A

UDAY NARAYAN

v.

REGINAM

B

[COURT OF APPEAL*, 1973 (Gould V.P., Marsack J.A., Henry J.A.), 26th, 28th November 1973]

Criminal Jurisdiction

Criminal law—evidence—confession—whether voluntary—whether such confession
C *must be reduced to writing.*

Criminal law—summing up—directions to assessors essentially the same as to a jury.

Criminal law—assessors—matter for assessors to consider probative value of a statement attributed to a prisoner after its admission by the judge.

Criminal law—sentence—murder—sentence of death—jurisdiction of Court—Court
D *of Appeal Ordinance (Cap. 8) s. 21(c) and 23(3)—Penal Code (Cap. 11) s. 229—decision of trial judge as to whether to certify that case should not warrant the death sentence—whether Court of Appeal can review the sentence.*

Criminal law—murder—sentence of death—jurisdiction of Court—whether Court of Appeal can review sentence of death imposed by trial judge.

Courts—jurisdiction—whether Court of Appeal can review sentence of death imposed
E *by trial judge.*

The evidence against the appellant consisted almost entirely of his own oral confession which he alleged was involuntary.

It was held on appeal: (1) That the allegations of assault by the police on the
F accused were carefully considered by the trial judge and that confessions are freely receivable as long as they are voluntary and need not be reduced to writing

(2) The summing up to assessors should be in similar terms as that to a jury.

(3) Once evidence is admitted the only question for the assessors to consider is its probative value or effect.

(4) There was no necessity for a separate direction of the judge to the assessors
G to the effect that the assessors must be satisfied beyond resaonable doubt as to the voluntariness of the confession.

(5) No appeal against sentence of death lay as the Court of Appeal had no power under Court of Appeal Ordinance (Cap. 8) s. 23(3) to direct the trial judge to pass a sentence of life imprisonment.

H *In the Privy Council, Cession Lal and Another *v.* the Queen, [1976] A.C. 523 it was held that the Fiji Court of Appeal, on appeal against sentence of death, did have jurisdiction to review the decision of the trial judge not to certify the case as a proper case for not sentencing the accused to death, and if it thought that he came to a wrong decision, to substitute life imprisonment.

Cases refer to:

Ibrahim v. Reginam [1914] A.C. 599; 111 L.T. 20.

Chan Wei Keung v. R. [1967] A.C. 160; [1967] 1 All E.R. 948.

Basto v. R. (1954) 91 C.L.R. 628.

Appeal against conviction and sentence for murder by the Supreme Court.

K. C. Ramrakha for the appellant.

A. I. N. Deoki and *Q. Bale* for the respondent.

Judgment of the Court: [28th November 1973]—

This is an appeal against conviction for murder entered at the Supreme Court sitting at Lautoka on the 3rd September 1973 and also an application for leave to appeal against the sentence of death passed on such conviction. The trial was held before a Judge and five assessors. The assessors expressed the unanimous opinion that appellant was guilty of murder. The trial Judge accepted the advice of the assessors, convicted appellant accordingly and passed sentence of death.

The basic facts may be shortly stated. Appellant is a young man, 20 years of age at the time of the alleged offence. The family of appellant was not on good terms with that of the deceased Daya Prasad. Deceased was a young man of about 22 years of age. On the 21st January 1973 the body of Daya Prasad was found in a cane field at Bilobilo in Viseisei. A post mortem examination was carried out by the Consultant Physician at the Lautoka Hospital who expressed the opinion that death had taken place 24 to 48 hours prior to the time of examination. The doctor found on the body a large number of wounds which had apparently been caused by blows from a very sharp instrument such as a knife. The wounds were mainly to the head, arms and upper part of the body; one had apparently been caused by a violent blow across the neck which had penetrated to the vetebral column and which would necessarily have been fatal. The doctor also gave the opinion from the degree of digestion of the stomach contents that death had taken place some three hours after the deceased had last taken food.

