



REPUBLIC OF KENYA

IN THE HIGH COURT APPELLATE SIDE NAIROBI

CRIMINAL APPEAL NOS 8 AND 9 OF 1979

RAPHAEL JOSEPH OMBERE.....APPELLANT

EDWARD OMUOK OGUTU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against convictions and sentences in Criminal Case 2097 of 1978 in the Resident Magistrate's Court, Mombasa)

JUDGMENT OF THE COURT

The two appellants, Ombere and Ogutu, were convicted on two counts of corruption, the one with soliciting Shs 5000 from a man called Farid Ahmed in relation to a criminal charge which he was facing, and the other with receiving that money for that purpose. The facts of the case were these. Farid was, on 30th March 1978, put up before a magistrate upon two charges and the hearing of those charges was fixed to take place before Ombere, a Resident Magistrate, on 5th June. Farid appeared for the mention of the case before a third magistrate on 2nd May and before Ombere on 30th July. Farid and his lawyer then appeared for the hearing on 5th June; but it was put off until the next day, ie 6th June. On that day, with Farid's identification an issue in the case, the evidence of a number of witnesses was taken; but the hearing was not concluded and the case was referred back to the first magistrate to set the further hearing on the following day, ie 7th June. He set it for 28th June. On that date Ombere said that he found himself disqualified for continuing with the hearing and it was set for hearing before another Court. Farid was eventually acquitted on both charges.

It was the prosecution case that on 7th June Ogutu, who is Ombere's nephew, or the son of his nephew, went to Farid's shop, which proclaims itself to be the "Jin Cycle Mart" and said that Ombere had sent him to see if Farid wanted any help from him, which Farid declined. On 15th June, Ombere went to the shop. He spoke about two cycles of his which needed repair and then, changing the subject, said that although they could not then discuss the case, Farid could get in touch with his nephew whose name (Edward Omuok and telephone number, 21211, extension 651) he wrote down on a pink piece of paper. He added that he, ie Ombere, had "already helped many people, so you can contact my nephew and arrange with him a meeting place". Edward Omuok is Ogutu. Next morning, ie 16th June, Ogutu again went to the shop saying that Ombere had sent him to suggest a meeting place somewhere away from the shop. Farid, who had no interest in all this agreed to a further meeting that evening and went off to see Mr Rana, senior State Counsel. But Mr Rana was not in his office. When, as arranged, Ogutu called once more, Farid made an excuse and had the meeting deferred to 19th June. On the following day, ie 17th June, having gained the time he wanted, Farid again went to Mr Rana's office and was as unsuccessful as he had been on the previous day. Ogutu, as arranged, called at the shop on the evening of 19th June and the two of them went to Ogutu's house in Farid's car. But Farid would not go into the house, and they drove

off to near a bar. When they got there Ogutu said that Ombere, for substantial sums, had helped others and suggested that for help to be given to Farid over his case, Ombere would want Shs 10,000. To gain yet more time, Farid said that the amount was too much and suggested that Shs 3,000 would be enough. Ogutu said he would find out. On the morning of the next day, 20th June, Ogutu was once more at Farid's shop saying that Shs 5000 was the least that Ombere would take. Farid purported to agree and asked that he should have until Friday, 23rd June, to pay. Next day, ie 20th June, Farid went yet again to Mr Rana's office. This time he was successful; he received some advice and, on the following day, he saw ACP Luyundi and a trap was arranged.

Farid got in touch with Ogutu and suggested that they meet at 6.00 pm on 23rd June. Ogutu agreed and said that Ombere would also be there. Farid was given Shs 5000 and a recording device; and the police awaited events. At 6.00 pm on 23rd June Ogutu was, for the last time, again at Farid's shop, but Ombere was not. Farid closed his shop, the two of them went to Ogutu's house in Farid's car; and inside it he got Ogutu to talk and handed him the money. Asking Ogutu for a receipt, Ogutu obliged by giving one which says, "I received Shs 5000 for Mr Ombere". The trap, however, was less than was hoped for. This was for two reasons: that Ombere was not there, and that the recording was too poor to use. Farid came out and the police went into Ogutu's house. Ogutu was questioned and produced the Shs 5,000. He was arrested.

