A

AFZAL KHAN AND ANOTHER

v.

REGINAM

B

[COURT OF APPEAL, 1973 (Gould V.P., Marsack J.A., Henry J.A.), 5th, 6th, 16th November]

Criminal Jurisdiction

Criminal law—murder—common design—whether evidence sufficient to show that
C *both appellants had acted in concert throughout.*

Criminal law—evidence—character—whether questions as to the previous convictions of the appellant justified—Criminal Procedure Code (Cap. 14) s. 145(f).

Criminal law—evidence—lies told to police—whether inference of guilt.

Criminal law—evidence—common design in murder—whether both appellants acted in concert throughout.

D

Both appellants were convicted of murder. They had abducted a girl and driven her to a remote spot where they had stripped and raped her. They had been seen by a group of Fijians who stoned the car which then drove away. Sixteen days later the second appellant led the police to a swamp at Naboro where the girl's body was discovered.

Held: 1. The facts led inevitably to the inference that the two appellants had
E acted in concert right up to the time of the murder of the girl.

2. A jury of assessors may take lies into account in conjunction with the circumstantial evidence.

3. An attack on the character of the police and their conduct justifies cross-examination of a defendant as to his previous convictions.

F 4. There was ample evidence of identification of the second appellant.

Cases referred to:

R. v. Lovesey and Peterson [1969] 2 All E.R. 1077. [1969] 3 W.L.R. 213.

R. v. Gibbons [1973] 1 N.Z.L.R. 376.

Broadhurst v. R. [1964] A.C. 441; [1964] 1 All E.R. 111.

G *Selvey v. D. P.P.* (1968) 52 Cr. App. R. 443; [1968] 2 All E.R. 497.

Appeal against conviction for murder in the Supreme Court.

M. Sahu Khan for the first appellant.

G. P. Lala for the second appellant.

D. Williams for the respondent.

H

Judgment of the Court (read by MARSACK J.A.): [16th November 1973]—

Each of these appeals has been dismissed and we now proceed to give our reasons for the judgment of the Court.

The appeals were brought against convictions for murder entered in the Supreme Court sitting at Suva on the 23rd October 1972. The appellants were jointly charged with the murder of one Evelyn Regina Nair. The trial was held before a Judge and three assessors. The assessors expressed the unanimous opinion that each of the accused was guilty of murder. The trial Judge gave judgment in accordance with this opinion, convicted both appellants of murder, and pronounced the mandatory sentence of imprisonment for life.

The relevant facts, as found at the trial, may be shortly stated. On the evening of 9th May 1972 the first appellant was driving his white Cortina car, number M914, in the region of Laucala Bay, the only other person in the car being the second appellant, That same evening one Edwina Subramani and her niece, Evelyn Nair, were walking along Lakeba Street in Tamavua. A white car was parked on the other side of the street, with the bonnet up and two men looking at the engine. The ladies turned into Helsen Street, when the white car drove up and stopped beside them. The two men got out of the white car, seized the two women and forced them into the car, Edwina Subramani into the front seat and Evelyn Nair into the rear seat. At the trial Edwina Subramani identified the man who had seized her as the first appellant. Mrs Subramani was able after a struggle to escape from the car, and run into a house nearby. The car then drove off along Lakeba Street. A white Cortina car was, between 7–7.30 p.m., seen coming along Lakeba Street to King's Road, down which it went in the direction of Nausori. A witness saw three persons in the car, the driver in front and a man and a girl in the back; and heard the girl crying out at the top of her voice. That same evening four Fijians who were walking along the King's Road from Logani towards Nausori saw a white car come from the direction of Nausori and turn into a disused lane. They heard a woman screaming loudly. As the car did not come out of the lane they went up to where it had stopped, so that they might investigate. They saw two men and a girl in the car. One Fijian, Keni, recognised the man in the front seat as the second appellant, with whom Keni had trained at Charman's All Races Club a few years before. The Fijians saw an Indian woman, who was naked, at the back of the car, struggling with a man there. While they watched, the second appellant climbed from the front seat into the rear of the car and assisted the other man in his struggle with the naked girl. The four Fijians were unable to open the doors and rescue the girl as they wished, the doors being locked; so they decided to throw stones at the car. One stone smashed the right headlight, another the windscreen and the third the rear window. Soon after the stones struck the car, one of the men jumped into the driver's seat, started the engine and drove off. The following morning the Fijians found on the grass beside the road in that vicinity a purple dress and a brassiere which were subsequently identified as belonging to Evelyn Nair. The first appellant's car, a white Cortina, No. M914, was subsequently seen in a garage where it was being repaired after damage which appeared to be such as might have been inflicted by the stones thrown by the Fijians.

