POLICE *v.* LEU HOP (ALIAS LOW LEU) & ORS.

[Appellate Jurisdiction (Jenkins, Acting C.J.) October 6, 1939.]

Police traps—whether accomplices so as to require corroboration.

The police supplied a £1 note to an informer and went with him to the house of the defendants, who were suspected of supplying liquor to natives. The informer purchased liquor from the defendants, who were thereupon arrested by the police who had watched the transaction. Having heard the evidence for the prosecution a Magistrate dismissed the charge on the ground that all the prosecution witnesses were accomplices and there was no corroboration of their evidence.

HELD.—The evidence of the police and of the informer is not in law evidence of accomplices and does not require corroboration.

Cases referred to :—

R. v. Bickley [1909] 2 Cr. Ap. 53.
R. v. Mullins [1848] 3 Cox. C.C. 526.
R. v. Heuser [1910] 6 Cr. Ap. 76.
R. v. Chandler [1913] I.K.B. 125.

APPEAL by the prosecution by way of case stated from dismissal of two charges. The facts appear from the judgment.

The Attorney-General, *T. T. Russell*, for the appellant.

Respondents unrepresented.

JENKINS, Acting C.J.—This is a case stated under s. 15 of the Appeals Ordinance 1934[1] by the Court of Summary Jurisdiction sitting at Nadi on the 15th November, 1938. Two informations were preferred by the police against one Leu Hop (alias Low Leu) for that he, on the 10th day of November, 1938, did supply liquor to a native contrary to law and for that he, on the same date, did sell liquor without a licence contrary to law. A similar case was heard on the 18th November, 1938, at Lautoka against Fong Ping.

The learned Resident Magistrate heard the evidence led by the police which shortly was as follows :—

The police supplied a £1 note to an informer and went with him to the house of the defendant who was suspected of selling liquor to natives contrary to law. The police watched the transaction and then arrested the defendant.

Having heard the evidence for the prosecution the learned Resident Magistrate came to the conclusion that the police witnesses were all accomplices and that as there was no corroboration of their evidence he entered a verdict of " not guilty " without calling upon the defence.

The learned Resident Magistrate states in the case stated drawn up by him, p. 5 :—

> " As I have no law library I have not been able to examine a " single case dealing with accomplices ; and I had to arrive at my " decision upon general principles ".

[1] *Repealed. Vide Criminal Procedure Code.*

It is regrettable that authorities are not at present available at Lautoka, but this matter is being remedied and a law library is in process of being obtained.

The point to be decided in this case is the following :—

Were the police and their spy accomplices ? The learned Resident Magistrate also puts the question :—

> " Do they become accomplices if they not only assent but provide the means necessary to " enable the crime to be committed and then stand around and watch their own spy com- " mitting an act expressly made criminal *per se* by Statute ?"

I have heard the arguments of the learned Attorney-General, but the respondents have not been represented by counsel at this appeal. They were represented by counsel at the hearings in the Courts below and notice of hearing of this appeal has been given. The first authority cited to me by the learned Attorney-General is that on p. 618 of *Taylor on Evidence*, 12th edition, Vol. I. Paragraph 971 reads as follows :—

> " To one class of persons, apparently accomplices, the rule " requiring corroborative evidence does not apply, namely, persons " who have entered into communication with conspirators, but " who, in consequence of either a subsequent repentance, or an " original determination to frustrate the enterprise, have disclosed " the conspiracy to the public authorities, under whose direction " they continue to act with their guilty confederates till the matter " can be so far matured as to insure their conviction. The early " disclosure is considered as binding the party to his duty and, " though a great deal of disfavour may attach to him for the part " he has acted as an informer, yet his case is not treated as that " of an accomplice."

It is submitted that in the case now before the Court there was an original determination to frustrate the enterprise.

The second authority by the learned Attorney-General is on p. 460 of *Kenny's Outlines of Criminal Law* :—

> " Corroboration by another accomplice, or even by several " accomplices, does not suffice. But a spy, since his complicity " extends only to the *actus reus* and not to the *mens rea*, is not " truly an accomplice, and so does not need corroboration."

Two authorities are cited for that statement of the law, namely, *Rex v. Bickley* [1909], 2 Cr. App. R. 53, and *Rex v. Mullins* [1848] 3 Cox. 526, and Kenny adds in a footnote :—

> " Yet a man who has thus taken falsehood as his trade must be " peculiarly untrustworthy."

In *Rex v. Mullins* the headnote says, *inter alia*,

> " A person employed by Government to mix with conspirators, " and pretend to aid their designs for the purpose of betraying " them, does not require corroboration as an accomplice."

and Mr. Justice Maule in summing up on p. 530 says :—

> " Now as to spies, I know of no rule of law which declares that " their evidence requires confirmation."