On 8th July Ombere made an inquiry statement to the police and on 19th October he made a cautioned statement to them. He gave evidence at the trial. In the inquiry statement, he said that he had two old bicycles with broken frames and, happening one evening in June to see a cycle shop, he went into it. He talked to some employees about the repairs his cycle needed and "a boy who looked like an Asian or Arab" (it was Farid) intervened. That Ombere spoke to those men does not mean, of itself, that his reason to go there was only for the repair of his bicycles. On the facts, it was not. Be that as it may, the statement goes on:

I told him what my problem was and he told me to bring the two bicycles then he would decide on what to do with them. I told him I was busy in Court and that I would not find time to bring the bicycles. I told him I would send somebody with the bicycles after arranging the transport. I gave him the name and telephone number of Edward and asked him to contact him [i.e. Edward] so that they could arrange when to bring the cycles.

Since then I have not seen Edward. On Saturday following the day Edward was arrested I got a message that Edward had been arrested in the previous night and that he was at the Central police station and nobody was allowed to see him. So far I have not seen Edward neither in the police cell nor in prison. I would most emphatically state that I did not send Edward to get money on my behalf, from anybody ... At the time I spoke to Farid at the shop I did not know he had a case before me. After this incident when I learned that Farid's case was before me I felt most disqualified to continue with the hearing of Farid's case ... I did not send Edward to collect any money from Farid and had earlier said that I never met Farid or Edward until I heard that Edward was arrested ...

The statement is imprecise as to the date in June when Ombere happened upon the shop; but the Saturday when he learned of Ogutu's arrest was 24th June. And whilst the statement is definite about his not seeing Ogutu from the time he visited the shop until the statement was taken, ie 8th July, it is less clear in relation to his never having met Farid prior to Ogutu's arrest. It is also less than clear as to the incident which prompted Ombere to disqualify himself for going on with Farid's case, but this emerges from his defence. It was Ogutu's arrest. The cautioned statement adopts the earlier one.

Giving evidence, Ombere again adopted his inquiry statement and he produced his two bicycles with supporting documents to re-inforce that his discussion at the shop concerned itself only with the repairs which his machines needed. However, it is not unfair, we think, to say that it was not the frames which needed repair.

He also denied saying that he would send his bicycles with his driver, adding that he had neither car nor driver, so could not have done so. And seeking further to clarify parts of his earlier statement, he

emphasised that he did not know Farid when he went into his shop, and that had he known whose shop it was, he would not have gone into it at all. It was pure accident that he happened upon it. Under cross-examination Ombere said that he last saw Ogutu before he began hearing Farid's case and that he had not been in touch with him since then. He did not seriously challenge that his visit to the shop was on 15th June (which it was). Arising out of this he was, of course, asked about the note which he gave, and the evidence about it reads thus:

Q. And are you saying [that the purpose of the note] was that [Farid] should get in touch with your nephew's son so that he could get these bicycles repaired?

A. Yes, to transport them.

Q. And you did not telephone [Ogutu] ... ? **A.** This is so. That was not unusual.

Q. You did not think it necessary to telephone your nephew that you had given his name for taking your bicycle to the shop?

A. No. That was Farid's job.

Q. How was [Ogutu] to know that you had authorised him to collect your bicycles?

A. Well, Farid was to ring him, and [Ogutu] would then have contacted me.

Dealing with the question as to whether he knew Farid as an accused before him, we have:

Although [Farid] had appeared before me for mention ... so many people appear in Court and you can't remember all of them.

Q. Was there no hearing before you before that date?

A. There was. It was on 5th and 6th June. Yes, the case was on for hearing before me for the whole of the day on 6th June 1978 with Farid as the accused.

