30th January, 1963.

JAMAICA.

COURT OF APPEAL

CRIMINAL APPEAL NO. 113/62

BEFORE: The Hon. Mr. Justice Duffus - Presiding
The Hon. Mr. Justice Lewis
The Hon. Mr. Justice Waddington (Ag.)

Mr. Frank Phipps appeared for the Crown

Mr. Howard Hamilton appeared for the Appellant.

REGINA V. C E C I L. S I N G H.

JUDGMENT DELIVERED BY THE HON. MR. JUSTICE LEWIS:

The Appellant was convicted in the Kingston Circuit Court on the 4th of June, 1962, on an Indictment charging him with forgery of three documents in the name of one Aubrey Chin, a merchant of Highgate, namely -

(i) a letter addressed to the Bank of London and Montreal requesting delivery of a cheque book to be charged to the current account of Aubrey Chin;

(ii) a letter to the said Bank accounting for a difference in the signature of Aubrey Chin; and

(iii) a cash cheque for Two Hundred Pounds (£200) drawn against the current account of Aubrey Chin.

At the time of the commission of these offences the appellant was a prisoner in the General Penitentiary. Douglas Braham, a warder at the General Penitentiary, was charged on the same indictment on three counts for uttering these documents and on a further count for obtaining money on the forged cheque. They were tried jointly and both were convicted. The appellant now appeals against his conviction. Several grounds of appeal were filed but only two were relied upon. Both are interesting grounds of law and were fully and ably argued by Counsel on both sides.

The first ground was that one member of the Jury, by virtue of a previous conviction for felony, namely, receiving stolen goods, was disqualified by law from acting as a juror at the trial. In support of this ground affidavits were filed and the truth of the statements in these was not disputed by the Crown.

Mr. Hamilton, who appeared for the appellant, founded his argument upon Section 4 of the Jury Law, Chapter 186, which is as follows:-

"No person who

(a) cannot speak, read and write English; or

(b) has been or shall be convicted of treason, felony, or any infamous crime, unless he has received a free pardon,

shall be qualified to serve on juries."

He submitted that although the objection to the juror's qualification was not taken at the trial it was competent to the appellant to take it now because he was not aware of it at the time of the trial and that on proof of the disqualification the Court should set aside the conviction and grant a venire de novo. In support of his submission he referred to Wakefield (1918) 1 K.B. 216, a case of personation of a juror by a person not qualified to act as a juror and whose name was not on the jury List, in which it was held that as the cause of challenge was not known at the time of the trial failure to challenge was not prejudicial to the appellant, and that there had been a mistrial. Counsel relied especially upon the case of Ras Behari Lal v. R. (1933) 102 L.J.P.C. 144 in which Lord Atkin, who delivered the judgment of the Judicial Committee, indicated that if the objection to a juror was not known at the time of the trial but arose afterwards the Court would interfere and set aside the conviction. In that case, on proof after trial that one juror knew no English at all and certain others did not understand English sufficiently to be able to follow those parts of the trial, such as addresses of Counsel and the Judge's charge, which were entirely in English, it was held that their lack of competence amounted to a miscarriage of justice and the conviction was set aside. Counsel submitted that as inability to 'speak, read and write English' is one of the grounds of disqualification mentioned in Section 4 of the Jury Law, this case was conclusive in appellant's favour.

Reference was made to Kelly(1950) 34 Cr. App. R. 95 in which the Court of Criminal Appeal held, inter alia, that a venire de novo will not be ordered on the ground of the lack of qualification of a juror except in cases of either the impersonation of a juror or a mistake as to his identity. Counsel submitted that this was not the real ground of the decision in Kelly and was in fact obiter.

If this Court thought that the decision in Ras Behari Lal v. R. (supra) was conclusive upon the point under consideration, it would of course be bound to follow it. We think, however, that that case, the facts of which as well as the issues involved were quite different from those of the instant case, was decided, not upon the interpretation of any statute relating to the qualifications of jurors, but upon the broad basis of natural justice. The main consideration involved in the inability of a juror to understand English, namely, his incompetence to take his proper part in the trial, thus depriving the accused person of his fundamental right to each juror's individual determination of the issues, is quite inapplicable to the case of disqualification by reason of conviction of felony. On these grounds we are of opinion that Ras Behari Lal is to be distinguished from the case before us.

Moreover, we consider that this question is to be determined upon consideration of the relevant provisions of the Jury Law. Sections 7 to 12 provide for the annual preparation, publication and final settlement by the Justices in Petty Sessions of the lists of persons in each parish qualified to serve as jurors. Section 13 provides that they 'shall hear and finally dispose of any objections that may be made to the list'. Section 13 requires the Justices, after finally settling the jury list to certify it, and anants that 'their decision as to the qualifications of the persons in the list shall, as respects that list be final'. And by Section 14, the persons whose names appear in the certified list for each parish 'shall' be the 'jurors qualified and liable to serve on the jury for such parish for the ensuing year and

until the formation of a new jury list'. In our judgment the effect of these sections, and in particular sections 13 and 14, is to give finality to the certified jury list and to preclude any objection being taken to the qualification of a juror whose name appears upon the list based simply upon the terms of section 4. In so holding we are supported by the decision in Kelly (supra) where the effect of a provision similar to that contained in Section 14 was considered, and by the case of R.v. Sutton (1828) 8 B. & C. 417, in which it was held that where an alien whose name was on the panel, although disqualified by statute to serve as a juror, was not challenged and sat, his presence did not invalidate the trial. We reserve for further consideration, should this question arise, what effect, if any, the provisions of the Jury Law as to the finality of the list may have upon an objection to a juror founded upon miscarriage of justice arising from his incompetence to follow the proceedings at trial because of his inability to understand English. In our view this ground of appeal fails.

