RAM ASRE

v.

REGINAM

[COURT OF APPEAL, 1965 (Mills-Owens P., Marsack J.A., Gould J.A.), 19th October, 9th November]

Criminal Jurisdiction

Criminal law—evidence—whether prejudicial effect outweighed by cogency—evidence of one accused against co-accused—warning to assessors.
Criminal law—witness—previous statements inconsistent with testimony—co-accused giving evidence—direction to assessors.

The prejudicial effect of evidence given at the trial of the appellant that he was in possession of a shotgun some four or five months prior to the shooting of the deceased, who died from shotgun wounds, is not such as to outweigh its relevance and the evidence was rightly admitted.

In directing the assessors that it is dangerous to accept sworn evidence which is in conflict with statements previously made by the same witness, or at least that the evidence should be submitted to the closest scrutiny, but that it was still their duty to determine whether the evidence was worthy of credence the trial judge correctly applied the law as laid down in *Gyan Singh v. R.* (1963) 9 F.L.R. 105 and *Ravi Nand v. R.* (1964) 10 F.L.R. 37.

While normally a trial judge will be impelled to direct the assessors that it would be dangerous to act upon the evidence of one co-accused against the other, or even in some cases to direct them that they ought to reject that evidence entirely, there is no general principle of law that evidence given at the trial by one accused person cannot be used against his co-accused.

Cases referred to: *R. v. Meredith* (1943) 29 Cr.App.R.40: *R. v. Rudd* (1948) 32 Cr.App.R.138; 64 T.L.R. 240: *R. v. Prater* (1959) 44 Cr. App.R.83; [1960] 1 All E.R. 298.

Appeal against conviction and sentence.

F. M. K. Sherani for the appellant.

G. N. Mishra for the Crown.

Judgment of the Court (read by Marsack J.A.): [9th November, 1965]—

The appellant was on the 8th July, 1965, convicted, together with one Khem Raj, of attempted murder and sentenced to 14 years' imprisonment. The trial took place before a Judge and three

Assessors, and the trial Judge entered a conviction in accordance with the unanimous opinions of the Assessors. This appeal is brought against both conviction and sentence.

The facts have been shortly stated in the judgment already given upon the appeal of Khem Raj and do not appear to require re-statement, except for one important fact affecting the appellant and not his co-accused. The day after the shooting of Suresh Singh the appellant was suffering from a number of injuries to the left side of the body, described by a medical witness as abrasions to the left ankle, hip, shoulder and wrist, and left side of the face. The medical officer deposed that these injuries were consistent with a fall, on the left side, on a hard rough surface. The case for the prosecution is that these injuries were sustained when the appellant jumped out of the moving car after the shooting of Suresh Singh. The appellant's evidence was to the effect that he was injured on the morning of the 25th January when he climbed a tree to cut some branches, and a branch jerked and caused him to fall.

The Notice of Appeal set out four grounds of appeal, including the general ground that the verdict was unreasonable and could not be supported having regard to the evidence. The argument before this Court was virtually confined to two main submissions:

(a) that the evidence of the prosecution witness Ami Chand as to the possession of a shot-gun by the appellant some months before the shooting of Suresh Singh was inadmissible, or if admissible should have been rejected on the ground that its prejudicial effect far outweighed its probative value;

(b) that the evidence of certain Crown witnesses, and in particular Ami Chand, presented such inconsistencies and contradictions that it should have been disregarded entirely.

Dealing first with the evidence of Ami Chand as to the possession by the appellant of a shot-gun. This was to the effect that some time in 1964, perhaps four or five months prior to the shooting, Ami Chand had gone to the appellant's house in the evening before going on to a Hindu religious ceremony elsewhere. When he was some three or four chains away from the appellant's house the witness heard the sound of a gun-shot, coming from the direction of the back of the house. He saw the appellant running from the back of the house carrying something like a gun. On his arrival the appellant said: "Oh, Ami. You have seen the gun. Don't tell anyone". The witness then saw that the appellant had a gun which he describes as black and about a yard long. The appellant took the gun inside the house. Later the appellant spoke with Ami Chand about the gun and said: "I have got the gun like that and there is no reason for you to know". Counsel submits that the only probative value of that evidence is by way of inference, first that the appellant is a man of bad character, and further that he used the same gun for the shooting of Suresh Singh. He also submits that the evidence was tendered for the purpose of proving that the appellant had a particular propensity, namely using a shot-gun for illegal purposes; and Counsel quoted well-known authorities to show that such evidence is not admissible.