Q. And you tell us that nine days thereafter when you went to his shop you did not know him?

A. I did not know him, and I did not know that he had a case before me ...

Q. What about Jins Cycle Mart. Did you not read the name outside the shop before you entered?

A. No I did not read the name. I don't remember seeing the name. I had not come across the name before I went to that shop. I first heard of that name at CID headquarters, that is 8th July 1978.

But the name appears as Farid's address on his charge sheet and it was mentioned several times in the evidence which Ombere took. The answers which we have just set out naturally prompted questioning about the selfdisqualification, and the record about it reads:

Q. And yet on 28th June 1978 you transferred that case to another magistrate because you felt that you were most disqualified to continue with the hearing of the case?

A. This was an oversight. I got information on 24th about the arrest of [Ogutu]. I now say it cannot be said that it was on 8th July that I first realized [Farid] was the same man whose case I was hearing and whose shop I had gone to. Yes. I came to know on 24th June 1978 [Ogutu] was arrested in connection with the case before me.

Ogutu made an inquiry statement to the police on the night he was arrested, ie 23rd June, which did not implicate Ombere; a further such statement on the morning of 25th June which did: and a cautioned

statement on 26th June. He made a statutory statement to the court. The first statement was impugned, but it was admitted in evidence following upon the holding of a trial within a trial. It was not again challenged in the trial; but it is only right to say that the magistrate did not draw the attention of the defence to the Court of Appeal having said, in *Kinyori s/o Karuditu v R* (1956) 23 EACA 480, that it was advisable to ascertain whether the defence intended to impugn the statement again as regards the weight to be given to it. The statement begins with a reference to "Friday last week", ie 16th June and the day after Ombere went to the shop; Farid telephoned him at about 9.30 a.m. on that day and said that he wanted to see him, giving directions where his shop was. Reaching the shop, Farid told him about his case and asked him to talk to Ombere about it as he (ie Ogutu) was friendly with him. Ogutu refused and left. On Wednesday 21st June, Farid rang him twice, first at 11.00 am and then at 2.00 pm neither of which calls he personally received; and a return call being unsuccessful, he went to the shop; but Farid was not there. Farid, however, soon enough caught up with him at a nearby teashop and said that he had been trying to get in touch with him since that morning, but as he, was leaving for Nairobi, could they meet on Friday instead? This was agreed to. On Friday morning Farid telephoned him and asked "how about passing at his place" and so, on the way to the cinema, at about 5.40 pm, he called in. The two of them got into Farid's car at his (ie Farid's) request and went to his (ie Ogutu's) house. When he arrived there, Farid asked him to intercede with Ombere for him; he said it would be most difficult; and Farid produced Shs 5000 to pass on to Ombere. The statement concludes:

Since he insisted so much, I told him it was alright, he could leave the money there and told him it was alright, he could leave the money there and told me to write on a piece of paper that I have taken the money which I did ... He then decided to leave ... After about five minutes the police came and found, found me in the kitchen and asked if I had any money; which money, I asked; then I said "yes" and took money out of my pocket (Shs 5000) and handed it over to them. I was then arrested and was told the reason for my arrest.

Inspector Kiilu was called from his house on the morning of Sunday, 25th June, as Ogutu wanted to make another statement, which Ogutu confirmed when he saw him. But before we reveal its contents, we will point to what took place in court before it went into evidence. The inspector having led up to the point where the statement could be put in, Ogutu's counsel, as it is recorded, said:

I am not objecting: I wanted to; but my grounds would be similar to the ones the statement and, as the court has already ruled against me, I would not object.

The magistrate told him that he could, nonetheless, object; but counsel said that he was not intending to do so. With respect, that a statement made two days earlier was admitted although challenged, even on similar grounds, is no reason not to challenge a statement said it have been made two days later. But no challenge was made, and the statement went in. In it, Ogutu said that on 6th June (that, it will be recalled, was the day when Ombere heard his several witnesses) Ombere sent for him, and, it is written down:

I went to his office the same day and he told me to write down a name, which he gave me as Farid. The magistrate directed me to where his business was situated. He instructed me to go to see Farid and ask him if he needed any help regarding his case, which was before him.

