

(December 17, 1952)

1. ELIAS ARISTOTELOUS MANDIS,
2. GEORGHIOS KYRIACOU, *Appellants,*

ELIAS ARI-
STOTELOUS
MANDIS
AND
ANOTHER
v.
THE QUEEN.

v.

THE QUEEN, *Respondent.*

(*Criminal Appeal No. 1927.*)

Murder—Weight of evidence of accused against co-accused—Evidence amounting only to suspicion.

The evidence against the 1st appellant was that of "P", an accomplice; and also the 1st appellant's own statement and evidence at the trial as an eye-witness of the crime; and his conduct after the murder. Evidence against the 2nd appellant was that of the accomplice and of his co-accused, the 1st appellant. The other evidence against the 2nd accused was that: Both appellants had been seen together on several occasions before the crime; and also within a few miles of the scene of the crime on the night it was committed. The 2nd accused after the crime had passed the night in 1st appellant's house.

The trial Court convicted both appellants of murder.

Held: There was sufficient evidence on which to convict the 1st appellant but the evidence against the 2nd appellant only amounted to a case of suspicion. Following the decision in *Martin, Ansell and Ross* (1934) 24 Criminal Appeal Reports, 177, the conviction of 2nd appellant quashed.

The 1st appellant's evidence against the 2nd appellant was not that of an accomplice because he was not a witness for the Crown, (*R. v. Barnes and Richards*, 27 C.A.R., 154) and a Judge is not required to direct a jury that corroboration in such a case is necessary. However, this does not absolve the trial Court from carefully assessing the weight which can be given to the evidence of a co-accused.

Appeal by accused from the judgment of the Assize Court of Limassol (Case No. 7452/52).

Chr. Demetriades for appellant No. 1.

J. Clerides, Q.C.; with *X. Clerides*, for appellant No. 2.

The facts of the case are set out in the judgment of the Court which was delivered by:

HALLINAN, C.J.: This is an appeal from the conviction of murder at the Assize Court at Limassol. The Presiding Judge in his summing up described the crime shortly in these words:—

"Some time during the night of the 22nd to 23rd April, 1952, Hassan Kiamil, who was the private rural constable employed by Lanitis N.E. Estate Company, Limited, at their farm at Laccos tou Frangou, a lonely place, in

the area of Alectora, was savagely murdered in his room there. The next morning, when the body was found, a blood-stained axe was also found, on the bed near where the body was lying, and two other axes and an axe-adze have been produced in this Court. From the evidence of the Government pathologist it appears that at least two of these weapons could have been made use of inflicting the dreadful wounds which were found on the head, face and neck of the deceased, and which caused his death."

At the opening of the trial there were three accused, the two appellants and one Georghios Polycarpou. All accused pleaded not guilty. The Crown offered no evidence against Polycarpou, he was found not guilty and he was discharged. Polycarpou then became the principal witness for the Crown. He is a farmer, married, with six children, and living at Pissouri. The first appellant is a tinker who lives in a house belonging to Polycarpou's aunt at Pissouri and the 2nd appellant comes from Kato Arkhimandrita, but has a garden at Limassol where he resided. Polycarpou's evidence is fully and carefully summarized in the summing up of the trial Court. He alleges that on the night of the crime the 1st appellant on the pretext of going out to look for stolen animals took him from Pissouri to a locality called Sarami where they met the 2nd appellant who had a gun and an axe. He states that the 2nd appellant kept the gun and gave the axe to the 1st appellant. The three men went to *Laccos tou Frangou* where deceased lived on the pretext that the deceased wished to buy an unregistered gun which the 2nd appellant was carrying. Polycarpou alleges that the appellant then left him at some distance from the deceased's house because he (Polycarpou) was on bad terms with the deceased. The first appellant through his friendship with the deceased managed to get the deceased to open his door. The appellants entered and sat down and after some discussion about the gun which they had brought the second appellant struck the deceased with an axe. A struggle ensued and the 1st appellant hit the deceased with an axe-adze (*xynari*) which instrument was apparently found in the room of the deceased. The third axe, according to Polycarpou's evidence, was also in the room of the deceased.

The trial Court inevitably considered that Polycarpou was an accomplice. Indeed it is difficult to see why no evidence was offered against him and why he was called as a Crown witness. Polycarpou had a strong motive for murdering the deceased: it was established in evidence that he believed the deceased had tried to murder him. He had made a long statement which was put in evidence at the preliminary enquiry (Exhibit 87); it is substantially the same as the evidence he gave at the trial. As the trial

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Court observes, this statement was only given after the first appellant had made three statements implicating Polycarpou. This statement, coupled with the evidence of motive, provided evidence against Polycarpou himself nearly as strong as the evidence heard at the preliminary enquiry against the 1st appellant and far stronger than the evidence against the 2nd appellant. It is surely incredible that the appellants, out upon a desperate criminal enterprise, should bring along Polycarpou with some talk of stolen animals and the sale of a gun, in order that he should witness their crime without himself being needed as a participant. An accused who turns Queen's evidence may, if sufficiently corroborated, be believed when his story (despite his complicity) appears to be the true story of what he saw and did. But here, the story of Polycarpou has all the appearance of a lying statement merely repeating the statement he originally made to the police (Exhibit 87) when he was trying to exculpate himself from the charge of murder. If then his evidence concerning his own part in the murder is most probably untrue, little or no weight can be attached to that part of his evidence which seeks to implicate his co-accused, especially after the 1st appellant had made three statements implicating Polycarpou.