The second ground of appeal was that the learned trial Judge failed to warn the jury of the danger of acting on the uncorroborated evidence of an accomplice, or of the possible motive of self-interest on the part of the co-accused Braham in giving his evidence.

In their evidence at the trial each of the accused pleaded his own innocence and sought to implicate the other. The appellant tendered a letter which he said Braham had sent him offering him One Hundred Pounds (£100) if he would say that he had given Braham the cheque to cash. Braham claimed that he had acted as an innocent agent of the appellant who he said had given him the letters and cheque to take to the Bank, though he admitted having cashed the cheque and used the money. In these circumstances it was urged that Braham was an accomplice and that as admittedly no warning as to corroboration was given to the jury, the conviction should be quashed. Alternatively, it was submitted that at least a warning as to the self-interest of a co-defendant giving evidence either

against or implicating his colleague should have been given, that the evidence of the handwriting expert, the only evidence tendered by the Crown against the appellant, was weak and unreliable, and that in the circumstances the conviction should be quashed.

The Court listened with interest to a valuable discussion of the question whether a co-defendant alleged by the Crown on the facts of the case to have been a party to the transaction, who gives evidence either against or implicating his colleague, can properly be termed an accomplice within the definition of that term given by Lord Simonds in Davies v. The Director of Public Prosecutions (1954) A.C. 378. For the purposes of the present appeal we do not think it necessary to resolve this question. We would merely observe that in Davies' case Lord Simonds was dealing with 'the rule as to warning' where a person who is an accomplice gives evidence on behalf of the prosecution, and which rule, he stated, applies only to witnesses for the prosecution.

Whatever may be the correct label to be applied to Braham in the present case, there can be no doubt that he was, on the facts, particeps criminis to the forgery of the documents, though he was not himself charged as an accessory to the forgery. Admittedly he knew that Singh was signing the name Aubrey Chin and his explanation that Singh told him that he did so because his mother was Chinese and he was known to the Bank by that name was obviously rejected by the jury. There was also evidence that he lied to the Bank clerks in saying that he worked with Chin and that Chin had suffered a fracture of some of his fingers. In these circumstances his evidence, seeking to exculpate himself, and placing the whole responsibility for the crimes upon the applicant, clearly called for a warning of some kind to the jury. No warning was given.

The Court was referred to a line of cases commencing with Scott (1909) 2 Cr. App. R. 215 and of which the most recent

appears to be Fletcher (1962) C.L.R. 551, in which the question whether and what warning should be given to the Jury where an accused person gives evidence adverse to or implicating his co-defendant was considered. It is unnecessary to consider all these cases, which, as has been stated in R. v. Prater (1960) 44 Cr. App. R. 83, do not all point in the same direction. We think that the modern and mere acceptable view is that stated by Edmund Davies, J. in delivering the judgment of the Court in Prater's case, at page 86 -

> "This Court in the circumstances of the present appeal, is content to express the view that it is desirable that, in cases where a person may be regarded as having some purpose of his own to serve, the warning against uncorroborated evidence should be given. But every case must be looked at in the light of its own facts and in Garland (1943) 29 Cr. App. R. 46 Humphreys, J. delivering the judgment of the Court used words which this Court finds completely apposite to the circumstances of the present case, namely that if there be clear and convincing evidence to such an extent that this Court is satisfied that no miscarraige of justice has arisen by reason of the omission of the direction of the jury, this Court will not interfere."

We have to consider what warning would have been appropriate in the instant case, bearing in mind that both the accused gave evidence and that each sought to exculpate himself and implicate the other. It may well be, as Mr. Phipps urged on behalf of the Crown that the usual warning against uncorroborated evidence might have confused the jury in their consideration of the case of each defendant separately. We think that this is the type of case in which it is desirable that the sort of direction which was held to be a proper direction in Meredith (1943) 29, Cr. A.R. 40, and which was approved in Rudd (1948) 32 C.R. A.R. 138, should be given. It is perhaps best stated in the headnote to Meredith -

> "Where several prisoners are tried jointly, and one or more of them gives evidence on oath, it may in some cases be desirable that the jury should be directed that, although the evidence given by one prisoner does in those circumstances strictly become evidence against his co-prisoners, they should not regard it as such, but should use that evidence only for the purpose of considering whether that individual prisoner has given an explanation which may be true, or whether his evidence compels the jury to disbelieve him."

We adopt this statement as being the proper direction which it was desirable to give in this case.

We have come to the conclusion that the evidence tendered by the prosecution against the appellant was clear and convincing. The jury had before it the questioned documents and the specimens of the appellant's handwriting and signature. They were assisted in their consideration by the evidence of the handwriting expert, which was strong and definite and was based upon his comparision of the three documents with the specimen writings. Our own examination of this evidence leads us to the same conclusion which the jury reached. The one aspect of the expert's evidence alleged by the appellant to be unsatisfactory, but which was indeed explained by the witness, was clearly put to the jury by the trial judge.

We are satisfied that no miscarriage of justice has arisen by reason of the omission of the direction to the jury and that this Court ought not to interfere with the conviction. If we felt it necessary to apply the proviso to Section 13 (1) of the Judicature (Court of Appeal) Law, we would do so, but we do not think this course necessary in the curcumstances of this case, and the appeal is dismissed.

The Court has decided that the sentence be deemed to have commenced on the 24th of September last, that is the date on which this Court should have sat for the first time, as the appeal would normally have come up for hearing during that session.