Keni tried to read the number of the car, but could not in the dark. He ran his fingers over the number plate and concluded that the number was M954. When the first appellant was subsequently interviewed by the police, he stated that the damage to his car had been caused by stones thrown at it by some drunken Fijians on the night of 8th May near Navua.

On the 25th May the body of Evelyn Nair was found in a swamp at Naboro, to which the police had been directed by the second appellant. A post-mortem examination of the body carried out by the Government Pathologist at the C.W.M. Hospital, Suva, found that the body, which was naked, was in an advanced stage of putrefaction. There were three wounds on the body apparantly caused by a

sharp instrument, wounds which, in the doctor's opinion, would cause death within a very short time after they were inflicted. On the 25th May, the second appellant gave a statement to the police in which he admitted that he had taken part in the abduction of Evelyn Nair and that he had had sexual intercourse with her at that time. The learned trial Judge, on the advice of the assessors, held that no other reasonable conclusion could be drawn from the evidence than that Evelyn Nair had been murdered by the two appellants acting in concert.

Although the appellants were jointly tried by the Supreme Court, their appeals were separately argued and it will be convenient in this judgment to consider the appeals separately.

That of the first appellant was based on some ten grounds, five of them filed with the original notice of appeal and five additional grounds put forward by leave at the hearing of the appeal. Some of these were repetitious and others we found to have no substance. It is accordingly not necessary to set them all out in full. Those upon which the first appellant mainly relied may be summarised briefly as under:—

(1) that the learned trial Judge erred in law in misdirecting himself and the assessors on the issues of common design and parties to an offence;

(2) that the learned trial Judge misdirected the assessors and himself in placing undue weight on the fact that the first appellant told lies to the police;

(3) that the verdict was unreasonable and could not be supported having regard to the evidence.

In his argument on the first ground, counsel contended that the direction given by the learned trial Judge on the subject of common design was inadequate. This direction was in the following terms:—

> "A person commits murder, gentlemen, if he causes the death of another person by an unlawful act with the intention of causing death, or of doing grievous harm which simply means really serious harm; and if another person is present; that is to say near enough to give assistance even though he in some considerable distance from the actual secne of the crime, and does give assistance or encouragement, or is present in pursuance of an agreement that the offence should be committed, that person is equally guilty of murder; and it matters not that it cannot be shown which of them carried out the actual act of killing. In such circumstances both of them are equally and jointly responsible."

In support of his argument counsel referred to several authorities, and in particular to the judgment of the Court of Criminal Appeal in *R. v. Lovesey* [1969], 2 All. E.R. 1077 at p. 1079:—

> "Where however the victim's death is not a product of the common design but is attributable to one of the co-adventurers going beyond the scope of that design, by using violence which is intended to cause grievous bodily harm, the others are not responsible for that unauthorised act."

It was counsel's contention that a common design to commit rape does not necessarily involve a common design to commit murder; that the evidence in this case did not establish who inflicted the wounds which caused the death of Evelyn Nair, or even who was present when such wounds were inflicted; and that the learned trial Judge accordingly should have directed the assessors on the insufficiency of evidence called to prove a common design to murder.

In our opinion, the direction given by the learned trial Judge was correct and adequate. It stressed that mere presence at the scene was not enough to prove guilt; what was necessary was proof of assistance or encouragement, or an agreement to commit that particular offence.

Here the accepted evidence established beyond doubt that both appellants had been in the car with Evelyn Nair during the time when the girl was being assaulted, and when the car was driven off after the stoning by the Fijians. The evidence that both appellants were acting in concert in the sexual assault on Evelyn Nair is convincing; and in the course of his argument counsel for first appellant did not contend that this fact had not been proved. After the car had been driven away nothing more was seen of Evelyn Nair until her naked body was found on 25th May in the manner described. She had obviously been murdered with a knife or similar instrument, and the medical evidence is consistent with that having been carried out on the night of 9th May.

