Privy Council Appeal No. 18 *of* 1959

Bharat son of Dorsamy - - - - - - - - *Appellant*

v.

The Queen - - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF FIJI

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

DELIVERED THE 23RD JULY, 1959

Present at the Hearing:

LORD TUCKER
LORD DENNING
MR. L. M. D. DE SILVA

[*Delivered by* LORD DENNING]

On the night of 19th May, 1958, two men named Chanan Singh and Govindappa were killed in Fiji. On the next day the appellant Bharat, son of Dorsamy, was charged with the murder of them. Two separate indictments were afterwards laid against him. The first to be tried was the indictment charging him with the murder of Chanan Singh. The other remained on the file.

The trial was held in October, 1958, before the Chief Justice of Fiji (Lowe, C.J.), sitting with five assessors. On the 18th October, 1958, the appellant was found guilty of the murder of Chanan Singh and sentenced to death. He appealed to the Court of Appeal against his conviction. The appeal was heard by two judges who had been appointed specially to hear it. They came from New Zealand. They were Sir George Finlay (who acted as President of the Court of Appeal) and Sir Joseph Stanton. After hearing argument they reserved their decision and returned to New Zealand. They afterwards sent their written opinions to the Registrar of the Court of Appeal and he read them in open court. It appeared from their opinions that the two judges were equally divided. Sir George Finlay was for allowing the appeal and Sir Joseph Stanton for dismissing it. In the result the appeal was dismissed. Thence the appellant appealed to Her Majesty in Council.

It was submitted to their Lordships that the dismissal of the appeal was bad in law because it had not been pronounced by the senior judge or indeed by any judge who had been present at the appeal as required by section 30 of the Court of Appeal Ordinance of Fiji. Their Lordships were inclined to agree with this contention. But they were disinclined to enter into it too closely because it had nothing to do with the merits of the case. It could be corrected quite readily by having the dismissal properly pronounced and the case then brought back again before their Lordships. Their Lordships therefore proceeded to hear the argument on the other points.

The appellant was the barman at the Tavua Hotel in Fiji. On the evening of the 29th May, 1958, he was on duty in the bar. Chanan Singh and Govindappa were drinking there. About 9 p.m. the appellant left the bar. About half-an-hour later the other two left. Neither of them

was ever seen alive again. Some little time afterwards a house-girl from the hotel found their dead bodies on a road not far away. The appellant was arrested. He at first denied any knowledge of the killing but later admitted that he did it. At the trial, after the evidence for the prosecution had been heard, he gave evidence on his own behalf and said:

> "I went off and went for a stroll towards town. I went nowhere in particular but went along the road some distance and then walked back towards the hotel. On my way about 3 or 4 chains from the hotel I met Chanan Singh and Govindappa. They both stood and Govindappa said: 'You were showing a lot of cunning in the hotel. I will fix you up now.' Then he attacked me with a stick. He raised the stick. As he tried to deliver the first blow I got hold of the stick. A struggle for possession of the stick ensued and the stick fell to the ground. To save myself I wanted to run away. Just then Chanan came and got hold of me. Govindappa came and got hold of my throat. I struggled to free myself. My state of mind was upset. I was helpless and could not do anything so I took out my pocket knife and attacked. While Govindappa had me by the throat Chanan Singh was holding me. I was very excited, so much so that I did not know what I was doing. I can't even say on whom and how many times I struck with the knife. After a while I found myself free of the others. I got up and ran towards the hotel. Later on S/Insp. Akuila came and sent me to the police station. I knew Chanan Singh for about three years before that night. I had no trouble with him at any time during that period. He was an acquaintance of me. There was never any trouble with him at any time nor was there any trouble with him at the bar that evening."

That evidence clearly raised two issues for consideration. First, self-defence, second, provocation. The appellant was, of course, cross-examined on it. After all the evidence was concluded and speeches made, the Judge summed up to the assessors as section 306 of the Criminal Procedure Code contemplates. He discussed at large the issue of self-defence. And then he mentioned the issue whether there was provocation such as to reduce the offence from murder to manslaughter. Unfortunately the Judge directed the assessors wrongly upon this point. He said to them:

> "It has been suggested that you might think the accused guilty of manslaughter. Before you could be justified in thinking that you would have to come to the conclusion that the accused's story in that particular respect is true. You would have to be satisfied beyond reasonable doubt that it might be that the Crown were wrong as to that aspect, and you would have to believe that the accused received such provocation that he was justified in resisting force by using force. I think you might find it difficult to believe that such was the case."

It was conceded by the Crown that this direction was erroneous in point of law. It wrongly puts the burden of proof on the accused, and it gives a wrong description as to what amounts to provocation in law.

After hearing the summing-up each of the five assessors gave his opinion that the appellant was guilty of murder. It was then for the Judge to give judgment and he did so. He came to the same conclusion as the assessors. He gave a reasoned judgment holding the appellant to be guilty of murder. In it he dealt fully with the question of self-defence and rejected it. But he did not mention the question of provocation.

What is the consequence of the misdirection given by the Judge to the assessors According to section 246 of the Criminal Procedure Code the trial is by the Judge "with the aid of Assessors". The Judge is not bound to conform to their opinions but he must at least take them into account. If they have been misdirected on a vital point, their opinions are vitiated. Take this very case. Suppose the assessors had been properly directed, is it not possible that one or more of them might

have been of opinion that the appellant was guilty of manslaughter only? If the majority of them had given such an opinion, the Judge might possibly have accepted it in preference to his own. At any rate he could hardly have rejected it without saying why he did so. He has, in truth, by his misdirection, disabled the assessors from giving him the aid which they should have given: and thus in turn disabled himself from taking their opinions into account as he should have done. This is a fatal flaw.

On behalf of the Crown it was said that the misdirection did not matter, because the Judge disbelieved the appellant's story altogether, and there was thus no foundation on which an issue of provocation could be raised. Their Lordships cannot accept this contention. Apart altogether from the appellant's evidence, there was some evidence of a struggle having taken place. Their Lordships think this was clearly a case where the question of provocation should have been considered, see *Bullard* v. *The Queen* [1957] A.C. 635. The failure of the Judge to direct the assessors properly upon it, or to consider it himself in his summing-up, means that his judgment cannot stand.

For these reasons their Lordships have advised Her Majesty that the appeal should be allowed and the order below set aside and the case remitted to the Court of Appeal in Fiji with the direction that they should quash the conviction for murder and enter a verdict of manslaughter and pass sentence accordingly or order a new trial, whichever course they consider proper in the interests of justice in the existing circumstances. The Court of Appeal need not for this purpose be constituted by the same judges as it was before.

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In the Privy Council

BHARAT SON OF DORSAMY

v.

THE QUEEN

DELIVERED BY LORD DENNING

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