In our view the purport of the evidence is quite other than that. It is clear that the wounds inflicted upon Suresh Singh were almost certainly caused by pellets from a shot-gun. One important link in the chain of proof against the appellant would, in our opinion, be evidence that he owned or had been in possession of such a weapon. Because of the restrictive provisions of the law in Fiji shot-guns are not readily available to all members of the public. The fact that such a weapon was available to the appellant is, therefore, one of the matters which it would be relevant to prove as part of the case against him. It might properly be urged also, we think, that the conversion deposed to by Ami Chand with regard to the appellant's possession of the shot-gun is relevant also in that it indicates that the gun was his property, and suggests that he was going to retain it; but did not want his possession of the weapon to be made known generally.

In our opinion the evidence of Ami Chand on this point was properly admitted and the learned trial Judge's ruling that its relevance outweighed its prejudicial effect was correct. This ground of appeal therefore fails.

On the second ground counsel refers particularly to the evidence of Ami Chand, which he properly describes as of considerable importance to the case for the prosecution. This witness had admittedly made earlier statements to the police which were quite inconsistent with the evidence given by him at the trial. In particular he had, when he was first interrogated by Inspector Nanka Singh, disclaimed all knowledge of what had taken place on the night of the shooting. In the course of his evidence Ami Chand says:

> "On the 19th Nanka Singh came to me. I denied knowing anything that day. That was a lie. My mind didn't work."

That same day, however, the witness told Nanka Singh that he knew something and would tell him the following day after he had discussed it with his uncle. Ami Chand gave as the reason for his initial reluctance to talk that he was afraid of the appellant. He was searchingly cross-examined on the subject of his previous contradictory statements which were thus brought clearly to the notice of the Assessors.

The law regarding the admissibility of evidence from witnesses who have made previous inconsistent statements, and the weight to be attached to that evidence, is well established. It was considered by this Court in the case of *Gyan Singh v. R.* (1963) 9 F.L.R. 105 and *Ravi Nand v. R.* (1964) 10 F.L.R. 37. Early in his summing-up the learned trial Judge gave a direction on this point in the following words:

> "I must also warn you that it is dangerous to accept sworn evidence which is in conflict with statements previously made by the same witness; or, at least, that such evidence should be submitted to the closest scrutiny before acceptance. It is, however, still your duty, after full attention has been paid to this warning, to determine whether or not the evidence given before

> you in Court at the trial is worthy of credence and, if so, what weight should be attached to it. In determining the credibility of the evidence, you must decide the preliminary question as to whether or not the explanation given by the witness as to the reason for such conflict is feasible and acceptable. It is for you to take all these factors into consideration."

This direction is strictly in accordance with the statement of the law appearing in both the judgments of this Court to which reference has been made. Later in his summing-up the Judge invited the Assessors, with specific reference to the evidence of Ami Chand, to consider all the contradictions and discrepancies between the evidence given at the trial and earlier statements, and in that consideration to bear in mind the warning he had already given.

In the course of his argument counsel for the appellant submitted that the evidence of Ami Chand required very careful scrutiny and a special direction from the learned trial Judge. We are satisfied that the trial Judge properly and adequately directed the Assessors as to the necessity for careful scrutiny of the evidence, and that his direction in this respect was above criticism. In giving judgment he indicated that he was directing himself in accordance with the terms of his summing-up to the Assessors.

