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## INNAITH HUSSAIN

*v.*

## REGINAM

[COURT OF APPEAL, 1972 (Gould V.P., Marsack J.A., Perry J.A.), 3rd, 6th April] B

Criminal Jurisdiction

*Criminal law—evidence and proof—confession—trial within trial—suggestion of fabrication of statements put to police witnesses—no evidence given by accused in support —trial judge's ruling—Court of Appeal Ordinance (Cap. 8) s.23(1).* C

*Criminal law—trial within trial—fabrication suggested but not supported by evidence —trial judge's ruling.*

At a trial within a trial held to determine the admissibility of statements in the nature of confessions tendered in evidence by the prosecution it was suggested to the police officers concerned in cross-examination that the statements had been fabricated, but the appellant gave no evidence in D support of the suggestions. In his ruling, the trial judge said that he need not comment upon the question of fabrication, as that was a matter of credibility for the assessors and not one of admissibility for the judge. The trial judge accepted the evidence of the police officers.

*Held:* There being no evidence whatever at the trial within a trial upon which the trial judge could have found that the statements were E fabricated, his failure to comment upon the question, if it was an error at all, was technical only, and the court was prepared, if necessary, to apply the proviso to section 23(1) of the Court of Appeal Ordinance.

Cases referred to :

*Sheikh Hassan v. Reginam* (1963) 9 F.L.R.110. F

*Barmanand v. Reginam* (1968) 14 F.L.R.139.

Appeal against conviction and sentence in the Supreme Court.

*K. C. Ramrakha* for the appellant.

*G. Mishra* for the respondent. G

6th April 1972

Judgment of the Court (read by Gould V.P.) :

This is an appeal from a conviction of manslaughter by the Supreme Court of Fiji at Labasa, and also against the sentence passed. The appel- H lant was charged with murder, but all five assessors were of opinion that the appropriate verdict was one of manslaughter by reason of provocation, and the learned trial Judge convicted the appellant of that offence and sentenced him to imprisonment for seven years.

It is not a case in which we need state the facts other than to indicate generally that there had been a quarrel between the appellant and the deceased, the deceased had abused the appellant in foul terms, and the appellant was found to have followed the deceased and to have almost severed his leg with a blow from a cane knife, from which the deceased later died.

The main body of evidence against the appellant comprised in the first place the testimony of persons present when the deceased abused the appellant: additionally there was an oral confession by the appellant to Inspector Chandar Bhan Singh at about 12.30 p.m. on the following day. This was followed by the appellant taking the police to a place where he had concealed the knife — it was duly found there. Finally, there was a further confession in a statement in answer to the charge, signed by the appellant.

At an earlier trial for murder based on these events the appellant had been convicted of that crime, but on the appeal to this court a new trial was ordered. This was, of course, held before a different judge and assessors, with the result we have indicated.

The grounds of appeal to this court are expressed as follows :—

"1. The learned trial Judge erred in law, and in fact, in not holding that the admissions made by the appellant both verbal and written were inadmissible having regard to all the circumstances.

2. The learned trial Judge misdirected himself and the assessors in stating that he was only concerned with the legal admissibility of the various admissions, and confessions in the trial within a trial.

3. The sentence is harsh and excessive."

As to ground 1, the trial Judge held a trial within a trial to determine the admissibility or otherwise of the oral and written statements alleged to have been made by the appellant. The evidence of five police witnesses was taken, but the appellant gave no evidence. He did call Mr. Harish Kohli, a lawyer who had seen Inspector C. B. Singh at the request of relatives of the appellant. Inspector C. B. Singh, in cross-examination by counsel for the appellant, had said that he had asked Mr. Kohli whether the appellant had any complaints and that Mr. Kohli had said "No." The main purpose of calling Mr. Kohli was to deny that he had said anything of the sort, though Mr. Kohli did say in evidence that the appellant had in fact made no complaint to him of any nature. In arguing Ground 1 counsel complained that the trial Judge should have resolved this conflict in favour of Mr. Kohli and so perhaps formed a different view of the truthfulness of Inspector C. B. Singh in relation to the oral confession. We are unable to accede to this suggestion. This was a minor and collateral issue, and the admitted fact that the appellant had made no complaint to Mr. Kohli was all that the learned Judge considered of relevance. We see no reason to differ.

