

unsuccessful; and most of the time at the hearing was taken up with evidence as to the occurrences prior to the execution of the lease in respect of matters in which in any event plaintiff should succeed.

There will be judgment for the plaintiff for possession of the land and premises referred to in the pleadings, and 150*l.* in respect of mesne profit up to the end of June. Execution stayed as to possession until the 31st July, and as to the judgment for mesne profits until the 29th June. Defendant to pay plaintiff's costs of the claim and counterclaim, to be taxed; such costs to include pleadings, discovery, and shorthand notes.

*Judgment for the plaintiff.*

Solicitors for the plaintiff: *Pearson & Eggington.*

Solicitors for the defendant: *Brocket & Kemp.*

H. D. W.

CUSSEN, J.

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BEATTIE

v.

FINE.

R. v. OLHOLM and McPHERSON.

F.C.

*Criminal Law—Misdirection—Judge's charge considered with reference to conduct of defence—Minority of jury urged by Judge to seriously consider views of majority, whether misdirection—Accomplice, who is—Corroboration, when need for warning as to.*

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June 2, 3, 4, 5,  
9, 11.

The charge to the jury at a criminal trial may rightly be influenced by the conduct of the trial.

A. and B. were charged with conspiring to obtain money from C. by unlawful means. The Crown case was that the prisoners had conspired to obtain, and had obtained, a large sum of money from C., as a bribe to refrain from taking criminal proceedings against C. or his daughter, both of whom gave evidence for the Crown. The accused denied having asked for or received any money.

*Held*, that C. was not an accomplice, and that on the facts it was not necessary for the Judge to give to the jury a warning similar to that which is in practice given with regard to the evidence of accomplices.

The Judge, on the jury intimating that they could not agree, told them that he would lock them up for the night, and said—"It is a case in which I think twelve men considering the matter reasonably, giving due consideration to what may be the correct view of a considerable majority of the jury, should be prepared to weigh the view of the majority very carefully. . . It rests with you, gentlemen, to try to reach a reasonable conclusion, giving due consideration to what the others say. If there is a great majority one way, the view of that majority is probably—probably—the correct one; not necessarily, but probably the correct one, and that should be taken into consideration by you." Subsequently, on the jury again announcing that they could not agree, His Honor said—"In this case the jury probably have to suffer, and the public

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will have to suffer, and the accused will have to suffer, because some of you cannot agree with the majority."

Thereupon the jury were locked up for the night. Next morning they returned a verdict of guilty, with a recommendation to mercy.

*Held*, that the direction amounted to no more than telling the jury that it was the duty of the minority not to allow any wilful or obstinate adherence to their own view to prevent them from giving full consideration to the view of the majority, and was not a misdirection.

#### APPEAL AGAINST CONVICTION.

The accused, Neil Olholm and Donald John McPherson, were presented in the Court of General Sessions at Melbourne, on a charge of having, with two other men—Leo O'Sullivan and one Fowler—conspired together to obtain money from one Terence Callaghan by unlawful means.

O'Sullivan and Fowler were not presented with the two accused, the former being alleged to be too ill to be tried, and the latter having disappeared.

The case for the Crown rested mainly on the evidence of Terence Callaghan and his daughter, Annie Callaghan.

Their evidence was to the following effect :—Terence Callaghan was the licensee and owner of the Londonderry Hotel, Collingwood, and also owner of a dairy and dairying business at Easey Street, Collingwood. Annie Callaghan managed the hotel. On the night of the 12th February some goods, apparently stolen goods, were taken to the hotel by a man named Quilty, who was paid 10*l.* for these goods by Annie Callaghan, and then went away. Shortly afterwards the two accused, with O'Sullivan and Fowler, who were detectives in the police force, came to the hotel, searched it, and found these goods. Annie Callaghan was questioned as to her possession of these goods, and Terence Callaghan was brought from Easey Street, where he was sleeping, to the hotel by two of the detectives, of whom McPherson was one. The detectives O'Sullivan and Fowler then carried on a discussion with Callaghan in one room, the former being the chief spokesman, while the two accused were in another room, but were, it was suggested, kept informed of the progress of the discussions. These discussions were as to how much Callaghan, who admitted to the detectives that he was worth about 80,000*l.*, should pay to hush the matter up. 10,000*l.* was at first demanded by O'Sullivan, but ultimately a sum of 6500*l.* was agreed on as the amount to be paid by Callaghan. The two accused were then called into the room, and were informed of the result of the discussion. McPherson said the amount agreed on was little enough, and all parties shook hands. O'Sullivan then went away to Easey Street with Callaghan, inspected some of his title deeds, and selected three on which the amount of 6500*l.* was to be raised.

They returned to the hotel, and O'Sullivan informed the others that it would be all right and shewed them the title deeds. The two accused left the hotel at a very early hour in the morning—between 3 a.m. and 5 a.m. O'Sullivan spent some time in the morning driving about in a motor car with Callaghan, who was trying to raise money, and about 11 a.m. or 12 noon on the 13th February O'Sullivan and Fowler, who had remained all night at the hotel, put the goods above referred to in a car and drove away. A few days later Callaghan, having managed to get 1000*l.*, paid it over to the four detectives, and promised to pay the balance shortly.