As a result, on the following day, ie 7th June, at about 3.30 pm he went there and found Farid. He told him what he had been asked to say; and Farid declined as he had confidence that he would be acquitted, he having done nothing wrong. On 13th June (a Tuesday and a date we have not before referred to) Ombere telephoned him in the early morning to ask whether anyone had rung him; and he said that no-one had. Ombere said that if a person called Farid of Jins Cycle mart telephoned, he should let him know. Then Farid rang and asked for him and said that he wanted to discuss something with him; but in his car, not in his shop. There is no mention of Ogutu telephoning Ombere. Then Farid said that on the previous day, as he sat in his car, he saw Ombere who was trying his case go into his shop so he rushed to greet him; but he only asked about spare parts for bicycles. Accordingly, he (ie Farid) asked him about his case and "that was when the magistrate gave Farid my telephone number to ring me and discuss it with me". Farid then asked him how much Ombere would want and:

I told him I could not tell him and asked him to weigh the case to see how strong the evidence was. I told him I was going to ask the magistrate. He insisted I should tell him how much I thought the magistrate would demand.

In the end, he suggested Shs 10,000 and Farid suggested Shs 3,000, plus a bicycle. On Friday, 16th June, continued Ogutu, he went to see Ombere who said that the “bicycle business” did not interest him and he would not take less than Shs 5,000. On 20th June, Tuesday it was, Farid twice rang him but he was out both times, and a return call being unsuccessful, he went to the shop. Farid was not there, but caught up with him at the teashop. There he said that he would pay the Shs 5,000 asked for. (This obviously is the incident spoken of in the earlier statement as having occurred on 21st June). Farid said that he was going to Nairobi that night and asked him to see Ombere and arrange a meeting for Friday, 23rd June. Farid telephoned him that day and a meeting fixed for 6.00 pm that evening was advanced to 5.45 pm. Ogutu passed the message on to Ombere; and Ombere said that he would not be going along as he had already spoken to Farid and asked him (ie Ogutu) to collect the money on his behalf. But if Farid would not give it to him, then he (ie Ombere) would collect the money from the shop on Saturday, 24th June. He went to Farid at 5.45 pm that night and told him that Ombere was not coming, which displeased him; but the visit was made to his house, the money was passed and he was arrested.

In his statutory statement, Ogutu told the Court that Ombere had called him on 7th June (that would be the day after the testimony of the several witnesses was taken) and told him to go to see Farid to ask if he needed any assistance. “Farid would understand”. He went, offered assistance, was told none was needed; and that was that. Then on 16th June Ombere telephoned him to ask whether anyone had rung him, and he said “No”. Ombere told him to expect a call from Jins Cycle Mart and, when he got it, he should relay its message to him. Then Farid called him and he went to the shop that evening. He introduced himself, as this was not done at the first meeting and, Farid said, “Mr Ombere had come to my shop a day before about the 15th. What has Mr Ombere told you?”. Nothing happened, and he left. Then, on 19th June, Farid rang him again and he (ie Ogutu) went to his shop about 6.00 pm that night. They went out in Farid’s car and Farid asked him to intercede with Ombere over his case as he (ie Ogutu) was his very good friend with the offer of Shs 3000 and a bicycle. He refused. On 21st June, Farid rang him about six times; he (ie Ogutu) went to his shop and then to the teashop; Farid found him there and said that he was going to Nairobi, asking him to fix a meeting for 23rd June, Friday. On Friday morning, Farid again telephoned him for a meeting that evening; he (ie Ogutu) got in touch with Ombere, and Ombere told him to deal with it or he would go next morning. He saw Farid as arranged and passed the message on. They went to his (ie Ogutu’s) house and the money was passed over for Ombere, the receipt for it was given and the police took it and arrested him.

