NGATAMANA

v.

REGINAM

[FIJI COURT OF APPEAL AT SUVA (Lowe, C.J., President, Knox-Mawer, J/A), February 1st, 1960]

Criminal Appeal No. 20 of 1959

(Appeal from H.B.M's High Commissioner's Court, Honiara)

Pacific Order in Council 1893—Article 98—Assessors' opinions—when to be sought—admissibility of dying declaration—issues thereon to be repeated before assessors after trial within a trial concluded.

The appellant was convicted of murder before H.B.M's High Commissioner's Court at Honiara, British Solomon Islands Protectorate, by a Judicial Commissioner sitting with two assessors. Upon appeal, the Fiji Court of Appeal held that the conviction could not be supported upon the evidence. This case is reported for certain other points referred to in the last part of the judgment of the Court of Appeal.

In the first place it was observed that the Judicial Commissioner had sought the opinions of the two assessors after summing up to them but before he delivered the judgment.

Secondly, it was noted that after the trial judge had, in the absence of the assessors, conducted a trial within a trial to decide upon the admissibility of a dying declaration by the deceased, and admitted same, no evidence was then given in the main trial before the assessors, as to whether or not the deceased was in the condition of mind necessary to make his declaration admissible.

Held.—(1) Article 98 of the Pacific Order in Council requires that the opinions of the assessors should be sought after and not before judgment.

(2) The fact that the evidence relating to the dying declaration was not repeated before the assessors would probably in itself, be fatal to the conviction.

Cases cited:

Bharat v. The Queen 1959 3 W.L.R. 406

R. v. Christensen, 1 W.W.R. 1307 (15 E. & E. Digest, 972)

P. Rice for the appellant

J. W. F. Judge, Crown Counsel for the Crown.

Judgment:

[After considering certain issues raised on the facts, the judgment proceeds]

There is, however, another aspect to which we must refer. The learned Judicial Commissioner at the conclusion of the evidence, summed up to the assessors and, we think, was right to do so as they would find such a procedure to be helpful. Although the assessors had no voice or vote in the decision of the Court they are entitled by the third paragraph of Article 98 of the Pacific Order in Council, 1893, to certain rights. The paragraph reads as follows:—

> "An assessor shall not have voice or vote in the decision of the Court in any case, civil or criminal, but an assessor dissenting . . . in a criminal case from any decision of the Court, or the conviction, or the amount of punishment awarded, may record in the minutes of the proceedings his dissent and the grounds thereof."

That clearly indicates that the assessors must be given the opportunity of dissenting.

After he had summed up, the learned Judicial Commissioner sought the opinions of the two assessors, each of whom considered the accused to be not guilty. We are of the opinion that it was premature to ask the assessors for their opinions at that stage as no decision of the Court had been disclosed nor had there been a conviction or any punishment awarded. It seems to us that the relevant portion of Article 98 makes it clear that the first opinions of the assessors should be sought after judgment. We are not unmindful of the fact that the procedure under Article 98 makes somewhat of a farce of the requirement that assessors shall be present at the trial and in such circumstances it would be difficult to say that the trial had been " with the aid of assessors " because they would not be able to aid the Court in such circumstances. Unless there is some amendment to Article 98, of which we are unaware, a trial Court is bound by the provisions of the Article and should seek the opinions of the assessors after judgment and again after sentence although in capital cases this latter requirement seems to be unnecessary. The record indicates that this was not done in the instant case although it is clear that the learned Judicial Commissioner gave serious consideration to the opinions expressed, before he wrote his judgment. However, the accused is entitled to whatever benefit might accrue to him from the opinions of assessors. Such a benefit might well become apparent on appeal when it is necessary to study the opinions of assessors and to scrutinize the evidence carefully to see if there was justification for those opinions or good reason for the trial Court differing from them. As the assessors were precluded from exercising the functions they were entitled to exercise, it is possibly arguable that the conviction and sentence amount to a nullity. *Bharat v. The Queen* 1959 3 W.L.R. 406, might well have some application in this regard, although it is difficult to say that the trial, in the result, was " not conducted with the aid of assessors ".

We realize that Rule 36 of the Court of Appeal Rules (No. 2) 1956, might in any case be properly applied. There is, however, still another aspect of the trial which we find it necessary to mention. When the prosecution intimated to the Court that it was intended to introduce evidence of a dying declaration, the learned Judicial Commissioner, very properly, excluded the assessors and conducted " a trial within a trial " to determine the question of admissibility. Father Espagne gave very clear evidence which proved to the satisfaction of the Court that, when Pita spoke to the Father at the hospital, Pita was in a settled hopeless expectation of death. On that evidence the trial Court decided that declarations made by Pita whilst in that condition were admissible in evidence and we agree with that finding.