That being so, it was for the Assessors and the trial Judge to determine what weight should be given to the evidence of Ami Chand; and if after due warning they chose to believe the witness then there is nothing appearing on the record or in the argument of counsel which would compel us to hold that the Judge and the Assessors were wrong in that respect.

The same result follows with regard to the objections to the evidence of the witnesses Munsami Pillai and Suresh Chand, in respect of whose evidence no case for its rejection was made out at the hearing of the appeal. Accordingly this ground of appeal also fails.

As to the submission that the verdict was unreasonable and could not be supported having regard to the weight of the evidence adduced, we can find no merit in this ground of appeal. There is ample evidence which, if accepted by the learned trial Judge and the Assessors as it was, justified a finding that the appellant was guilty of the charge brought against him; and we do not find it necessary to set out that evidence in detail in this judgment.

That is sufficient to dispose of the appeal. There is, however, one matter to which reference was made in the argument before us and which we think calls for comment in the course of this judgment. That concerns the evidence of the appellant's co-accused, Khem Raj, given on oath at the trial, inculpating the appellant in the crime of attempted murder. In the course of his summing-up the learned trial Judge says:

> "I turn now to what the accused themselves have said in evidence. Before I read it to you I wish to direct you that in this case you should not regard the evidence of accused 1 as evidence against accused 2."

Before the cross-examination by the Crown of Khem Raj, the 1st accused, the learned trial Judge, in the absence of the Assessors, heard argument as to the proper direction which he should give to the Assessors on the point whether the evidence on oath of one accused could be used against the other. After hearing argument he announced his intention of directing the Assessors in accordance with *Meredith* (1943) 29 Cr. App. R. 40.

It is, we think, necessary to point out that the direction given by the Recorder in Meredith has been liable to misconstruction. That direction was considered by the Court of Criminal Appeal in *Leonard Rudd* (1948) 32 Cr.App.R.138. At p.140 the law on the subject of evidence given by one co-accused against another is thus set out:

> "Ever since this Court was established it has been the invariable rule to state the law in the same way — that, while a statement made in the absence of the accused person by one of his co-defendants cannot be evidence against him, if a co-defendant goes into the witness box and gives evidence in the course of a joint trial, then what he says becomes evidence for all the purposes of the case including the purpose of being evidence against his co-defendant. That is the law as we have always understood it, and there is ample authority to that effect, and most assuredly Meredith and Others (supra) said nothing to the contrary."

Further at pp.141/142:

> ". . . a statement in law that a jury would be wrongly directed if they were told that they may take into consideration in considering the case of one defendant what has been said by a co-defendant, that is nonsense. We are satisfied that that was not the meaning of the learned Recorder or of the Lord Chief Justice when he used the expression (at p.44): 'that was a proper direction, and one that was fair to each of the appellants'."

Normally a trial judge will be impelled to direct the jury that it would be dangerous to act upon the evidence of one co-accused against another, or even in some cases to direct them that they ought to reject that evidence entirely. In *Prater* (1959) 44 Cr. App. R. 83 it is laid down that where a co-prisoner may have some purpose of his own to serve in giving evidence, it is desirable in practice that a warning should be given to the jury with regard to the danger of acting on his uncorroborated evidence similar to that which is given in the case of accomplices, whether the witness could properly be classed as an accomplice or not.

It is however clear that there is no general principle of law that evidence given at the trial by one accused person cannot be used against his co-accused. This, as is pointed out in Rudd, becomes evidence for all purposes of the case. In that respect the direction of the learned trial Judge at the trial of the appellant was more favourable to the appellant that the strict law required. He would have been justified in giving a direction to the effect that the evidence of one co-accused against another must be scrutinised very carefully, but if after paying due attention to this warning the Assessors considered the evidence worthy of belief then they were entitled to accepted it.

For reasons we have already given the appeal against conviction fails. In our judgment on the appeal of Khem Raj we have already indicated that, in our view, no grounds exist for varying the sentence imposed in the Court below. For the reasons set out in that judgment we consider also that we should not interfere with the sentence imposed against the appellant. The appeal against sentence consequently fails.

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Appeal dismissed.