

1932.

Ex parte
KESSELL;
LEVINSON
v.
KESSELL.

Harvey
C.J. in Eq.

As the Crown's application partly succeeds and partly fails,
I shall make no order as to costs of this application.

Solicitors: *J. E. Clark* (Crown Solicitor); *Reginald E. Taylor*.

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Mar. 7, 11.

Street, C.J.
James, J.
Halse Rogers,
J.

REX *v.* DUNCAN HUTTON.

*Criminal law—Evidence — Accomplice — Corroboration —
Misdirection—Onus of proof.*

The applicant was tried at Quarter Sessions on a charge of arson. The case against him rested mainly on the evidence of one H. which tended to prove that the applicant was guilty of the charge but which at the same time incriminated H. in that it showed that he was to some extent acting in concert with the applicant. A statement to the same effect, previously made by H. to the police was read over to the applicant who said "That is what he says. I will not deny it, nor will I admit that, it is true." The applicant at the trial appeared in person and when giving evidence and while addressing the jury, the trial Judge repeatedly asked him if he wished to say anything about it. In his summing up the Judge told the jury that they must ask themselves whether the accused had given a reasonable answer to the statements involving his guilt, and to his remark to the police on H.'s statement being read to him. He also told the jury that they might regard H. as an accomplice, and warned them of the danger of acting on his uncorroborated evidence, and then went on to say that the applicant's answer "I will not admit and I will not deny" might be considered as ample corroboration of H.'s evidence. The applicant's son who had given oral evidence at the coroner's inquiry was called as a witness by the Crown. In view of an impediment in his speech, a written statement taken by the police was admitted in evidence upon the son swearing that it was correct. The applicant claimed that the written statement was not quite the same as the evidence given by his son before the coroner.

Held, that the trial Judge should have left it to the jury to determine whether H. was an accomplice and if so, whether, having regard to the nature of the applicant's statement to the police, and the circumstances in which it was made, it was such as to afford corroboration of H.'s evidence.

Held, further, that the Judge's questions asking the appellant whether he wished to say anything about his statement to the police were wrong, as they were likely to impress the jury with the idea that his guilt or innocence depended upon whether he gave a satisfactory answer, and that the Judge had misdirected the jury in this respect in that the burden of proof was on the Crown to establish guilt and not on the accused to establish his innocence.

Held, further, that the applicant's son should have given evidence orally, unless his speech was so affected as to make that course impossible, and in that event his former sworn deposition should have been put in evidence and not the statement not on oath taken down by a police officer.

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CRIMINAL APPEAL.

The relevant facts fully appear in the judgment.

Sheahan, for the applicant.

Weigall, K.C. (Solicitor-General) for the Crown.

Cur. adv. vult.

Mar. 11.

STREET, C.J. Unfortunately we see no escape from the conclusion in this case that the conviction must be quashed and a new trial ordered.

The charge was one of arson, and the case against the appellant rested mainly on the evidence of a young man named Harding. The house which was burnt was a dwelling-house occupied by the appellant and his family, and there can be no doubt on the evidence I think but that it was wilfully set on fire by somebody. Some two or three weeks before it was set on fire the appellant had received notice to quit from the landlord, and at the time of the fire he and his two children had gone to St. Mary's, and his wife, with whom he was not on good terms, was at Willoughby. The house was burnt on the night of Friday, the 9th of last October. Harding, an unemployed labourer, said that on the Sunday before the fire the appellant came to him and said "My furniture is insured for £200. If you put a match to it, when I get the insurance I will give you a tenner." Harding said that he refused to entertain the idea, but he seems to have been in touch with the appellant during the week. He was taken through the house and was given some things in it, he said; he was shown how the burning could best be done; he was given the key of the front door; he was given sixpence to buy petrol, which in fact he bought; and he was told—according to his story—to set the place on fire on Saturday night, the 10th. Instead of doing so he was aroused about half past ten or so that night by the appellant, who asked him for the front door key, and

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who made statements going to show that he was responsible for the fire which had taken place the previous night. After the fire, Harding made a statement to the police which corresponded very closely with his evidence as I have stated it, and at a later stage this statement was read to the appellant. Having heard it he said: "That is what he says. I will not deny it, nor will I admit that it is true."

As I read his summing up, the learned Chairman of Quarter Sessions told the jury (I think properly) that they might, if they saw fit, regard Harding as an accomplice, and warned them against the danger of acting on the uncorroborated evidence of an accomplice. He then went on to tell them that they might consider the answer made by the appellant to Harding's statement—"I will not admit and I will not deny,"—as ample corroboration of the story told by Harding. I am certainly not prepared to go so far as to say that this reply afforded ample corroboration of Harding's statement, but I think that it would be wrong to say that it afforded no evidence of corroboration. It has been laid down by the Court of Criminal Appeal in England that failure to deny a formal charge after being cautioned, or silence on being charged and cautioned, is not corroboration of incriminating evidence to be left to the jury. (See *Whitehead's Case* ([1929] 1 K.B. p. 99); and see also *Charavanmuttu's Case* (22 C.A.R. 1); but in *Tate's Case* ([1908] 2 K.B. p. 680 at p. 683), it was held that in some cases the absence of an indignant repudiation of a charge may be some corroboration. Where a formal charge is made it may very well be that in such circumstances silence or non-denial may be fairly regarded as meaning no more than "I reserve my defence,"—a statement which if made, could clearly not be used as an admission of any kind by an accused person. In *Feigenbaum's Case*, however, ([1919] 1 K.B. 431), where some boys had been arrested for theft and where statements implicating the appellant had been made by them, a police officer went to the appellant and gave him specific information of what had happened. He made no reply, and it was held by the Court of Criminal Appeal that in those circumstances it would be wrong to say that there was no evidence on which the jury could find that the boys' evidence had been corroborated. Mr. Justice *Darling*,