The matter became known, but not through any information given to anyone by Callaghan, and later on Callaghan swore an information against the four detectives.

In his evidence Callaghan said that he agreed to pay the money to keep his daughter from being sent to gaol, the detectives saying that she would be put into a dirty cell.

Annie Callaghan's evidence, in effect, directly implicated her as a receiver of stolen property. She admitted having made misleading statements to the detectives as to the manner in which she had obtained the property found on the hotel premises.

The detectives did not report the finding of stolen goods on the premises or take any steps against Callaghan or Annie Callaghan, though evidence was tendered that O'Sullivan had put the goods in the Railways lost property store, and entered certain particulars in a book there.

The statement of the accused was in effect that O'Sullivan had told Olholm that he had information that stolen property was to be taken to the Londonderry Hotel, or was already there, and that the four detectives had gone to raid the hotel on the 12th February, and that they had found the property previously referred to in a lane at the back of the hotel, and not in the hotel, as Annie Callaghan had sworn. They searched the hotel, but found no stolen property, and waited till 5 a.m. (as to the accused) and till later in the next day (as to O'Sullivan and Fowler) in the hope of catching a suspected thief bringing stolen goods to the hotel. They both denied the whole story about the demanding of money or payment of money. As to the occasion when Callaghan said he paid the 1000*l.* over to the four detectives, Olholm produced some sixteen witnesses to prove that on that day he was at Yarra-wonga, on the Murray, duck shooting, while McPherson swore, and produced other witnesses to corroborate him, that he was in attendance on duty at the Criminal Court at the relevant time.

The learned Chairman of General Sessions, in his charge to the jury, did not tell them that the evidence of Callaghan was that

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of an accomplice, and therefore should be corroborated, nor did he warn them at all that it should be corroborated because of Callaghan's position. He did, however, suggest that the jury might think Annie Callaghan's evidence corroborated that of her father, and he drew attention to her evidence as to the goods being found in the hotel, and not in the lane, as the accused had sworn, and as they had said to their superior officer when questioned as to why they had not commenced proceedings against Annie Callaghan in respect of those goods.

After the jury had retired for several hours they intimated to the Judge that they could not agree. His Honor told them that he would lock them up for the night, and said—"It is a case in which I think twelve men, considering the matter reasonably, giving due consideration to what may be the correct view of a considerable majority of the jury, should be prepared to weigh the view of the majority very carefully. . . It rests with you, gentlemen, to try to reach a reasonable conclusion, giving due consideration to what the others say. If there is a great majority one way, the view of that majority is probably—probably—the correct one; not necessarily, but probably the correct one, and that should be taken into consideration by you." Later on, on their again announcing that they could not agree, His Honor said—"In this case the jury probably have to suffer, and the public will have to suffer, and the accused will have to suffer, because some of you cannot agree with the majority."

Next morning the jury, after having been locked up all night, returned a verdict of guilty, adding a recommendation to mercy on account of the long service and previous good character of the accused.

On a later day Olholm was sentenced to one year's imprisonment and McPherson to nine months' imprisonment.

Both prisoners appealed on questions of law, and also applied for leave to appeal against the conviction under sec. 539 (c) of the *Crimes Act 1915*.

The grounds of appeal, so far as material to this report, are sufficiently indicated in the judgment (*infra*).

*L. B. Cussen*, for prisoner Olholm—The summing up did not sufficiently put the effect of the evidence for the defence and the case for the defence before the jury. The Chairman should have been particular on this point, because of the absence of the other two accused men, O'Sullivan and Fowler. It was also the Chairman's duty to warn the jury that if they found—and they could not help finding—that Callaghan was lying about the presence of Olholm when the money was paid over, that they

must exercise great care in accepting his evidence on other points : *Taylor on Evidence* (11th ed.), vol. i., para. 216. Next the Chairman was wrong in not giving the jury the usual warning about an accomplice's evidence. Callaghan was here an accomplice, or might be found to be so if the jury took this view of the evidence for the Crown—viz., that he was a receiver of stolen goods offering or paying a bribe to the detectives to hush the matter up.

[McARTHUR, J. Is not an accomplice one who is an accomplice in the very offence charged ? Callaghan could not be that here—he could not be charged with this offence.]

That is not the test. He had committed a crime connected with the detectives' offence—he gave the money, they took it.

[McARTHUR, J. But the crime is conspiring.]

Counsel referred to *Greenleaf on Evidence*, sec. 382 ; *R. v. Despard (a)*. In any event, Callaghan had just that strong interest "to save his own skin" that an accomplice has, which is the reason for the warning. Therefore, even if Callaghan is not strictly an accomplice within the meaning of the rule as to warning, a similar warning should, in the circumstances, have been given as to the necessity for corroboration. There was no corroboration.

