR MADHAVAN NAIR

[*Delivered by* SIR GEORGE RANKIN]

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The appellant, Otto George Gfeller, is a Swiss national. At Lagos, in July, 1941, he was tried by the Supreme Court of Nigeria on a charge framed under Section 427 of the Criminal Code of Nigeria that he did on the 20th February, 1941, receive 156 bottles of Gordon's gin, knowing the same to have been stolen. He was convicted and sentenced to three years' imprisonment with hard labour. On appeal to the West African Court of Appeal his conviction was upheld but his sentence was reduced to eighteen months' imprisonment with hard labour. From this decision, dated 6th November, 1941, he appeals to His Majesty in Council by special leave. Their Lordships are informed that he has undergone the imprisonment to which he was sentenced. His learned counsel, Mr. Douglas, focussed a most careful and accurate review of the evidence by submitting, *first*, that there was no such evidence as could properly be left to the jury, and *secondly*, that the appellant's individual case had not been properly laid before the jury by the learned Judge in his summing up, with the result that the appellant did not have "the substance of fair trial." He maintained that his criticisms if made good would satisfy the conditions which in *Dillet's* case (L.R. 12 A.C. 459) and other cases have been laid down as controlling the administration of the prerogative in criminal appeals.

The trial was held before His Honour Judge Baker and a jury of twelve, of whom six were natives and six non-natives.

The appellant was the sixth out of seven accused. Against the first four, the prosecution case was that they participated in the theft of 18 cases of Gordon's gin from a certain Customs warehouse on or about the 17th February, 1941. In fact the full number of cases stolen seems to have been 21. Each case contained 12 bottles. A charge of receiving was also framed against these four, but the primary charge on the evidence was one of breaking and entering a warehouse and stealing therein contrary to sections 390 (4) (*c*) and 413 (1) of the Criminal Code. One of these four was a superintendent in charge of the sheds from which the goods were taken: he was accused No. 2 and was acquitted. The main thief, according to the prosecution case, was a lawyer's clerk, called Adebowale (accused No. 1), the third and fourth accused, Vasco Dagama

and Rufai Apena, being persons of the labouring class who were engaged in the removal of the goods. Those three persons were not only convicted by the jury of the charge of theft and warehouse breaking but also on the charge of receiving; and unfortunately, the trial Judge sentenced them upon both charges, imposing upon all three a sentence of four years' imprisonment with hard labour on the main charge and three years on the charge of receiving, these sentences to run concurrently. The West African Court of Appeal, holding that the charges were alternative charges, set aside the convictions on the main charge and maintained the convictions for receiving and the sentences of three years' imprisonment with hard labour.

Their Lordships have considered whether this somewhat unfortunate complication affects in any way the validity of the conviction of the appellant. They are of opinion that it does not.

Of the three accused who were charged only as receivers, one was a Syrian named Jaffar (accused No. 5), who was charged with receiving 14 cases (168 bottles) and another was Nemi Hassan Saidi (accused No. 7) who, like the appellant (accused No. 6), was charged with receiving 156 bottles. Nemi was a person who had arranged with Adebowale for Jaffar to sell the gin. The reason given by him for so doing was that Adebowale owed him some £112 and that he in turn owed £100 to his cousin Ali Saidi. Nemi was charged with receiving on the footing that he had " aided in disposing " of the gin within the meaning of the last words of Section 427 of the Criminal Code. The appellant had bought the goods from Jaffar, against whom there is no allegation that he had been in trouble before, though it is no part of the appellant's case that Jaffar was, in fact, acting innocently in the transaction now in question.

The appellant does not now seek to dispute either that he received 156 bottles of the gin on the 20th February, or that these were part of the goods stolen by accused numbers 1, 3 and 4 on the 17th February. His case is simply that he did not know that the gin which he received had been stolen. He says that the Crown called no evidence to prove his knowledge, and claims further that he has given an explanation consistent with innocence which may reasonably be true and that it is not for him to prove his innocence. It is conceded by the Crown's case on this appeal that " the evidence did not in any way implicate the appellant with the theft of the 21 cases or with the receiving by Jaffar of the 168 bottles nor did it show any association between the appellant and the convicted persons other than Jaffar."