The magistrate set out the charges, prosecution and defence cases and went on to say:

“Now the star witness for the prosecution is Farid ... As Mr Rao quite rightly pointed out, this witness should be treated as an accomplice. That is the effect of section 3 (2A) of the Prevention of Corruption Act ... The intent of the giver is now irrelevant. The mere giving of a bribe ... is now deemed to be done corruptly. The Court must therefore look for corroboration for his evidence. There is ample corroboration that he had a case before [Ombere] in which he faced two serious charges ... Now as to the various visits by [Ogutu] to his shop and one visit of [Ombere] there ... That the witness gave Shs 5000 to [Ogutu] is amply corroborated by police officers ... [Ogutu] again does not deny receiving the money on behalf of [Ombere]. There is also the receipt given by [Ogutu] ... Was [Ogutu] ... as innocent and ignorant of the real purpose ... as he now wishes the Court to believe ... ? The first [statement of Ogutu] ... he made on the very day the money was found on him and he said as little as he thought was safe for him to do. He made the second statement ... The whole of this statement makes it abundantly clear, in spite of [Ogutu’s] protestations that he had an innocent mind, that he was fully involved in this criminal transaction ... How can the Court believe Farid ... He impressed the Court very much in the witness box. He was cross-examined at length by the two counsel of the two accused and neither of them could shake him. His answers were convincing and consistent. But as the court has already noted that he is to be regarded as an accomplice ... The greatest corroboration of his evidence is that he went and reported ... Then there is the evidence of the police officers who

supplied Farid with the money and who later found money on [Ogutu]. Farid has therefore been corroborated in material particulars. I accept his evidence. Now as to the defence of [Ombere], there is first the evidence of Farid that this accused came to his shop ... Furthermore, if [Ogutu] is to be believed there can be no doubt about the guilt of [Ombere]. In fact [Ogutu's] statement in Court is very nearly a confession; but I am not treating it so, and I am not holding against [Ombere] anything said by [Ogutu] in Court, or indeed in any of his two inquiry statements ... To say the least [Ombere] cut a very poor figure in the witness box. I am convinced that he lied when he stated he entered Farid's shop just by chance. Only a few days ago he heard Farid's case for the whole day in Court ... Then of course he lied again about not knowing Farid of Jins Cycle Mart until these names were mentioned to him on 8th July 1978. He himself had to admit that was untrue when he was cornered on this matter. I have therefore no doubt in my mind that [Ombere] went to Farid's shop to initiate the negotiation for a bribe through his relative [Ogutu]. Further, Farid has told the Court that [Ogutu] mentioned that [Ombere] had sent him to assist him in his case ... Lastly, there is the receipt given by [Ogutu] where it is clearly stated that the money was meant for [Ombere] ... In the result, I find both [Ombere] and [Ogutu] guilty ...

We must now go over that part of the judgment which we have quoted; but before we do so, we think it only right to point out, as counsel for the Republic so fairly said, that, at all events in respect of Ogutu, the magistrate, on paper, appears to have arrived at his conclusion before making his findings concerning Farid. We shall say something of this in a moment; but now we go back to the judgment.