There is nothing whatever in the evidence to raise even a suspicion that the concerted actions of the two appellants, after bringing about the abduction and the rape of the deceased girl, ceased at some time prior to the murder of the girl. Accordingly, there was no obligation on the part of the learned trial Judge to put that issue before the assessors. Before the assessors could find, as they did find, that the first appellant was guilty of murder, it would have to be proved beyond reasonable doubt that the combined activities of the appellants had continued right up to the time of the killing of the girl. This was made clear to them by the learned trial Judge in the summing up. The evidence of the sexual assaults by both appellants, their driving away with the victim in the first appellant's car, their return to their homes that night without her, but with first appellant's car, and the finding of the girl's body at the place pointed out to them by the second appellant, led inevitably to the inference that the two appellants had acted in concert right up to the time of the murder of the girl. Accordingly, there was no onus on the learned trial Judge to put to the assessors any fanciful supposition which had no foundation in the evidence. The principle set out in the passage cited from the judgment in *R. v. Lovesey* has therefore, on our opinion, no application to the present case.

Counsel's argument on the question of common design was directed not only to what he refers to as the inadequacy of the summing up, but also to what he submits was the insufficiency of the evidence of common design. This brings in his third ground of appeal, which it will be convenient to consider in conjunction with his first ground. His contention is based on the fact that there is no direct evidence of the circumstances surrounding the actual murder. It must be pointed out, however, that very seldom is the evidence of an eye-witness to a murder available. The proof in such cases rests almost invariably on circumstantial evidence, and the inferences which must necessarily be drawn from it. Where the circumstantial evidence points with reasonable certainty to the guilt of the accused, a conviction for murder can properly follow. In our view, the conclusion drawn by the Court below from the accepted evidence in this case, that both appellants were involved in the sexual offences committed and in the murder of Evelyn Nair, was amply justified by that evidence.

Accordingly, we can find no merit in the first and third grounds of appeal.

With reference to the second ground of appeal, counsel contended that the learned trial Judge throughout had placed undue stress on the lies that were told by the first appellant, to the extent that the assessors may have thought that they amounted to proof of guilt. Counsel referred to comments such as these in the

summing up: "It is the prosecution case that the first appellant was telling a pack of lies" and "It is the prosecution case that this was yet another deliberate lie on the part of the first accused." Counsel submitted that one passage of the summing up amounts to misdirection on this point:—

> "If you conclude that any of the statements made by either of the accused to the police were untrue, while this is not enough to convict a person of any crime, let alone murder, you may take into account the falsity of such statements, in conjunction with the circumstantial evidence, in determining his guilt or innocence."

Counsel relied upon, *inter alia*, the judgment of the New Zealand Court of Appeal in *R. v. Gibbons* [1973] 1 N.Z.L.R. 376; in which it was held that a direction to the jury on the matter of lies told by the accused should include the following:—

> "That people lie for a variety of reasons, and that the jury should guard itself against the natural tendency to think that if an accused is lying, he must be guilty."

In counsel's submission, the failure of the learned trial Judge to point out to the assessors that "people lie for a variety of reasons" was a serious omission and amounted to a miscarriage of justice. We do not read the judgment in *R. v. Gibbons* as laying down the principle that failure to direct the jury that people tell lies for different reasons amounts to a misdirection sufficient to invalidate the trial. It is perfectly true, as was said by Lord Devlin in *Broadhurst v. R.* [1964] A.C. 441 at p. 457:—

> "It is very important that a jury should be carefully directed upon the effect of a conclusion, if they reach it, that the accused is lying. There is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty, and accordingly to convict him without more ado. It is the duty of the judge to make it clear to them that this is not so. Save in one respect, a case in which an accused gives untruthful evidence is no different from one in which he given no evidence at all. In either case the burden remains on the prosecution to prove the guilt of the accused. But if upon the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt. What strength it adds depends, of course, on all the circumstances and especially on whether there are reasons other than guilt that might account for untruthfulness. This is the sort of direction which it is at least desirable to give to a jury."

In the present case, the learned trial Judge did make it clear to the assessors that more is needed for a conviction than the telling of lies by the accused. He stated positively that this was not enough to convict a person of any crime, let alone murder. But it is well established, as pointed out by the Judge, that the jury—or the assessors—may take the telling of lies into account in conjunction with the circumstantial evidence.

The learned trial Judge in his summing up correctly explained to the assessors that the burden of proof of guilt remains at all times upon the prosecution; and that the telling of lies by an accused person cannot of itself amount to proof of his guilt. The assessors however were entitled to take the untruthfulness of the first appellant into account as strengthening the inference of guilt. On the facts of the present case, it is difficult to think of any reason other than concealment of guilt for the telling of such lies as the falsification to the police of the date and place of the stoning of his car, and his statement that the car was already in the garage undergoing repair on the night of the abduction of the deceased girl. There was

substantial and convincing evidence against the appellant in addition to that of his lies; and in the circumstances we do not consider that the Judge's direction was inadequate. In any case, we are satisfied that it caused no miscarriage of justice.