The evidence against appellant consisted almost entirely of his own confession to the police. The only circumstantial evidence connecting appellant with the murder was that of the finding of a cane knife, stained by human blood, which was found near the scene of the murder and which was identified as belonging to the appellant's family; and that a man called Ram Charitar saw appellant, on the night of Friday 19th January when Daya Prasad was last seen alive, riding a horse on what is known as the Viseisei back road.

Ten grounds of appeal were filed on behalf of the appellant, but some of these were not argued at the hearing of the appeal. Those upon which appellant relied may be, set out as under:—

1. *THAT* the decision is unreasonable and cannot be supported having regard to the evidence.
2. *THAT* the learned trial judge erred in law in ruling that the appellant's alleged confession on the 25th day of January 1973 made to Detective Sergeant Permal was given voluntarily and he further erred in law in admitting such confession in evidence.
3. *THE* learned trial Judge erred in not directing the assessors properly as their rights and duties in considering the alleged confession of the appellant.

4. *THE* learned trial Judge erred in law in permitting counsel for the appellant, Mr. Manikam Vasagam Pillai to give evidence for the appellant, and at the same time to conduct the trial.

5. *THAT* the learned trial Judge erred in law in exercising his discretion not to certify that this was a proper case for the imposition of a sentence of life imprisonment.

Grounds 1 and 2 were argued together; and in fact the determination of the first ground depends entirely, as does that of the second, on whether appellant's confession was properly admitted in the evidence. If it be held that the confession was voluntarily and properly admitted then it is clearly sufficient to establish the guilt of the appellant. It is not necessary for us to cite authority for the proposition that a man can be convicted of any offence, even murder, upon his confession alone. Here there is some circumstantial evidence which, although as the learned trial Judge says it is of itself totally insufficient to establish appellant's guilt, is yet at least consistent with the facts set out in that confession. There is the admitted enmity between the two families; the finding of a cane knife, with human blood stains, in the vicinity of the place where the dead body was found, and the evidence that that cane knife belonged to appellant's family; and the evidence of Ram Charitar that appellant had been seen in that vicinity—which is but sparsley populated—about the time when the murder was most probably committed.

The case for the defence was that the admissions made by the appellant were not freely and voluntarily given. It was not denied that appellant had said to the police:

> " Yes I and Hari Sahai killed him. Hari Sahai ran away to his house and I ran away to mine. "

Appellant insisted that he had made this statement only because he had been assaulted by the police and threatened with continued assaults if he did not confess. He then made this statement because he was very much sacred; in fact he said he would rather die than be beaten up. Another objection taken to the statements made by the accused is that they were oral and not taken down in writing and signed. We can find no substance in this latter ground. Oral confessions are freely receivable as long as they are made voluntarily as that term is defined in *Ibrahim v. Reginam* [1914] A.C. 599.

With regard to the allegation that the police had compelled appellant to make the incriminating statements by the use of physical violence and the threats of further assaults, it is clear that these matters were very carefully considered by the learned trial Judge. In his ruling he said that he did not believe the appellant, whose evidence he found entirely untrustworthy. He did not believe that appellant was assaulted, either in the police van or during the interrogation. Furthermore, Doctor Kusum Lata Sharma, Medical Officer at Nadi Hospital, tesitfied to giving appellant a complete examination on the 25th January, and finding no sign of injury on him. The doctor also gave evidence that appellant made no complaint of any injuries having been caused to him.

Accordingly we can find no reason for holding that the learned trial Judge was wrong when he admitted the incriminating statements made by appellant as voluntary. We can therefore see no merit in grounds 1 and 2.

In his argument on the third ground, Mr. Ramrakha contended that though in a jury trial, once evidence of a confession had been admitted the jury thereafter, was concerned only with its weight; the assessors did not stand on the same basis as a jury and must consider all aspects of the evidence relating to the confessions. The learned trial Judge directed the assessors in these terms:—

> " If you think these allegations of the treatment by the police are true then it would certainly bear on what you think of the accused's socalled confession and if you think they are true you may very well say that you are so unhappy about the confession that you are not prepared to believe it."