In *Rex v. Bickley* the headnote says :—

"The evidence of a police spy or "agent provocateur" is not "that of an accomplice and does not require corroboration."

Counsel for the accused in that case in argument in the Court of Appeal said :—

"She, that is the spy, ought to be regarded at least with as much "suspicion as an accomplice. *Connor v. People*, 36 Am. State "Rep at 300-1. (Darling J. referred to *Mullins* (1848, 3 Cox. "C.C. 526.) That case is distinguishable, for there the offence, "the conspiracy, had been already committed independently of "the government spy; while here it is the police agent who "herself suggested, instigated and created the offence."

Mr. Justice Walton in giving the judgment of the Court of Appeal said :—

"In the first place, the fact that the woman was a police spy "in no way invalidates her evidence, nor must her evidence be "regarded as that of an accomplice. As the law stands at present, "it seems established that a police spy does not need corroboration. "(Mullins above). The American case quoted has no bearing "upon the question at all, and the Court's remarks there were "*obiter*. Further, the jury here were told that the women was a "policy spy."

A further case cited to me for the appellant is *Rex v. Heuser*, 6 Cr. App. R. 76. In giving the judgment of the Court of Appeal in that case Mr. Justice Avory said :—

"In this case we think there is no ground for the contention that "the police officers were accomplices, and therefore required corro- "ration. Appellant has the benefit at the trial of the ruling that "the witness Proctor did require corroboration. Speaking for "myself, I am not satisfied at all that that was so. But even "assuming it in the appellant's favour, there is no ground for "saying that when the police have information that an offence is "likely to be committed, and go to the place for the purpose of "detecting it, they thereby become accomplices merely because "they assent to the informer going there too, for the purpose of "entrapping the offender".

It is clear, therefore, that in such cases, where the police act in concert with an informer, the police and the informer are not accomplices.

There is the further question, however, as put by the learned Resident Magistrate :—

"Do they become accomplices after they not only assent but provide the means necessary to "enable the crime to be committed and themselves stand around and watch their own spy com- "mitting an act expressly made criminal *per se* by Statute ?"

The authority cited to me on that point is *Rex v. Chandler* [1913[1 K.B. 125. The heading is as follows :—

"The appellant suggested to a servant of the prosecutrix a plan "for the commission of a robbery by the appellant at the shop of "the prosecutrix. The servant, pretending to agree to the apel- "ant's suggestion, lent the keys of the shop to the appel- "lant, who made duplicate keys, with one of which, on a day

" arranged with the servant, the appellant unlocked a padlock " attached to the outer door and entered the shop, where he was " arrested. The prosecutrix had been informed by the servant of " the appellant's plan and knew that he intended to enter the shop " on the day in question. The appellant was convicted on an " indictment which charged him with having broken and entered " the shop with intent to steal therein :—

" HELD.—That the conviction was right, notwithstanding that " the prosecutrix knew that the appellant had been supplied with " the means of breaking and entering by her servant."

Mr. Justice Avory said in giving the judgment of the Court of Appeal :—

" The question is whether *Rex v. Johnson* is an authority which " is applicable to this case. It is clear from the evidence that the " prisoner by means of a key with which he unlocked a padlock " on a door broke and entered the premises of the prosecutrix, and " it is not disputed that he did so with intent to steal. The prisoner " therefore prima facie did everything which is necessary to " constitute the offence of shopbreaking, but it has been contended " that, because the servant of the prosecutrix had furnished the " prisoner with the means of getting the key with which he un- " locked the padlock, it must be taken that the entry was made " with the assent of the prosecutrix, and that the offence of shop- " breaking has, therefore, not been proved. In our opinion " although the prosecutrix may have been fully aware of what was " going to be done, she did not assent to the breaking and entering " of her premises by the prisoner for the purpose of stealing. The " keys were only supplied to the prisoner by the servant of the " prosecutrix in order that he might be detected in the commission " of the offence ; that did not make the servant an accomplice " of the prisoner, nor make the breaking and entering lawful."

It is clear, therefore, that the police in endeavouring to detect offenders can work with informers and can provide the means necessary to enable the crime to be committed. If the offender is caught then at the trial the evidence of the police and of the informer is not in law evidence of accomplices. It does not therefore require corroboration under the rule which makes corroboration of the evidence of accomplices desirable.

On this case stated I accordingly order that under s. 22 of the Appeals Ordinance 1934[1] the matter be remitted with the opinion of this Court thereon to the Resident Magistrate. The decisions of the Resident Magistrate on the charges which he heard are wrong and are quashed. There were two charges against each of the accused. The Resident Magistrate heard only one charge against each accused and found them not guilty without hearing evidence for the defence.

I accordingly order that evidence for the defence be now taken and the charges decided in accordance with this judgment on the points raised in the case stated.

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[1] *Repealed. Vide Criminal Procedure Code (Cap. 4) s. 374.*