as he then was, delivering the judgment of the Court, said (p. 434)—“The Deputy Chairman quite properly pointed out to the jury that the failure of the appellant to make any reply to the statement of the police officer might, having regard to the nature of the statement and to the circumstances in which it was made, be considered as being a corroboration of the boy’s evidence, that it was for the jury to consider whether in their opinion it did, or did not, amount to corroboration, and, if they thought it did, it was for them to consider if they thought there was sufficient evidence on which to convict the appellant.” In *Peacock’s Case*, (13 C.L.R. 619) too, it was held by the High Court of Australia that where a prisoner, after a statement alleged to have been made by him was repeated to him, said “I will say nothing,” there was some evidence of corroboration.

I think, therefore, as I have already said, that we cannot say that there was no evidence of corroboration, but we think it should have been left to the jury to consider, firstly, whether they were satisfied that Harding was an accomplice, and, if they were, then to consider how, having regard to the nature of the statement and the circumstances in which it was made, they interpreted the appellant’s reply, and whether in their opinion it was of such a character as to afford corroboration of the statement made by Harding.

This is not the only respect, however, in which the conduct of the case and the summing up are open to criticism. Both when the appellant was giving evidence and when he was addressing the jury, the learned Chairman repeatedly called his attention to the reply he had made to Harding’s statement as read to him and asked him whether he wished to say anything about it, in such a manner that, though I have no doubt his wish was really to help the accused, the jury may well have become impressed with the idea that the guilt or innocence of the appellant really depended on whether he could satisfactorily explain away that reply. Then, when summing up, the learned Chairman began in this way :—“This is a very unusual and peculiar case in several particulars, more especially with regard to what I have adverted to more than once, and you must ask yourselves has the accused dealt with the matters and given a reasonable answer before you. I

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mean the statements which were made involving his guilt, and his statement 'I don't admit it, and I don't deny it.' I am going to mention this to you again, gentlemen, to ask you has he dealt with the matter in such a way as you can say 'Now, along that line I see the accused has shown that it may be that he is not guilty.' I want to emphasize that, gentlemen ; it seems to me an important matter in this case."

That appears to me, with respect, to be an improper shifting of the burden of proof. The law does not require an accused person to prove his innocence. It calls upon the Crown to prove his guilt. I think that a jury listening to what was said would probably understand it to mean that the appellant had to prove his innocence, and for that purpose had to explain away his reply to Harding's statement when read to him ; and though it is true that at a later stage in the summing up the learned Chairman told them that the case against the appellant must be proved to their satisfaction beyond reasonable doubt, I am by no means satisfied that they would have a clear conception of the responsibility that rested on the Crown throughout. They might very easily carry away with them into the jury-room an impression that the Crown had established a *prima facie* case by proving what the appellant had said in reply to Harding's statement, and that the burden lay upon him of disproving that case.

Then there is a further unsatisfactory feature of the case, which is that the summing up was inadequate inasmuch as it did not put the defence to the jury. The appellant was undefended, and he did not display any ability or any marked intelligence in his conduct of his defence, so far as one can gather from the printed record, but it is plain that he wished to state by way of defence that he was leaving the house because the landlord wanted it for someone else, that he had taken another house at St. Mary's, that the furniture was not his, but his wife's, and that he knew nothing of any insurance on it (she bears him out in that) and that he had nothing whatever to gain by burning the place down. He also suggested that the real author of the fire was Harding. There may or may not have been substance in the defence which this man wished to set up, but he was undefended, and all that the learned Chairman said to the jury was, when referring to the

night of the fire—"He clears out that night from Kogarah to St. Mary's." I think that the summing up was plainly inadequate in respect of the omission to call the attention of the jury in any way to what the defence was, and I think that, on this ground, and because of the other defects to which I have referred, there must be a new trial.

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There is one other matter to which I wish to refer and it is this. The appellant's son, who was called as a witness for the Crown, had an impediment in his speech—he stuttered badly, I believe—and in lieu of giving evidence orally on oath he swore to the truth of a statement which he had made, and it was put in evidence. I do not know how bad the impediment in this boy's speech was, but the learned Chairman referred to him more than once as an intelligent lad, and apparently he gave evidence in some former proceedings—I suppose at the Coroner's Court. In his unsworn statement, which was put in evidence, he said that the appellant, referring to want of work and lack of clothing, said that the only way out of it was to put the place up, meaning to burn it. We are told that in his evidence on a former occasion he admitted that the appellant might have used the word "give" and not "put," and that is the word which the appellant says he used. Unless the boy's speech was so much affected that it was impossible for him to give evidence orally, I think that he should have done so, and if it was necessary to refer to a former statement I think that his sworn deposition should have been put in evidence, and not a statement not on oath taken down by a police officer. I have not overlooked the fact that his evidence, as given, afforded corroboration of Harding's story, independently of anything said to the police by the appellant, but, for the reasons indicated, we think that in the interests of justice the proper course to take is to order a new trial.

The order of the Court will be that the conviction is quashed and a new trial ordered.

JAMES and HALSE ROGERS, JJ., concurred.

*Appeal upheld. Conviction quashed.
New trial ordered.*

Solicitors: R. D. Meagher, Sproule & Co.; J. E. Clark
(Crown Solicitor).