Counsel submitted that the learned trial Judge should have directed the assessors to consider whether the police had discharged the onus which was on them of showing that the confession was made and that it had been voluntary; that is to say whether the police had acted properly in obtaining the statements. As we see it, the trial judge had specifically invited the assessors to consider the conduct of the Police, and we do not think he could have been expected to say more than he did on the point.

In *Chan Wei Keung v. R.* [1967] A.C. 160—which Mr. Ramrakha contended was not applicable to Fiji as here the Court had assessors and not a jury—the Privy Council approved of a judgment of the High Court of Australia in *Basto v. R.* (1954) 91 C.L.R. 628:

> " The jury is not concerned with the admissibility of the evidence; that is for the judge, whose ruling is conclusive upon the jury and who for the purpose of making it must decide both the facts and the law for himself independently of the jury. Once the evidence is admitted the only question for the jury to consider with reference to the evidence so admitted is its probative value or effect. For that purpose it must sometimes be necessary to go over before the jury the same testimony and material as the judge has heard or considered on a *voir dire* for the purpose of deciding the admissibility of the accused's confessional statements as voluntarily made. The jury's consideration of the probative value of statements attributed to the prisoner must, of course, be independent of any views the judge has formed or expressed in deciding that the statements were voluntary."

In its judgment the Privy Council held that there was no necessity for a separate direction of the Judge to the jury to the effect that, notwithstanding that the Judge had given a ruling admitting the confession in evidence as a voluntary statement, the jury must be satisfied beyond reasonable doubt as to the voluntariness of the confession.

Although the constitution of a court with assessors is different from that of a Judge and jury, yet we are unable to accept Mr. Ramrakha's argument that the summing up to the assessors should be essentially different in principle from that to a jury. The assessors are not part of the court, in the sense that the verdict is a matter for the Judge alone. They are there to advise the Judge as to whether in their opinion the verdict should be one of guilty or not guilty; and as in the case of a jury they must accept what the trial Judge tells them as to the law but must make up their own minds as to the facts.

The third ground of appeal therefore fails.

With regard to the fourth ground of the appeal we agree that the appearance of counsel as a witness in the case was irregular. But this was done at the express request of counsel for the defence without objection from counsel for the prosecution,

and we cannot see in what way appellant was prejudiced by this action of his counsel. It is in our opinion impossible to say that a miscarriage of justice was therefore occasioned.

In the result we cannot find any substance in any of the grounds of the appeal against conviction and the appeal against conviction is accordingly dismissed.

The appellant's application for leave to appeal against his sentence has raised a question of some difficulty. Though counsel for the Crown agreed with counsel for the appellant that in the circumstances of the case an appeal lies to this Court we ourselves find it necessary to examine our jurisdiction in the matter.

The relevant section of the Court of Appeal Ordinance (Cap. 8) is 21(*c*) which reads—

> " 21. A person convicted on a trial held before the Supreme Court of Fiji may appeal under this part of this Ordinance to the Court of Appeal—
>
> .....
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> (*c*) with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law."

The powers of this Court in an appeal against sentence are contained in section 23(3):—

> " 23. (3) On an appeal against sentence, the Court of Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted by law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, or may dismiss the appeal or make such other order as they think just."

There are general supplementary powers set out in section 28 but none has any relevance to the present question.

Until the passing of the Penal Code (Amendment) Ordinance, 1966, the relevant section of the Penal Code provided that any person convicted of murder " shall be sentenced to death ". By virtue of section 21(*c*) of the Court of Appeal Ordinance, which we have quoted above, no appeal to this Court lay against that mandatory sentence.

