FOURTH SUPPLEMENT TO THE
GIBRALTAR GAZETTE L.R. 5/78.

No. 1,793 of 25th JANUARY, 1979.

LAW REPORTS

Note: These Reports are cited thus —
(1978) Gib. L.R.

DRIMMIE v. THE QUEEN

Court of Appeal
Forbes, P., Bourke and Hogan, J.J.A.
11, 12 May 1978
Criminal law — perjury — materiality of false evidence
Criminal law — perjury — wilfulness — effect of surprise
Verdict — rider added by jury — ambiguity

The appellant was convicted in the Supreme Court of perjury, the charge arising out of evidence he had given in the magistrates' court. The jury added a rider to their verdict referring to the fact that the offence had been committed instinctively and on the spur of the moment. On appeal, it was argued that the false evidence was not material to the issue before the magistrates' court, that it had not been distinctively and clearly brought to the attention of the appellant, that the rider negatived the element of wilfulness and that the verdict should be regarded as an acquittal in law.

HELD: The rider introduced an element of ambiguity into the verdict and accordingly the appeal would be allowed.

Cases referred to in the judgment

R. v. *Carr* (1867) 10 Cox 564
R. v. Tyson (1867) L.R. 1 C.C.R. 107
R. v. Holden (1872) 12 Cox 166
Sweet-Escott (1971) 55 Cr.App.R.316
R. v. Muscot (1713) 10 Mod. Rep. 192
R. v. Griepe 88 E.R. 1220
R. v. Stolady (1859) 1 F. & F. 518
R. v. London (1871) 24 L.T. 232
Ryan (1914) 10 Cr.App.R.4.
R. v. Hawkes (1931) 22 Cr.App.R.172

Appeal

This was an appeal from the Supreme Court to the Court of Appeal against conviction and sentence for perjury. The appeal was allowed and the conviction quashed, reasons being reserved.

A. B. Serfaty for the appellant
E. Thistlewaite for the Crown

14 July 1978: The following reasons for judgment were delivered —

The appellant appealed against his conviction for perjury under s. 203(1) of the Criminal Offences Ordinance (Cap. 37). After hearing counsel for the appellant and Crown Counsel for the respondent we allowed the appeal and quashed the conviction and sentence. We now give our reasons.

The appellant was a constable in the Gibraltar Police Force. On 8 December 1977 a youth called Mark Phillips was arrested by the appellant and another constable in Main Street, Gibraltar, for being found drunk in a public place contrary to s. 232 of the Criminal Offences Ordinance. Subsequently, when charged in the magistrates' court, Phillips at first pleaded guilty but, after the prosecution had outlined the case and on being asked by the magistrate if he had anything to say, he gave his version of the event and he was advised to plead not guilty. He then changed his earlier plea.

The appellant was called as a witness for the prosecution and having given an account of the condition in which he found Phillips, the latter put questions in cross examination designed to show that the appellant, in breach of the rules applicable to his police service, had obtained a window cleaning contract from the R.A.F.; that he had employed Phillips to do some of the cleaning work; that there was a sum of £6 owing to Phillips in respect of this work, and that it was Phillips' request for this money and not Phillips' drunken condition which prompted the arrest. In answer to these questions the appellant denied owing any money and amplified this denial by an assertion, which emerged in somewhat different words from a number of witnesses, that the contract had nothing to do with him and was made with his wife.

The perjury charge was laid in respect of these answers and the prosecution produced evidence that the appellant had in fact joined with a lady, not his wife, for the purpose of forming a

company which received a contract for window cleaning from the R.A.F. and that he had engaged labour, including that of Phillips, for the purpose of fulfilling the contract; but it was not established whether any debt of £6 was or was not owing to Phillips.

The grounds of appeal with which this court has been concerned can be compendiously and briefly stated as follows:

(a) the false evidence was not material to the issue before the magistrates' court;

(b) the alleged false statement was not distinctly and clearly brought to the attention of the appellant in the magistrates' court; and

(c) the jury did not find the accused guilty as a rider to the verdict negatived the essential element of wilfulness.

The appellant undoubtedly told a lie when he said the contract was with his wife. This is reprehensible conduct in anybody and particularly reprehensible in a policeman. Moreover, he told it on oath. But for perjury something more is required and the additional element is succinctly stated in a case to which counsel for the appellant referred, *R. v. Carr* (1), where Kelly, C.B., said:

> "This is an indictment for perjury, on the trial of which offence it is necessary to prove first that perjury was committed, that is that the party charged has deposed on oath to something that it untrue; and, secondly, that that evidence is material to the issue before the tribunal where the inquiry takes place."