Farid was the prosecution's main witness and his status and worth as such were for thought and they were thought on. Farid "very much" impressed the magistrate by his convincing and consistent answers and his steadfastness. But there was more to it than that. Dealing with what he regarded as "the greatest corroboration", the magistrate spoke of Farid having reported to the police after seeking to do so to Mr Rana; but that was not corroboration at all. What it does is to show the sort of man Farid is; and that is another matter. However, Ogutu went to Farid's shop on 7th June and was rebuffed. Farid no doubt thought that that was the end of that; and, of course, nothing happened for about a week. Then, on 15th June, Ombere went to the shop, suggested help and left it to Farid to make the next move. But the morning after that Ogutu was back; and two visits within a day were a clear enough indication to Farid that he was not to be left in peace and so, putting Ogutu off, he went to see a representative of the Republic. Being unsuccessful, he went again the next day; and was unsuccessful once more. Three days later, after yet another visit by Ogutu, Farid again went to Mr Rana's office and following, as it must be, advice given him, finally saw the police. He did what they asked him to do. On what there is, Farid was a perfectly responsible member of the public and the magistrate was entitled to be impressed by him and to believe what he said. Farid was not, and could not possibly have been, a *particeps criminis* in the offences charged; but, beyond that, his evidence being supported by police testimony, there was no apparent reason why the magistrate should not have acted on what he said without looking to see if it was corroborated. The reason why corroboration was sought was because the magistrate must have misunderstood what Mr Rao, who prosecuted the case, put to him when, at the end of the evidence, he addressed him. The magistrate also had, as we believe, an imperfect understanding of the two cases to which Mr Rao referred him. It will be recalled that at the beginning of our extract from the magistrate's judgment we reproduced a passage beginning "As Mr Rao quite rightly pointed out, this witness should be treated as an accomplice ... The Court must therefore look for corroboration ... ". But Mr Rao did not say that. What he said was quite different. It was this:

[Farid] is a statutory accomplice; Prevention of Corruption Amendment Act 1967, section 3(2A); *Josphat Mulwa Mukima v The Republic* [1977] Kenya LR 5; *Kilili v The Republic* [1977] Kenya LR 80.

In other words, Mr Rao drew (and, with respect, rightly drew) a distinction between a real and a statutory accomplice, saying that Farid was a statutory accomplice only. Of course, he also went on to say that if Farid was to be treated otherwise he should be treated as an accomplice in the lowest possible degree; but none of this received consideration in the magistrate's judgment. *Josphat Mulwa Mukima v The Republic* certainly held that the mere giving of a bribe which leads to the doing of a corrupt act by the receiver must be taken, in view of the amendment of the law, to have been done corruptly, even though the giver

was an agent of justice acting under the instructions of the police (although police officers setting a trap were not accomplices). But *Kilili v The Republic* pointed out that an *agent provocateur* does not, generally speaking, need corroboration for his evidence, and by its comment (1977) Kenya LR at pages 81, 82):

We do not know what was argued in *Mukima's* case; the judgment gives no indication that a case was put up for accepting the complainant's evidence alone

the Court suggested that a statutory accomplice could have his evidence accepted without corroboration. We venture to say (and this has to be read in the light of what was said in the *Kilili* case as to why accomplice evidence needs corroboration) that, whilst a real accomplice needs corroboration, save in exceptional cases, a statutory accomplice *simpliciter* needs corroboration only in exceptional cases. As we read the evidence in the case before us, had we been sitting in first instance we would certainly have considered Farid a complete witness of truth and would not have looked for corroboration of what he told us. But the magistrate looked for corroboration, and we need to consider what he found, and what it was.

That Farid had a case before Ombere involving two serious charges, was for taking into account, but it was not corroboration. It could not be, because corroboration can only be found in some independent testimony which affects an accused person by tending to connect him with the crime. It must implicate him and confirm in some material particular not only the evidence given by the accomplice, but also the evidence that the accused person committed it: *R v Baskerville* [1916] 2 KB 658. The visits to the shop by the two appellants which they agree they made, upon the evidence accepted by the magistrate, were to be treated as corroboration. The trial in the lower court was essentially to do with fact and, upon the magistrate's findings and with all the evidence in mind, the visits which were made afforded corroboration because they confirmed Farid's evidence about what happened. The magistrate saw and heard the witnesses and he had to come to his conclusions as to the respective credibility to be attached to the evidence of the Republic's witnesses and that given by Ombere and Ogutu. It would be wrong for us to interfere with his findings; *R v Gokaldas Kanji Karia* (1949) 16 EACA 116, *Uganda v Khimchand Kalidas Shah* [1966] EA 30 and *Murugami v The Republic* (unreported). Surprisingly, the magistrate, in dealing with the visits and the issue of corroboration has not separately referred to Ombere writing down Ogutu's name and telephone number. We shall say something about it in a moment. The money found upon Ogutu is corroboration of Farid's evidence concerning him; and the fact that Ogutu said that it was for Ombere does not make it less so. And that, as we read the magistrate's judgment, is all that he said about corroboration. Nor does he indicate which piece of evidence was, in his view, corroboration against which appellant, as he should have done. But he did speak of untruths in the defence case, a topic with which we shall also deal in a moment.