The effect of the 1966 Amendment Ordinance was to introduce various categories of murder for which the death penalty was retained but to make the general provision that any person convicted of murder " shall .... be sentenced to imprisonment for life ". This again being a sentence fixed by law, was not subject to an appeal to this Court.

This was the situation until the Penal Code (Re-enactment of Provisions) Act, 1972, came into force on the 1st January 1973. The Act, which by virtue of section 5 has effect in relation to offences committed wholly or partly after the date of commencement thereof, restored the pre-1966 provisions, with some alterations. The relevant section (now s. 229) reads:—

> " 229. Any person convicted of murder shall be sentenced to death:
>
> Provided that a judge may, before passing sentence, certify that the case is a proper case for not sentencing the accused to death in which event the accused shall be sentenced to imprisonment for life."

Provision is made there for sentences both of which are " fixed ". It is made compulsory for the judge to sentence the offender to death, but, by a proviso a true exception has been carved out. It is an exception exercisable by the judge who may certify that the case is a proper case for not sentencing the accused to death in which event the accused shall be sentenced to life imprisonment.

In the event of his being sentenced to death the prerogative of mercy could still be exercised by the Governor-General, so that the accused would be in the same position as he would have been prior to 1966. But if the judge certified that the case was not one for the death penalty, was it the intention of the legislature that he should have three chances of commutation, (1) under the Prerogative (2) by the trial judge and (3) by the Court of Appeal? A

The word " certify " used in the section is unusual and must have been deliberately chosen by the legislature. It is not language normally used when it is desired to differentiate between such penalties as fine or imprisonment. A certification could no doubt be made the subject of appeal but it would be unusual. B

But if an appeal lies in the present case the powers of the Court of Appeal must be wide enough to enable it to deal with this new type of fixed penalty. The Court of Appeal cannot pass the sentence of life imprisonment as it has no power to do so. The power depends on a certification by the trial judge, without which it is not " warranted by law by the verdict " within section 23(3). The further power of the Court of Appeal under that subsection is " to make such other order as they think just ". The qualifying word " other " in that phrase must mean other than the power of passing sentence mentioned earlier in the section. But to be effective in the present circumstances the power must enable this Court to quash the death sentence, to direct the trial judge both to give a certificate and to pass a life sentence. But the section contemplates that it is the duty of the Court of Appeal to pass sentence on appeal and we do not construe the words " make such other order as they think just " as entitling this Court to direct the trial judge to do so, or indeed to direct him to give a certificate. C D

Our view of the effect of the legislation is that, after conviction, the trial judge must arrive at the decision whether or not to certify that the case is a proper one for not sentencing the accused to death. That decision is not part of the conviction and in our view it is a pre-requisite to but not part of the sentence. In essence the section confers upon the judge the authority to decide whether the murder is to be treated as capital or non-capital murder. This is a judicial power that is both new and anomalous. If the legislature desired to make it the subject of appeal it required to use clear language to accomplish that end, and to vest in this Court appropriate powers to deal with the new situation. It has not done so, and in our judgment no appeal against sentence in this case lies to this Court. E

For the reasons we have given, both the application or leave to appeal against sentence, and the appeal against conviction, are dismissed. We would add that the new form of the legislation we have been discussing, leaves the judge in the Supreme Court in a position fraught with difficulty. The legislature has laid down no rules for his guidance in a matter which has been the subject of the most wide spread controversy. For ourselves, looking at the facts of the present case, we might well have come to a different decision from that of the learned trial judge in relation to the certificate. We note hat the appellant was only twenty years of age and that it appears from the record that his family had been the subject of victimization for which this undoubtedly murderous attack was by way of retaliation. As we have held, the matter is not within our sphere, and, sitting in appeal, we are more remote from the people concerned than was the learned trial judge: nevertheless, we feel that we should make this observation as this is, so far as we know, the first case of its kind under the new legislation, and in order to point to the difficulties which it imposes upon the judiciary in the Supreme Court. F G H

Appeal dismissed.