The evidence against each of the appellants is very different and the Court quite rightly considered the case against each appellant separately. Mr. Demetriades for the 1st appellant in a careful and lucid presentation of his case has submitted that the evidence of Polycarpou against the first appellant had not been corroborated by any evidence sufficient to support a conviction.

The principal evidence against this appellant is contained in his own evidence. The 1st appellant made three statements before trial and gave evidence at the trial. In his first statement made on the 24th April, and in his evidence, he alleged that having spent Easter Monday and Easter Tuesday at Arkhimandrita he set off after dark to go down to Pissouri with the second appellant. On reaching points 11 and 12 on the map, which is near the junction from which one can either go down to Pissouri or turn north-west towards Laccos tou Frangou, the appellants waited for some hours until they were joined by Polycarpou and then all three of them went to Laccos tou Frangou. The first appellant alleges that the other two compelled him to accompany them and compelled him to call out to the deceased in his house so that he would open the door to his friend. As soon as the deceased opened the door the first appellant alleges that the 2nd appellant went in and hit the deceased with the axe. Then Polycarpou rushed into the corner of the room, picked up a *xynari*, and started hitting the deceased.

On his own admission the 1st appellant was present when the crime was committed and it was he who induced his friend, the deceased, to open the door so as to admit the murderers. His counsel submitted that when he induced the deceased to open the door he was acting under duress. There is no evidence except that of the 1st appellant alone that he was threatened by Polycarpou, or by the 2nd appellant and this evidence is manifestly untrue; the trial Court was quite right to reject this allegation.

After the crime had been committed, the 1st appellant, according to his own evidence, accompanied Polycarpou back along the road by which they had come, and saw Polycarpou throw away the axe at the locality Trikamera, point 8 on the plan; further on, having reached the junction where one path goes to Alectora and the main path continues on to Pissouri, the first appellant accompanied Polycarpou up to the path towards Alectora until Polycarpou reached points 9 and 10 where he hid the gun. The 1st appellant was supposedly on his way back to Pissouri, yet he accompanied Polycarpou some distance up to the path to Alectora in order to dispose of the gun. The first appellant subsequently took the police to where the axe and the gun had been hidden and where they were recovered by the police.

There was evidence at the trial that the deceased was reputed to be in possession of a considerable sum of money and the evidence of both Polycarpou and the 1st appellant is that the deceased's room was searched for money after his murder but only some £18 or £19 were found. The 2nd appellant slept on the night of the murder in 1st appellant's house at Pissouri. The 1st appellant in his evidence states "when the third accused (that is 2nd appellant) got up on the following morning he came and put £11 under my pillow and said to me "take this Koumbare; my father owes you £3 and for the rest you can thank God."

In our opinion the evidence against the 1st appellant apart from the evidence of Polycarpou was sufficient to support his conviction. Therefore, the conviction of the 1st appellant must be confirmed and his appeal dismissed.

The trial Court convicted the 2nd appellant upon the evidence of Polycarpou and the 1st appellant and certain other evidence which the Court regarded as corroborative.

The value of Polycarpou's evidence has already been discussed in this judgment. We are unable to see how any greater credence could be placed on the evidence of the 1st appellant. One must remember, when considering the evidence, that the trial Court was of opinion that the crime had been committed by more than one person. Since both

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Polycarpou and the 1st appellant had in their statement before trial placed themselves at the scene of the crime; in order to exculpate themselves, each one had to allege that he saw two people murdering the deceased. It is not unnatural that each one having accused the other of participating in the crime should also incriminate the 2nd appellant who was known to be in company with the first appellant on the night the crime was committed. The fact that the 1st and 2nd appellants were friends would certainly not deter the 1st appellant from giving evidence against the 2nd appellant in order that he, the 1st appellant, might, escape punishment; for this same man, the 1st appellant, was prepared treacherously to murder his friend, the deceased, in order to obtain his money. The credibility of his evidence is further reduced by the fact that he made two statements, one on the 26th April and one on the 6th May, which in material respects contradict his first statement and his evidence at the trial. In his statement of the 26th April, the 1st appellant stated that Polycarpou, 2nd appellant, and himself all left Pissouri together and went to Laccos tou Frangou where the deceased lived and there they were joined by two others: Tryfonas and Hussein Mentesh Shérif. The 2nd appellant, Tryfonas, and Hussein then proceeded to kill the deceased. Polycarpou then entered the deceased's house to share in the spoils. In his evidence the 1st appellant makes no mention of Tryfonas and Hussein; he and 2nd appellant do not go to Pissouri before the crime but meet Polycarpou about the junction of the paths to Alectora and to the scene of the crime. He is a man who can implicate two men in a statement to the police and then drop these allegations in his evidence. Technically of course the 1st appellant is not an accomplice because he was not a witness for the Crown (*R. v. Barnes and Richards*, 27 C.A.R., 154), and a Judge is not required to direct a jury that corroboration in such a case is necessary. However, this does not absolve the trial Court from carefully assessing the weight which can be given to the evidence of a co-accused. It is difficult to see how any more credence can be attached to his evidence than to that of Polycarpou.