In these circumstances, their Lordships think proper to confine their references to the evidence to those matters in which the appellant took part or which were plainly within his knowledge. His wife had an interest in and was manageress of the Grand Hotel. He assisted her in the buying of goods and spirits which for some time before February, 1941, had been difficult to procure, since the war had caused a shortage in supplies. His case was in outline as follows: Some six months or more before the transaction now impugned Jaffar had been introduced to him as a person who could get supplies of alcohol and provisions; and he gave Jaffar many orders which were fulfilled from time to time. He believed that Jaffar was getting supplies from various shops and stores. Jaffar, when he had got the quantity required, brought the goods to the hotel. On the 19th February Jaffar had come to him at the hotel and said that he could obtain a large quantity of gin and asked fifteen shillings a bottle; he had agreed to take it, or about 150 bottles of it, for fourteen shillings a bottle, plus sixpence per bottle as Jaffar's commission. One hundred and fifty-six bottles of gin were brought to the hotel on the 20th in a taxi-cab by Jaffar at a time when the appellant was absent. They were not in cases, but loose; they were carried into the hotel by using a petrol box; they were put into a room or store called the " fancy shop " and a receipt for 156 bottles was given by the hotel's clerk. Later in the day the appellant gave Jaffar two cheques on his own account at Barclays Bank—one an " order " cheque for £109 4s. 0d. made out at Jaffar's request in the name of Ali Saidi as payee; the other in the form " pay bearer three pounds eighteen shillings " being for Jaffar's commission. The appellant's case is that he did not know Nemi Saidi, that Ali Saidi's name was given

to him by Jaffar at the time of making out the cheque. He told the trial court in his statement from the dock that he did not remember asking Jaffar where he had obtained the gin. Jaffar, who gave evidence on his own behalf, deposed that he did not tell the appellant from whom he got the gin. It is not quite clear on Jaffar's deposition whether he mentioned the name of Nemi to the appellant: but Jaffar's story is that he did not at the first interview with the appellant on 19th February accept the figure of 14 shillings plus sixpence commission, but said that he would have to get the seller to agree to it; and that if the seller agreed, he, Jaffar, would bring the gin. Delivery of the gin from the taxi-cab was made openly in the day-time and there is no suggestion that the " fancy shop " was a place of concealment. Other details of the transaction might be mentioned, e.g. the counterfoil of the cheque to Ali Saidi had been torn out of the cheque book; Jaffar had soon afterwards sold to a prosecution witness Sarrough a dozen bottles of the same gin saying that he had sold plenty gin to the Grand Hotel for 14s. 6d., that he wanted to use the money and that this was why he was selling at 14 shillings. These and other details when examined do not however appear significant to their Lordships, who regard them as immaterial since they have little or no effect either to strengthen or to negative any adverse inference as to the appellant's state of mind. His statement from the dock was consistent in all material respects with what he had told the police when first challenged on the 1st of March but he did not elect to give evidence.

In considering the appellant's conduct from the standpoint of an issue as to guilty knowledge two important factors are: *first*, the price which an honest seller possessed of some 150 bottles of Gordon's gin would expect to obtain for it at the time in Lagos; *second*, the previous purchases made by the appellant from or through Jaffar—whether in point of quantity and character these were comparable to the sale now in question.

The price at which Gordon's gin when available could have been bought by retail in the local shops in February, 1941, was proved in their Lordships view to be 16s. per bottle and for an hotel keeper, the chance to buy 156 bottles at 14 shillings, plus sixpence commission to Jaffar, was an exceptional opportunity, but the price was not so very low as to suggest of itself that the goods were stolen goods.

