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IN THE SUPREME COURT OF THE)
TERRITORY OF PAPUA AND NEW GUINEA)

THE QUEEN - v - WALTER FREDERICK BARKER

In this case, which was tried at Lae on the 15th, 17th and 18th of August, 1956, the accused was charged with having unlawfully and indecently dealt with a boy under the age of fourteen years; and that boy and other boys under fourteen years of age (who said they had been similarly dealt with by accused and said that they knew this was wrong) gave evidence for the prosecution.

In the course of his summing-up, Phillips, C. J. made observations as to the evidence of young boys in cases of this kind, as to the evidence of accomplices generally and, in particular, as to the evidence of young boys who might be regarded as accomplices.

The Chief Justice said:- "I have already directed myself in regard to the onus of strict proof that rests on the Prosecution in a criminal proceeding and, in particular, on the Prosecution in relation to the present charge against the accused.

"I must also direct myself that, when young boys have given evidence in a case such as this, - one where the charge is one of having unlawfully and indecently dealt with a boy under fourteen, - the jury should look at their evidence with the greatest caution and reserve: and I must warn myself that it would be very dangerous (and, as I propose to show, in certain cases unlawful in this Territory) to convict on such evidence alone. If, however, such evidence is corroborated by other evidence that the jury considers reliable and cogent, it would, of course, be open to the jury to convict. When I speak of 'corroborative' evidence, I mean evidence, direct or circumstantial, from an independent source, implicating the accused in the offence with which he is charged: Baskerville's case (1916) 2 K.B., 658.

"One reason for warning a jury against acting on the evidence of young boys is based on long experience: as Kenny says, children are not as fraudulent as adults but they are much more imaginative.

"Another reason for such a warning, and in some cases for even a ban, against acting on the uncorroborated evidence of young boys is, that they may be accomplices or in a position akin to that of accomplices: and the importance of this aspect becomes manifest when it is remembered that, because of Section 632 of the Queensland Criminal Code (adopted), 'a person cannot be convicted', in this Territory, 'of an offence on the uncorroborated testimony of an accomplice or accomplices.'

"'But', it may be asked, 'if the charge is one of an offence under Section 210 of the Code, a section intended to protect boys under 14, how may a boy of fourteen be considered to be an accomplice in such an offence?' That question arose in Queensland in the case of R. v. Sneesby (1951) Q.S.R., 26, before Philp, J; and it is interesting to see how that Judge dealt with it. In that case the accused was charged, under Section 210 of the Code, with unlawfully and indecently dealing with S, a boy under fourteen, in the accused's rooms. The only evidence for the Crown was that of the boy, S, and that of another boy under fourteen years of age, M, who had been present: (M had also been present at prior alleged offences by the accused against S). Both boys, S and M, knew what the accused was going to do to S and both knew it was wrong. Philp, J. held that, notwithstanding Section 7 of the Code, the boy S could not be charged as a principal offender under Section 210 since Section 210 was enacted as a protection to boys under fourteen: but he considered that both S and M, on their own admissions, were guilty of indecent practices between males under Section 211 (which has no age limit). He further held that those boys, to be accomplices, need not be chargeable as principals with the offence of which the prisoner was charged, so long as they had 'brought themselves, by the very acts to which they were party, within the criminal law, that is to say, within Section 211;' he therefore considered that both boys were accomplices within the meaning of Section 632 of the Code and that their evidence required corroboration.

"Until recently, little could be found in the cases defining just who came within the description 'accomplice' and who did not. There is no definition of 'accomplice' in the Queensland Criminal Code. But, in England in 1954, in Davies v. D.P.P. (1954) 2 W.L.R., 343, the House of Lords had something to say about 'accomplices'.

first, it should be said that the rule laid down in Section 632 of our Code does not apply in England. In England the rule is, that the trial Judge has the duty of warning jury against convicting on the uncorroborated evidence of an accomplice or accomplices; but if, after such a warning, the jury nevertheless decides to convict, it may do so. In Davies v. D.P.P. the question arose, on appeal, whether a certain witness was an accomplice or not, for the trial Judge had not told the jury he was and had therefore not given a warning to the jury that that person's evidence could not be acted on unless corroborated. The House of Lords held that the persons who, if called as witnesses for the prosecution, should be treated as 'accomplices', for the purposes of the rule that the Judge should warn juries not to act on the evidence unless corroborated, are as follows:-

(a) 'Persons who are participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact, in felonies, or persons committing, procuring, or aiding and abetting in, in the case of misdemeanours.

(b) receivers, who have been held to be accomplices of the thieves from whom they receive goods, on the trial of the latter for larceny: and,

(c) persons who are participes criminis in crimes similar to that actually charged and of which evidence is allowed to be given 'to prove, for example, system or intent'. (As to this last-mentioned group, the Court of Criminal Appeal in Queensland had expressed the same view as the House of Lords, apparently just before Davies v. D.P.P. was reported in Queensland: see R. v. Ross and others, (1955) Q.S.R., 48).

"Now in Davies v. D.P.P. the facts were, that a large gang, which included Davies and another youth named Lawson, attacked a much smaller gang with their fists; but, in the course of that affray, Davies drew a knife and fatally wounded Beckley, one of the smaller gang. There was no evidence that Lawson or any others of the larger gang had a knife or knew or contemplated that Davies would use a knife, so Lawson could not be held responsible for the death of Beckley. Lawson gave evidence against Davies, and the trial Judge did not warn the jury about Lawson's

evidence. Davies appealed on the ground that Lawson was an 'accomplice' and that the Judge should have warned the jury not to accept his evidence unless corroborated. The learned author of an article in 1954 Criminal Law Review, at pp. 324, et seq., has observed:- "Lawson was not, in other words, an 'accomplice in the actual crime' in the sense of being particeps criminis to the crime of murder. By restricting the necessity for warning to cases in which the witness is a principal or accessory in the actual crime charged, the House of Lords perforce was bound to hold that Lawson was not an accomplice to murder .... There can be no denying the correctness of the ruling that Lawson was not a principal in the second degree to the murder of Beckley. But there can be equally no doubt that Lawson was a tainted witness, in that he was criminally implicated in the affray out of which arose the actual crime charged, murder .... but the House of Lords considered that in such a case there was no duty to warn the jury. However .... it would seem open to the trial Judge even in such a case, to warn the jury as to the desirability of corroboration .... If the Judge choses to do so it will be in the exercise of his discretionary power to advise the jury'. In view of Philp, J's remarks in R. v. Sneesby, I rather think that he would, with the learned author of the article in the Criminal Law Review, consider Lawson's evidence to have been 'tainted': I rather think that Philp, J. would consider Lawson to have been an accomplice and one whose evidence would, had the case occurred in Queensland, have required corroboration under Section 632 of the Queensland Criminal Code. Speaking for myself, and remembering that I am now 'on circuit' and out of touch with a fully-equipped library, I incline to the view that a witness who, though not a particeps criminis in the actual offence charged, was yet a particeps criminis in a criminal transaction out of which arose the actual offence charged, should at least be regarded as a person akin to an 'accomplice' and as a person whose evidence requires corroboration, just as that of an 'accomplice' does and for the same reason. I apprehend that reason to be, that an accomplice (or a person akin to an accomplice) usually knows much about what happened and is thus able, for his own purposes, to weave facts that are perfectly true into a false story and so give that story the semblance of a true one."

(In this case, evidence was given by a non-native adult that was considered by the Court to corroborate

the story told by the young boys who were witnesses for the Prosecution. The accused was ultimately convicted).

CHIEF JUSTICE.