Dealing with the defence of Ogutu, the magistrate began by referring to his first inquiry statement, commenting that it contained only so much as Ogutu thought it safe to say. We do not accept that. It is true that it begins with a reference to 16th June rather than 7th June and it indicates that Farid initiated the affair; but it is a confession even to the extent of acknowledging the receipt of the Shs 5000 as a bribe for Ombere. Nor do we accept that Ogutu's second inquiry statement protested his innocence. It, also, is a confession. And, finally, we do not accept that Ogutu's statutory statement is "very nearly a confession" because that is what it is.

Dealing with the defence of Ombere, it is unfortunate that the magistrate made no more than the bald statement that he cut a very poor figure in the witness box, for this comment required elaboration. But the magistrate was entitled to hold that Ombere was untruthful when he said that he went into Farid's shop by chance and that he did not know Farid before 8th July. Untruths, of course, have their view in a case: *Pyaralal Melaram Bassan v R* [1960] EA 854 and *Juma s/o Ramadhani v The Republic* (unreported) following *Rafaeri Munya v R* (1953) 20 EACA 226 and *Boota Singh s/o Naranjan Singh v R* [1960] EA 638.

We are impelled to say that we find it impossible to understand why the magistrate said that he was not "holding against [Ombere] anything said by [Ogutu]" although, of course, in defiance of this self-direction he said, "Furthermore, if [Ogutu] is to be believed there can be no doubt as to the guilt of

[Ombere]”. If evidence is led and accepted, it must be used as the law requires. Even the seemingly unfettered overriding jurisdiction of judges in criminal cases to exclude evidence has recently been shown to be nowhere near as wide as was hitherto thought; *R v Sang, R v Mangan* [1979] 2 All ER 46. A confession, even a retracted confession, can be taken into consideration against a co-accused (*Anyuma s/o Omolo v R* (1953) 20 EACA 218); so, too, a statutory statement which is a confession, although it needs corroboration (*R v Ramji Hilji* (1946) 13 EACA, 127). But we are, of course, required to make our own assessment of the written word (*Dinkerrai Ramkrishan Pandya v R* [1957] EA 336, explained in *Shantilal Maneklal Ruwala v R* [1957] EA 570); and that we have done. Let us point to just a few aspects of the case with all the evidence in mind.

The two appellants not having been charged with conspiracy to defeat justice, the evidence against each of them must be separately considered. But Farid’s evidence must be thought on in its entirety to establish his credibility before that is done. And if it is analysed, as we have analysed it, with the dates (which we have particularly detailed) in mind, it ties in exactly: there was the evidence taken on 6th June, the re-allocation for 28th June made on 7th June, the visit by Ogutu on this date, the visit which Ombere made on 15th June, the visit next morning by Ogutu, the suggested meeting for 19th June, the events of 23rd June, and so on. And, superimposed on this, and fitting in precisely with it, are the visits made by Farid to authority. It would have been better had Mr Rana and his secretary (or whoever saw Farid) given evidence; but the magistrate nonetheless believed (as we believe) that the visits were made. That being so, much of the defence case must be wrong. It is, for instance, clear, among other things, that Farid did not initiate the suggestion of a bribe. In Ogutu’s first statement he said that when Farid telephoned him on the morning of 16th June he said he wanted to see him, gave him directions as to where to come, and when he saw him he asked him if he would intercede with Ombere because he was friendly with him. But, by that time, Ombere had been to the shop, had offered his help and had written Ogutu’s name and number down on a piece of paper. Farid did not telephone Ogutu on the morning of 16th June; but were it otherwise, if the call was made as a result of Ombere’s visit of the previous day, Farid would not have suggested that Ogutu talk to Ombere because they were friends. And if the call was made other than as a result of Ombere’s visit, the coincidence would be too much. Furthermore, and still in regard to the same statement (the date is unimportant here) if Farid was so concerned that he had been trying to get in touch with Ogutu since morning, it is surely unlikely that he would put off telling him his troubles for two or three days because he was going to Nairobi. And there is this piece of evidence, not, as we think, the subject of challenge in cross-examination given by C I Nyenze relating to the time when the police recovered the Sh 5000 from Ogutu:

I told him to surrender the money he had received from the first prosecution witness. He took out the money from his right side hip pocket and handed it to the third prosecution witness. It was Shs 5000. I questioned [Ogutu]. I asked him “What is this money for?” He [said] Farid had come to hide his money here because he did not want his wife to see it.

That answer, shortly to be changed, was patently untrue.

In respect of Ombere’s visit to the shop, it is true that he had two cycles and that they needed repair, although doubtfully those he mentioned; but whilst repairs were needed, we do not accept that it was just by chance that within eight days of taking evidence in the case against Farid, he chanced to go into his shop. Farid’s name and the name and address of his firm “Jin’s Cycle Mart, Mombasa” were written on the charge sheet and the firm name was mentioned several times during the day’s hearing; but leaving aside that the name is twice displayed on the premises and that Farid’s case was to do with identification, we find this in Farid’s evidence, “The case went on for the whole day. I was not identified by any of the prosecution witnesses” and this comment in Mr Ryland’s judgment acquitting Farid:

Accused on being taken to Mackenzie’s not surprisingly failed to recognise his would-be purchasers. Neither did anyone recognise him ...

there is untruth in Ombere’s first statement where he said, “I never met Farid or Edward until I heard that Edward was arrested”. He himself admits that he went to the shop. But in addition to that, in this statement we find:

I told [Farid] what my problem was he told me to bring the two bicycles then he would decide on what to do with them. I told him I was very busy in Court and that I would not find time to bring the bicycles.

What was the purpose of telling Farid that he was very busy in Court? And it is at least possible that Farid would have said, "I know, you are trying me". And for what (if anything) it is worth, the arrangement spoken to seems odd. If Ombere was to arrange transport, and in his statement he says, "I told him I would send somebody with the cycles after arranging the transport" what purpose would Farid have had to get in touch with Ogutu? There was no point in anyone getting in touch with anyone else except Ombere after he had arranged the transport. And he did not arrange it. There is much else that can be pointed to such as how, on the defence case, Farid knew that Ombere and Ogutu were close to each other, how Farid would know where to get in touch with Ogutu and that when Farid was supposed to be making his urgent telephone calls to Ogutu, he was seeing the police.

We do not doubt the guilt of either appellant. We would, as we have indicated, have convicted on Farid's evidence without corroboration for it was cogent, steadfast and presented no dangers. But the magistrate looked for corroboration. At least Farid's evidence is corroborated in respect of Ombere by the slip of paper which the magistrate found, and was entitled and right to find was for the purpose of corruption and not repair work. As for the case concerning Ogutu, we are satisfied that the premature finding concerning him to which we have referred, occasioned no possible miscarriage of justice. As we read the judgment, for all the manner in which the magistrate got it down, he had all the evidence in mind when he did so. In any case Farid's evidence against Ogutu is corroborated by the discovery of the money on him. There are also his confessions, that which was impugned being corroborated at least by the receipt. We do not accept that the magistrate was wrong to utilise section 20 of the Penal Code, nor do we accept the argument, rejected also in the court below, that there was no soliciting of the bribe by Ogutu because Farid asked for it; Farid did not.

Appeals dismissed.

Dated and delivered at Nairobi this 28th day of June 1979.

E. TREVELYAN

JUDGE

S.K SACHDEVA

JUDGE