For these reasons, we have dismissed this appeal.

The second appellant submitted five grounds in his original notice and at the hearing Counsel was granted leave to adduce an additional ten grounds. Here again, this Court found that the grounds put forward overlapped to a certain extent and some, in our view, had no merit and do not require consideration in this judgment. In fact counsel for the Crown was not called upon to reply to any of the arguments put forward on behalf of the second appellant.

The main grounds argued by counsel for the second appellant may be summarised as follows:—

(1) that the learned trial Judge erred in law in permitting cross-examination of the first appellant as to his previous convictions;

(2) that the learned trial Judge made no reference in his summing up to the allegation of the second appellant that he had been acting under compulsion;

(3) that the evidence of identification of the second appellant was unsatisfactory, and the learned trial Judge was not justified in stating to the assessors, "Faced with this damning identification by Keni, the second accused said that he would tell the truth."

As to the first ground, it is not denied that the second appellant made serious imputations against the conduct of the police of such a nature as clearly to amount to an attack on the character of these witnesses. It is well established that in such cases, the trial Judge has a discretion to give effect to the provisions of Section 145(*f*) of the Criminal Procedure Code and to permit questions of the accused tending to show that he has committed any offence or is of bad character. In this case Crown Counsel acted very fairly in applying to the trial Judge, in the absence of the assessors, for leave to ask questions as to previous convictions of the second appellant. Counsel for the second appellant expressly stated that he had no objection. The learned trial Judge, after considering a number of authorities and in particular *Selvey v. D.P.P.* (1968) 52 Cr. Ap. R. 443, exercised his discretion in the direction of permitting the questions Crown counsel was to put. In our view, the learned trial Judge was fully justified in permitting the questions and would have been, even without consent of counsel for the second appellant.

With regard to the second ground, we can find no basis for the submission that the trial Judge should have directed the assessors on a defence that the second appellant had acted under compulsion. The only mention of compulsion occurs in the evidence of A.S.P. Ram Narayan to the effect that when the second appellant was giving his account as to what took place on the night of 9th May, in the course of which he stated that he had sexual intercourse with Evelyn Nair and drove the car away when the Fijians came, he said, "Sir, don't take me to Afzal or else he will kill me." Later in the same statement, when he was telling the Inspector how the first appellant had killed the girl, he said, "Sir, I am very much afraid. Don't tell Afzal." It is to be noted that at no time did he tell the Inspector that he had been acting in fear of first appellant when he did what he did on the night of 9th May; all that he said to the Inspector was that he was afraid of physical violence at the hands of the first appellant if the latter came to know what he was then telling the Inspector. It is significant, too, that nowhere in the course of his evidence at the trial does the second appellant make any reference to his having acted under compulsion. It was thus in no sense part of his defence; and there was no obligation whatever on the learned trial Judge to put that issue before the assessors.

As to the third ground, we can say only that there was ample evidence of identification of the second appellant and that evidence was, for good reason, accepted by the learned trial Judge and the assessors. As for the phrase "damning identification" to which the counsel for the second appellant took the strongest objection, it should be noted that the learned Judge used it with reference to an occurrence, before the arrest of the second appellant, when he was making a statement to A.S.P. Ram Narayan. Second appellant had maintained that he had no part in the events surrounding the disappearance of the deceased girl until the Fijian, Keni, who later gave evidence at the trial, was brought in. What happened then was explained in the summing up in a passage immediately preceding that in which the phrase "damning identification" was used:—

> "Keni was then brought into the room and Assistant Superintendent Ram Narayan told the second accused in Hindustani what Keni was saying in Fijian, namely that Keni knew the second accused very well as he was doing body-building in Nausori and that he saw him sitting at the steering in a car when another Indian was holding a girl in the back seat and that when he saw him he drove off towards Nausori and Keni with three friends threw stones on the car."

In this context we do not think the learned Judge went too far; and in any event, he had made it clear to the assessors at the commencement of his summing up:—

> ' On matters of fact, however, it is for you to reach your own conclusions and should I express any opinions on the facts you are free to disregard them."

Counsel contends that the use of the phrase in question indicated clearly that the trial Judge thought the evidence of Keni unassailable. We do not think that is a necessary inference, but even if it were, we are satisfied that the assessors knew they must make up their own minds on questions of fact, notwithstanding any opinion on the facts expressed by the learned trial Judge.

In the result, we found no merit in any of the grounds put forward on behalf of the second appellant.

For these reasons both appeals have been dismissed.

Appeals dismissed.