The other evidence against the 2nd appellant may be summarized as follows: On several occasions between the 14th and 21st April, the 1st and 2nd appellants were seen in each other's company. That the two appellants were seen in each other's company before the 22nd April is not very significant. It was Easter time; there was much visiting and feasting among friends. The most significant association was that on the 17th April when they were seen at night going in the direction of Laccos tou Frangou; but they were about 2½ miles from that place, it was five days before the crime, and this evidence relating to the 17th April was denied by the appellants. Besides the evidence of association there was this further evidence: On the night of the

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murder they left Arkhimandrita together about 8 p.m. going to Pissouri and while on that path they must have been within some miles of the scene of the crime. The 2nd appellant in his evidence stated that he spent the night in the house of the 1st appellant at Pissouri, and gave some unconvincing evidence of having slept in the yard.

The trial Court concluded its summing up as follows :—

“ Considering that a very brutal murder was committed by more than one person at a distance of some five miles from Pissouri on that night and that the 2nd accused (that is 1st appellant) was one of the participants, we cannot believe that the 3rd accused (that is 2nd appellant) was permitted to be a casual visitor spending the night at his house ; and we hold that this is sufficient corroboration of the evidence of the accomplice ex-accused No. 1 and co-accused No. 2 that the 3rd accused took an active part in the murder of the deceased as stated.”

Apart from the evidence of Polycarpou and 1st appellant there is admittedly some evidence tending to connect the 2nd appellant with the crime ; but in considering whether it was sufficient to corroborate the evidence of Polycarpou and of 1st appellant, one must also consider what weight if any can be attached to their evidence. For the reasons already given, we consider that the evidence of these witnesses is of little or no value. The trial Court in considering the case against the 2nd appellant stated : “ We have only accepted such parts of the evidence of his co-accused (i.e. first appellant) as can reasonably well be corroborated by other evidence.” But what parts of the 1st appellant’s evidence (or indeed of Polycarpou’s evidence) are corroborated, and what parts are not ? And when the evidence of Polycarpou and the 1st appellant conflict, whose evidence is corroborated ? For example, each of these witnesses gives a totally different account of the *res gestae*, the scene in the deceased’s house.

The term “ corroborative evidence ” is generally used to describe evidence which strengthens and confirms the evidence of the principal witness or witnesses ; it is ancillary to the main evidence. But in this case the evidence which is being corroborated is so weak the buttresses of corroboration required to support it must inevitably be bigger than the edifice they are supposed to support. In these circumstances it is really the so-called corroborative evidence that must support the burden of proof which is on the prosecution.

The facts in the case of *Martin, Ansell and Ross* (1934) 24 Cr. Ap. Rep. 177, were in many respects similar to those in the present case. An old lady, Mrs Ray, was reported to keep some £3,000 in her house. One Knowles on 14th

February told Martin about it at a public house in Croydon and showed him Mrs. Ray's house nearby and discussed plans for stealing her money. On the 15th February Martin, Ross and Ansell came to Croydon; on this and the following evening they identified Mrs. Ray's lodger, Mr. Pennefather. On Saturday 17th all three appellants came to Croydon. Mr. Pennefather went out for a walk as usual at 7.25 p.m. leaving Mrs. Ray in good health. Between 7 and 8 the three appellants were in a public house 137 yards from Mrs. Ray's house; about 8.15 Ansell and Ross were seen on to an omnibus by Martin. At 8.30 Mr. Pennefather returned from his walk and found Mrs. Ray murdered. At the trial Knowles gave evidence for the Crown and was treated as an accomplice. Martin made a statement and gave evidence implicating his co-accused. He admitted inciting them to rob Mrs. Ray and that he shared in the proceeds of the robbery.

Knowles in that case was certainly more removed from the crime than Polycarpou in this and there is nothing to show that Knowles' evidence (unlike Polycarpou's) was inherently improbable. The evidence of corroboration in the English case also was considerably stronger. Both as to time and place Ansell and Ross were much more closely connected with the crime than was the 2nd appellant in this case. It is interesting therefore to read the comment of the Court of Criminal Appeal as to the corroboration of Knowles and Martin:—

“ Now, that there was some corroboration was not to be denied. Mr. Roberts enumerated the various matters of fact, of inference and of probability, in his argument yesterday. If all those matters were put together and the question were asked what did they amount to, the answer might possibly be, they amount to a case of suspicion, it may be of strong suspicion; but in the opinion of the Court it could not be said that those matters taken together amounted to any strong corroboration ”.

In our view the evidence of Polycarpou and the 1st appellant together with the other evidence which was considered corroborative as against the 2nd appellant, merely amounts to a case of suspicion, and is not sufficient to support the conviction of the 2nd appellant whose conviction and sentence must accordingly be quashed and his appeal allowed.