Counsel next adverted to the fact that at the first trial the prosecution had tendered evidence of a dying declaration by the deceased, which was excluded from the evidence by the judge at the first trial, and which

was not re-tendered at the second. At the trial within a trial at the second trial this matter was raised obliquely by counsel for the appellant in his cross-examination of prosecution witnesses. He elicited from Inspector Subodh Kumar Mishra that he had spoken to the deceased in hospital and the deceased, in pain but speaking freely, had said that the appellant had hit him. This had been from 1 minute to 10 p.m. to five minutes past. Dr. Stuart Rutherford Morrison in cross-examination, said that he saw the deceased from 6 minutes to 10 p.m. until after 10 p.m. and could not obtain sensible answers from him. On this counsel submitted in the court below and here, that if the Inspector on that evidence could be found to be untruthful, the whole of the evidence should be rejected.

This was in effect a cross-examination to credit. The trial Judge could place such weight upon it as he thought fit. Otherwise than as affecting credit, the issue was not before the trial Judge, as the prosecution had not sought to put in evidence the statement in question. It is obvious that he attached no weight to the matter. He gave very detailed consideration to all the evidence given and had no hesitation in accepting the polce evidence as to the manner in which the confessions were made. It must be remembered that at the trial within a trial the appellant did not give one word of evidence to support the allegations of force, manhandling and questioning, which had been put to the witnesses by counsel in cross-examination. We can attach no weight to this argument.

A further argument advanced by counsel under this head was that undue pressure had been used by the police in obtaining the statements. The case of *Sheikh Hassan v. R.* (1963) 9 F.L.R.110 was referred to. On our view of the evidence, this submission is quite unfounded, and the circumstances relied upon have no relation to those in the case of *Sheikh Hassan.*

This whole question of admissibility was one for the trial Judge who gave it very careful examination, and we see no reason whatever for disagreeing with his ruling.

Ground 2 of the Notice of Appeal still bears on the queston of admissibility but from the point of view of what is said to be an error in law by the trial Judge. In the course of his ruling he said :—

> "Dealing now with Mr. Ramrakha's objections. His first ground of objection is that the statements are fabrication. That of course is a matter upon which I need not comment at this stage, because clearly this is a matter of credibility for the Assessors and not one of admissibility for the Judge."

It was submitted, mainly on the authority of the judgment of this court in *Barmanand v. Reginam* (1968) 14 F.L.R.139 that the trial Judge was in error in this portion of his ruling. In Barmanand's case the court reserved its opinion upon whether, if the issue of whether a statement was in fact made could stand alone, and no question of voluntariness arose at all, the issue was not properly a question for the jury. But the court then said that in practice the two issues could seldom be completely severed, and in the case under consideration the appellant had denied making

the statement at all, but at the same time made assertions which could have a bearing on the issue of admissibility, if in fact he had made it. As no trial within a trial had been held this court ordered a new trial.

The basic distinction between that case and the present, is that here there was a trial within a trial, and at it the question of fabrication of the statement never really arose on the evidence. It was perhaps suggested to the police officers in cross-examination but they made no admissions and the appellant gave no evidence in support of those suggestions. The trial Judge accepted the evidence of the police officers and there was no evidence whatever in the trial within a trial upon which he could have found that the statements were fabricated.

This being the position, the trial Judge's error, if he made one, was technical, and we would be prepared if necessary to apply the proviso to section 23(1) of the Court of Appeal Ordinance (Cap. 8).

In fact, it is clear from the ruling of the trial Judge that he had no doubt on the queston of fabrication for he accepted the police evidence as a whole and was "completely satisfied that the statements were voluntary." He did not use any such words as "if they were made at all." In his unsworn statement at the trial proper, the appellant did make allegations of fabrication, which the trial Judge adequately dealt with in his summing up; in his judgment he said that he believed the evidence of the police officers and completely rejected the evidence of the appellant and his allegations against the police.

We find no merit in any ground of appeal and no reason to interfere with the conviction. As to the sentence we are unable to say that it was wrong in principle or manifestly excessive.

The appeals both against conviction and sentence are accordingly dismissed.

*Appeals dismissed.*