Counsel conceded that, on the question of materiality, one could find in the reports of earlier cases examples which appeared to tell for and against his submission that the appellant's statement was not material. He instanced *The Queen v. Tyson* (2) as one which could weigh against him.

In that case the accused swore in support of an alibi that he was in a certain house at the time of a robbery, and supported that statement by saying he had lived in that house for the last two years and had never been absent from it for more than two or three nights together during that time. In fact he had been

(1) (1867) 10 Cox 564.
(2) (1867) L.R. 1 C.C.R. 107.

in prison during one of those years. It was held that the second and third allegations were material as tending to render the first more credible.

On the other side of the line counsel put *R. v. Holden* (1), decided some fifteen years later, when the question was whether A on seeing B kick and strike a horse had used language calculated to make B commit a breach of the peace. B denied that he had kicked and struck the horse. Miller, J., after consulting Lush, J., held this statement to be merely collateral to the issue.

That conclusion seems open to question and less readily acceptable than the approach in the more recent case of *Sweet-Escott* (2), where a witness giving evidence on a blackmail charge in 1970 untruthfully denied in cross examination convictions for offences prior to 1950. Lawton, J., held this could not found a charge for perjury as it was unlikely to affect his credibility and standing with the tribunal in 1970 and consequently was not material.

Relying on s. 31B of the Criminal Justice Administration Ordinance, which introduced the principle of written or oral admissions in criminal proceedings, counsel argued that Phillips' admission in the magistrates' court that he was drunk and in a public place meant that the appellant's answer about the R.A.F. contract was not material to any issue in the case before the magistrate.

Counsel for the Crown, on the other hand, maintained that since the degree and extent of Phillips' drunkenness was disputed and this could have particularly affected the measure of any punishment imposed, the evidence was material to an issue.

Phillips in cross examination admitted to being drunk and his account of the liquor consumed would certainly point that way. He also admitted that his object in introducing the R.A.F. contract was to make trouble for the appellant, by which he appears to have meant disciplinary procedure in the case, whilst the appellant said his object in denying the contract and referring to his wife was to try and avoid action by his superiors because of engaging in a commercial activity outside his job.

(1) (1872) 12 Cox 166.

(2) (1971) 55 Cr.App.R. 316.

The introduction of this side issue seems to have done little harm to Phillips and may indeed have helped him because, if the evidence given in the court below fairly reflected that before the magistrate, the reasons for an acquittal are not readily apparent.

Certainly the relevance of the contract to the matter in issue before the magistrate was tenuous. It is not easy to see the precise bearing of the alleged demand for £6 on the degree of drunkenness — as distinct from the fact of drunkenness which seems not to have been in dispute. As already indicated, the position as to the debt of £6 seems not to have been determined, but a claim for it, justified or unjustified, and consequent irritation, could hardly have been rendered less likely by the untruthful element in the appellant's evidence: the reference to his wife. Had he restricted his reply merely to saying he had no contract, which might have been technically justified on the ground that it was a company contract, the implied refutation of Phillips' evidence would have been stronger. Given the normal approach to man and wife, the demand for £6 was little less unlikely to have been made if the contract was with his wife rather than with himself.

It was a borderline case coming, it would seem, rather closer to *Holden* (supra) than to *Tyson* (supra). Consequently we were disposed to think that the materiality of the evidence was no more than marginal.

In this connection we have not overlooked the statement in Russell on Crime (12th Ed. p.296) that "it is not necessary to consider to what degree the false evidence was material to the issue, but it is enough that the point was circumstantially material." Of the two cases quoted for the proposition, *R. v. Muscot* (1) ends with the statement that "it must be a material circumstance, a circumstance of that weight that without it (the witness) could not hope to find credit with the jury", which probably puts the test too high but does not suggest that the minimal character of the materiality should be ignored any more than does the statement in Blackstone's Commentaries (23rd Ed. p. 161) that a lie in regard to some "trifling collateral circumstance" would not amount to perjury. The report of the other case, *R. v. Griepe* (2), which says "If a man speak to the credit of a witness,

(1) (1713) 10 Mod. Rep. 192.
(2) 88 E.R. 1220.

which is not directly to the issue, yet is false, that is perjury", is, perhaps, more helpful in a note (1) of a case where it was suggested that the plaintiff being a "cautious" man was unlikely to have lent money without a note and testimony that he had lent a greater sum without a note was held to be material.

However, because of the view we have taken of a later ground of appeal, we do not find it necessary to explore this aspect more extensively or to express a more conclusive opinion on it.

We turn to the grounds set out under (b) and (c) above which are closely related and can be conveniently put together.