The appellant's previous transactions with Jaffar included no purchases of gin and no purchases at all similar in quantity to that now impugned. The point is not that the hotel would have no need for so much gin: on the contrary, it might be very prudent to lay in all the gin it could get. The question is rather whether it was in keeping with what the appellant knew of Jaffar that he should have so much gin on offer at a price definitely low. The appellant's description in Court of the beginning of the present transaction was that " Jaffar came to the hotel and said he could obtain a large quantity of gin and he asked 15 shillings a bottle." Jaffar's evidence included two statements as follows: " I have been supplying Gfeller with whisky and provisions. I used to go to Grand Hotel and ask them what they wanted, then I went round the town and bought them." " Originally I bought in bottles one or two at a time and sold to Gfeller. I got liquor cheaper from the firms."

The question whether there was such evidence of the offence charged as made it proper to leave the case against the appellant to the jury may be asked either on the basis of the prosecution evidence alone, or on that evidence coupled with the appellant's statement from the dock, or upon the whole of the evidence as it stood at the end of the trial. As the appellant's account of his previous transactions with Jaffar and of this transaction as given to the police had been laid before the Court by the prosecution evidence such distinctions are of no materiality from the standpoint of the Board. For the purposes of such a question the appellant cannot rely on the evidence of Jaffar: indeed he could hardly expect the jury to put much faith in Jaffar as a witness. On the other hand, there is no question here of a case against the appellant being made out by Jaffar's evidence: indeed Jaffar's evidence for what it was worth supported the appellant's defence.

The learned judge dealt with the charges of receiving on the basis of the law laid down in the well known case of *Abramavitch* (1914) 84 L.J.K.B. 396 11 Crim. App. Rep. 1. His note states that he read the judgment in that case to the jury and told them:—

> " that upon the prosecution establishing that the accused were in possession of goods recently stolen they may in the absence of any explanation by the accused of the way in which the goods came into their possession which might reasonably be true find him guilty, but that if an explanation were given which the jury think might reasonably be true, and which is consistent with innocence although they were not convinced of its truth the prisoners were entitled to be acquitted inasmuch as the prosecution would have failed to discharge the duty cast upon it of satisfying the jury beyond reasonable doubt of the guilt of the accused."

Their Lordships agree that this correctly states the law applicable to the appellant. What then was his position? On the 20th February, 1941, though gin was in short supply he was in possession of 156 loose bottles part of some 21 cases stolen from the Customs shed on the 17th, the bottles having been delivered to the hotel from a taxi-cab by a person from whom he had previously obtained alcohol and provisions—not so far as appears in any similar quantity but collected in small quantities from various shops and stores. He had paid 14 shillings per bottle as price and sixpence per bottle as commission. When challenged he had professed to have made no inquiry as to the source of the supply or the immediate supplier.

In this summary every single fact might turn out to be free from suspicion, but if it can be regarded as a broad statement of the main facts the appellant had something to explain. The question must then be whether the explanation given was such that the learned judge ought to have directed himself or the jury to the effect that while they might or might not think it proved, they were obliged to hold that it might reasonably be true and in this limited sense to accept it? Their Lordships are unable so to hold. They think that it was open to the jury to reject as untrue the story that the appellant asked Jaffar nothing and was told nothing about the person from whom Jaffar got so substantial a quantity of gin. The appellant did not have to prove his story but if his story broke down the jury might convict. In other words the jury might think that the explanation given was one which could not reasonably be true, attributing a reticence or an incuriosity or a guilelessness to the appellant beyond anything that could fairly be supposed. The verdict must in view of the summing up be taken in this sense. Whether it was right, may depend in some measure on the habits of the people and the conditions of life in Lagos at the time; or on the mentality of the appellant—whether he was shrewd or dull, quick or slow witted, sharp or unsuspecting. These matters are typical of the considerations which a jury may be taken to appreciate, but the existence of a case to go to the jury did not depend upon them. So too the appellant's omission to go into the witness-box did not make the case against him: whether he elected or refused to give evidence he took a certain risk.