However, when the assessors returned to Court for the continuation of the main trial, no evidence was given in their hearing of Pita being in that settled hopeless expectation of death when he made his declaration. We cite in this connexion the case of *R. v. Christensen*, 1 W.W.R., 1307 (15 E. & E. Digest, 972). The portion of the judgment referred to in the Digest is as follows:—

> " The trial judge may, in his discretion, exclude the jury while he takes evidence as to the circumstances surrounding the taking of a dying declaration, for the purpose of deciding whether or not to admit it in the evidence. But if he has excluded the jury during this preliminary investigation, and he admits the evidence, then the whole evidence of the person taking the declaration with regard to the method of obtaining it and the condition of mind of deceased and every detail of the circumstances surrounding the proceeding must be fully repeated to the jury. The weight to be given to the declaration is entirely for the jury, and in order to judge of this they must be told completely everything that occurred. They are entitled to hear all this not merely to enable them to judge of the weight to be given to the declaration even if they believe it was made in the settled and hopeless expecation of death, but also, and primarily, to enable them to decide finally whether there was in fact such a settled belief in the mind of the deceased. Where, however, upon cross-examination by counsel for accused in the absence of the jury the doctor who had taken the declaration stated that he had given the deceased a hypodermic injection before the declaration was made, in order to relieve his pain, and when the jury returned no one asked the doctor to repeat this evidence, it was held that the trial judge was not in error because of this omission, and in any case it had not caused any substantial wrong or miscarriage of justice. The judge in deciding to admit in evidence the dying declaration is only performing a preliminary duty, and after it has been admitted it is still the duty of the jury to decide finally, as part of the process of weighing the testimony, whether the deceased was or was not in the condition of mind, i.e. the settled and hopeless expectation of approaching death, necessary to make the declaration admissible, and their duty in this respect should be made clear in the judge's charge to the jury."

We think that the same principle is pertinent in the instant case. The question of whether or not Pita was in a settled hopeless expectation of death is one of fact upon which the assessors would base their opinions. There can be no doubt that the Court is to decide the question of law as to admissibility and we think it possible that the relevant reference in Archbold (34th Edn.) 1082, might have misled the Court in the instant case. The learned author in that paragraph was dealing with the question of law to be determined by a trial Judge and not the question of fact in so far as the latter is something for a jury to decide.

The judgment of the learned Judicial Commissioner was, of course, based on the evidence contained in the main trial, as is necessary in all cases, and had the assessors expressed their opinions as to the decision of the Court, those opinions would have been expressed on that judgment but founded upon the evidence adduced before them. But they heard no evidence as to the condition of the mind of the deceased. In this respect, the trial Court was, no doubt, misled by the fact that the prosecution failed to adduce evidence from Father Espagne, repeating the relevant portion of the evidence

he had given in the inner trial. As to that, it is not necessary for us to record any finding, particularly as this matter and the legal point which arises regarding the assessors' opinion being given at the wrong stage, were not raised by either Counsel and we have, therefore, heard no argument in those respects. It appears to us, however, that, alone, the error in admitting the dying declaration in the circumstances is probably fatal to the conviction.

We have expressed this opinion in the hope that it might be of future guidance and we find support for it in the fact that, as the assessors have the right to express their opinions regarding the decision of the Court and the punishment imposed but were not given an opportunity of doing so, it is difficult to say with any degree of certainty that their opinions, expressed after the summing-up, were favourable to the accused and that he was not prejudiced in the result. In law, still bearing in mind Article 98, the assessors have expressed no opinions at all because, as we have stressed, there is no legal provision whereby they are entitled to an expression of opinion prior to judgment and the opinions prematurely expressed must be ignored. This Court is not entitled to speculate as to what opinions the assessors might have given had they first considered the delivered judgment and then been afforded the opportunity which should have been given to them.

Apart from other considerations, the serious conflicts of evidence, which raise considerable doubt in our minds as to the guilt of the appellant, satisfy us that the conviction cannot be sustained.

We allow this appeal, quash the conviction and direct that a judgment and verdict of acquittal be entered. The appellant is to be released from custody forthwith.