Counsel referred to *R. v. Stolady* (2) as establishing the principle that to ground a charge of perjury it is necessary that the statements alleged to be false should be clearly distinguished and thus brought specifically to the attention of the person charged. The case does seem to imply an approach of the kind and is quoted as authority for it in subsequent cases and text books, but, again, the decision itself, as reported, despite the eminence of the judge concerned, seems open to question. A swore that B who lodged with him was never absent from his lodgings on any Sunday. Pollock, C.B., held that A's attention should have been drawn to the particular Sunday in question.

In the later Reserved Crown Case of *R. v. London* (3), *Stolady* was quoted as authority for an objection that an indictment for perjury was too general when it alleged that the accused swore "he had never received any coals from P". The objection was overruled but the headnote reads:

> "At the trial the prisoner was asked three or four times by the advocate and judge whether he did at any time, either on his own account or that of A. have any coals on credit from P, to which the prisoner always answered 'I did not'.
>
> "Held, that the prisoner's attention was sufficiently called to the subject so as to found a charge of perjury upon the answer....."

Counsel maintained that the decisions emphasised the need to isolate, identify and bring very clearly to the attention of the

(1) At p. 1222.
(2) (1859) 1 F. & F. 518.
(3) (1871) 24 L.T. 232.

accused the precise matter on which he is alleged to be lying. They stood in contrast, counsel said, with the instant case where the appellant's untruthful assertion emerged from a somewhat confused interchange between Phillips and the accused, the precise details of which differed in the recollection of one witness from that of another and where Phillips' questions involved more than one allegation at a time and were only partly queries and partly assertions of fact. The answers had a measure of ambiguity, counsel argued, very different from the clarity so assiduously sought in *London's* case (supra). Moreover, counsel continued, the answer was blurted out on the spur of the moment without due consideration and lacked the deliberation and wilful quality required for perjury.

As justification for the latter proposition, counsel referred us to a number of authorities, including:

> Stephen's Commentaries (5th Ed. Vol. 4, p.279);
> Blackstone's Commentaries (published by Chitty in 1926, Vol. 4, p.137);
> Russell on Crimes (12th Ed. Vol. 1, p.300);
> Halsbury's Laws of England (4th Ed. Vol. 11, para.938);
> Words and Phrases (1970 Ed. Vol. 5, p.336)

Of these we would only mention Russell on Crimes, where it is said:

> "The evidence must be given wilfully, i.e. with some degree of deliberation. It cannot be regarded as wilful or corrupt perjury if given through surprise or inattention or mistake. It must be given intentionally."

Blackstone's Commentaries on the Laws of England (23rd Ed. p.161):

> "The perjury must also be corrupt (that is, committed malo-animo, wilful, positive and absolute not upon surprise, or the like."

Witness had spoken, counsel said, of the appellant being surprised when Phillips put to him the matter of the window cleaning contract and the jury were clearly impressed by this aspect because in a rider to their verdict, they said:

> "However, the jury in reaching this decision have been very conscious of the fact that the offence was committed

instinctively and on the spur of the moment for self-preservation and was in no way intended to damage any party in the case in which it was uttered."

In view of this rider we granted leave to add a ground of appeal raising the question whether the jury's verdict should be regarded as an acquittal in law.

Counsel for the Crown sought to meet the argument about ambiguity and failure to bring this matter sufficiently to the attention of the appellant, as well as the argument about surprise, by saying that the appellant knew very well at what the questions were aimed and also knew what to expect, since he had been warned beforehand by a police witness, Sergt. Viagas, of the kind of allegation Phillips was going to make against him, whilst the appellant's own testimony indicated that he deliberately denied having a personal contract so as to avoid having trouble with his superior officers.

Moreover, said counsel, "wilfully" was held in *Ryan* (1) to mean no more than "intentionally" and this element was fully satisfied in the instant case by the appellant's desire to avoid disciplinary proceedings and by the direction of his answer to that purpose.

Crown Counsel very fairly confessed a measure of anxiety about the jury's finding on surprise but said that in view of the evidence it was perverse and should be so treated.

Clearly, there was much force in Crown Counsel's contention that the prior warning must militate strongly against the suggestions that the appellant's attention was not sufficiently directed to the implications of what he was saying and that he acted out of surprise, but question could remain as to the precise content and impact of the warning from Sergt. Viagas.

In the circumstances, we do not think the finding expressed in the rider can be treated as perverse. At the least it introduced an element of ambiguity into the verdict. See *R. v. Hawkes* (2) and Halsbury's Laws of England (3rd Ed., Vol. 10, p.431). Consequently we allowed the appeal and quashed the conviction.

(1) (1914) 10 Cr. App. R. 4.
(2) (1931) 22 Cr. App. R. 172.

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