The second submission made for the appellant invites their Lordships to interfere on the ground of defects in the summing up. These it is said can be brought within the requirement stated by Lord Sumner delivering the Board's judgment in *Ibrahim* v. *The King* [1914] A.C. 599 at 615.

> " Misdirection as such, even irregularity as such, will not suffice . . . There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law . . ."

The summing up is open to no complaint as regards the definition of the offences charged and the notes of the evidence are particularly good and clear. The learned judge set forth correctly, as has been shown, the rule of law which the case of *Abramavitch* (*supra*) has settled. Unfortunately the judge's own note is the only record of the summing up there being no provision for a shorthand note of the proceedings in the trial Court. The note concludes:

"Then summarise the evidence reading the record of the principal witnesses' evidence and again warn them that the accused must be given the benefit of any reasonable doubt they might have."

On this it is complained that there is nothing to show that in the summing up attention was paid to the separate individual case of each of the three persons accused only of receiving; that Jaffar and Nemi were both shown to have been in touch with the actual thieves whereas the appellant on the evidence had been in touch with no one except Jaffar; and that the jury should have been cautioned lest the appellant should suffer from being tried jointly with the others. That the appellant's case required separate consideration is indeed obvious, and if it can really be shown that it was not laid before the jury as a case separate from that of Nemi or Jaffar the appellant has indeed serious grounds of complaint. But their Lordships see no ground for imputing this to the learned judge, who naturally enough, having no shorthand writer, made a note of his directions in point of law and left it to be taken that his disquisition upon the facts carried out the principles which he had laid down. They cannot think that any probability attaches to the suggestion that a juryman could have supposed, after listening to the evidence, that the appellant was shown to have been in touch with any of the thieves or that guilty knowledge was imputed to him on that basis. When the judge's note says "then summarise the evidence reading the record of the principal witnesses' evidence," this need hardly be taken to mean that extracts from the evidence were read without any attempt to show their bearing. Substantially, the sole issue as regards the appellant was the issue as to knowledge, and the jury had been told that the onus of proving this always remains upon the prosecution and that if they thought that his explanation of his possession of the goods might reasonably be true they should acquit. They had heard the explanation both as given to the police, as stated by himself from the dock and as supported in substance by Jaffar's evidence. Mr. Wells Palmer the appellant's counsel had made a separate address to the jury on his behalf. The original and amended grounds of appeal filed for the appellant in the West African Court of Appeal do not in their Lordships' view reflect any grievance that the appellant's individual case on the facts had not been put before the jury nor do they find from the judgment in appeal that this particular complaint was made at the time. They do find that for the appellant, for Jaffar and for Nemi it was argued that there was no evidence at all of guilty knowledge and that the Court of Appeal disposed of this point as against all three by a few summary sentences without discriminating between the three. This however throws no light on the judge's charge to the jury and in their Lordships' view there is on the materials before the Board no sufficient basis for the suggestion that his clear and correct directions as to the law were in danger of being misapplied to the facts alleged against the appellant so as to deprive the appellant of the substance of fair trial.

> "Their Lordships have repeated *ad nauseam* the statement that 'they do not sit as a Court of Criminal Appeal; for them to interfere with a criminal sentence there must be something so irregular or so outrageous as to shake the very basis of justice' (*per* Lord Dunedin in *Mohindar Singh* v. *The King Emperor* (1932) L.R. 59 I.A. 233 at 235. *Cf. Muhammad Nawaz* v. *The King Emperor* (1941) L.R. 68 I.A. 126 at 129)."

Their Lordships will humbly advise His Majesty that this appeal should be dismissed.

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# In the Privy Council

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OTTO GEORGE GFELLER

*v.*

THE KING

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DELIVERED BY SIR GEORGE RANKIN

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