*Menzies*, for the prisoner McPherson—An accomplice within the meaning of the rule is not only a person who could be charged with the offence on which the prisoner is presented. One should not look at the mere form of the presentment. Where there are persons, all of whose interest it is to benefit themselves by convicting others, their evidence is on the same plane as that of an accomplice in the strictest sense of the term. Suppose the accused were charged merely with accepting a bribe, and Callaghan had bribed them. He would be an accomplice, though obviously he could not be placed on trial for himself accepting the bribe ; yet his interest would be to curry favour by giving evidence against the accused. Therefore, his evidence should be corroborated, or at least the warning should be given : *Encyclopædia of the Laws of England*, vol. i., p. 68 ; *Reg. v. Boyes (b)*. The learned Chairman was wrong in practically directing the minority to surrender their own opinions and give in to the majority. This is a misdirection in law : *Winsor v. The Queen (c)*. The effect of Callaghan's lies as to the events on the day on which the money was said to have been paid over was not indicated sufficiently to the jury by the learned Chairman, but he treated the matter as an isolated incident merely.

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(a) [1798] 12 How. State Trials 489. (c) [1866] L.R. 1 Q.B. 289, at pp.  
(b) [1861] 1 B. & S. 311, at p. 305, 306.

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*Macindoe*, for the Crown—The gist of the offence was the conspiring on the 12th February. If the jury believed Callaghan as to the happenings on that day the offence was established, apart from the events of the later day altogether. The evidence of Callaghan was not that of an accomplice. The rule in question is limited to the evidence of accomplices in the very act charged: *R. v. Graham* (d). The defence here is not that Callaghan was an accomplice, a willing participant; the accused deny the whole transaction. Assuming, however, that he was an accomplice, there was no need for the warning. Such a warning need only be given where the evidence is in fact uncorroborated: *R. v. Peacock* (e); *R. v. Tait* (f). Here Callaghan's evidence was corroborated (1) by Annie Callaghan's evidence that the goods were on the premises, coupled with the detectives' denial of that fact; (2) the failure of the accused detectives to prosecute Callaghan. There was no such direction to the jury as amounted to directing a juryman to give up his own honest opinion: *Quartermain's Case* (g).

*Cur. adv. vult.*

The judgment of the Court (IRVINE, C.J., MANN and McARTHUR, JJ.) was read by IRVINE, C.J.:—The arguments on which this Court was invited to quash the convictions in this case were in substance as follows:—

1. That the verdict of the jury was against the weight of evidence.

2. That the learned Judge should have, in his charge, drawn the attention of the jury more strongly than he did to the weakness of the case against Olholm and McPherson as contrasted with that against the other alleged conspirators, O'Sullivan and Fowler.

3. That he should have warned the jury against accepting the evidence of Callaghan without corroboration.

4. That he misdirected the jury in pressing the minority of the jury to subordinate their opinions to those of the majority.

As to the first argument, a perusal of the evidence is sufficient to show that this contention cannot be sustained.

As to the second, the case for the prisoners upon the evidence is one which at this stage may be presented in different ways; but it is the way in which it is presented at the trial which inevitably affects the form of the Judge's charge and the comparative prominence given in the charge to different aspects of the case.

The attacks upon the learned Judge's charge in this case have,

(d) [1915] V.L.R. 402, at p. 433.

(f) [1908] 2 K.B. 680.

(e) [1911] 13 C.L.R. 619, at p.

(g) [1919] 14 Cr. Ap. R. 109.

654, *per* Barton, J., and at p. 672; *per* O'Connor J.

we think, been suggested to some extent by the way in which his remarks are arranged, but both as to the arrangement and form of expression we think His Honor has been obviously influenced, and, so far as appears, rightly influenced, by the conduct of the trial.

Bearing this in mind, we think that the learned Judge, in his charge, sufficiently discriminated between the evidence so far as it affected the two appellants and so far as it affected the others.

The third of the arguments mentioned resolved itself into the contention that Callaghan was either an accomplice or at least a witness so interested in fabricating the story which he told that the learned Judge should have given the warning usual in the case of an accomplice. In our opinion Callaghan was not an accomplice. Nor do we think that, on the facts of this case, it was necessary to give to the jury a warning similar to that which is in practice given to juries with regard to the evidence of accomplices.

We should add that, in our opinion, there was ample evidence, if believed by the jury, corroborative of the story told by Callaghan. If, to take one instance, the jury believed the evidence of Annie Callaghan in her circumstantial account as to the goods in question being in the hotel on the arrival of the four detectives (evidence which directly implicates herself as a receiver), the story told by the appellants was manifestly concocted, and corroborated Callaghan's story to the extent of showing that they wished to hide the truth and to account for not proceeding further in a case where stolen goods were found on the premises. In our opinion the learned Judge sufficiently drew the attention of the jury to the grounds on which the credibility of Callaghan was attacked, leaving it quite properly to them to determine on all the evidence and on the probabilities how far such evidence could be relied upon.

The last ground of attack upon the learned Judge's charge also, we think, fails. The language used cannot, we think, be taken to mean more than that it was the duty of the minority not to allow any wilful or obstinate adherence to their own view to prevent them from giving full consideration to the view of the majority.

The appeals in each case are dismissed, and the applications for leave to appeal on the facts refused.

*Appeals dismissed.*

Solicitor for the Crown : *Guinness*, Crown Solicitor.

Solicitor for the accused : *N. H. Sonenberg*.

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