Privy Council Appeal No. 46 of 1970

Nirmal son of Chandar Bali – – – – – – *Appellant*

v.

The Queen – – – – – – – – – *Respondent*

and

The Queen – – – – – – – – – *Appellant*

v.

Nirmal son of Chandar Bali – – – – – – *Respondent*

FROM

THE FIJI COURT OF APPEAL

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 8TH DECEMBER 1971

Present at the Hearing:
LORD PEARSON
LORD PARKER OF WADDINGTON
LORD HODSON

[*Delivered by* LORD PEARSON]

Their Lordships have humbly advised Her Majesty that the appeal be allowed, the cross-appeal dismissed and the order for a new trial quashed. They will now give their reasons.

On 13th March 1969 the appellant was tried in the Fiji Supreme Court and convicted of murder and was sentenced to imprisonment for life. By a judgment given on 7th November 1969 the Fiji Court of Appeal quashed the conviction on the ground that certain alleged written and oral confessions by the appellant had been wrongly admitted in evidence, and they ordered a new trial. The appellant presented a petition for special leave to appeal *in formâ pauperis* against that part of the judgment of the Fiji Court of Appeal which ordered a new trial. By an Order in Council dated 11th November 1970 a report from the Judicial Committee dated 20th October 1970 was approved and such leave was granted. Subsequently the Crown presented a petition for special leave to cross-appeal against that part of the judgment of the Fiji Court of Appeal which quashed the conviction. By an Order in Council dated 25th May 1971 a report of the Judicial Committee dated 3rd May 1971 was approved and such leave was granted and it was ordered that the appeal and cross-appeal should be consolidated. At the conclusion of the hearing before the Judicial Committee of the Crown's petition for special leave to cross-appeal it was stated that their Lordships had found this a difficult case and also an unusual case and the decision should not be taken as a precedent, but their Lordships

were faced with a situation where one party had got leave to appeal and in a sense the present petition was a cross-appeal and their Lordships thought that it would be better on many grounds that the whole matter should be properly considered, but the appeal and cross-appeal should be consolidated.

The relevant facts were conveniently summarised in the appellant's case as follows:

> "The body of Davendra Sharma was found at about 3.00 a.m. on the morning of the 5th September, 1968, lying face downwards near the tramline at Koronubu. The police arrived at the scene at at 4.15 a.m. They found a vaivai stick lying near the head of the deceased. Doctor Mangal Singh was called and after viewing the body expressed the opinion that death had occurred between 9.30 p.m. and 11.30 p.m. on the evening of the 4th September, 1968. Dr. Holmes carried out a post-mortem examination and concluded that death was due to multiple wounds of the head, face and neck; at least three of the wounds being inflicted by a sharp instrument. There was also a wound on the front of the deceased's left leg which was consistent with the deceased being struck by a blunt instrument. Jagat Singh, who was the last prosecution witness to see the deceased alive on the night of the 4th September, 1968, gave evidence that he had walked along the Koronubu tramline with the deceased until they reached the junction of the Nabatolu Road at 11.00 p.m. when they separated. The deceased then walked along the tramline towards his house.
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> Evidence was given by two Fijians that on the night of the murder after 10.30 p.m. at night a man was heard to yell out in a "scared" manner and 5 to 10 minutes later the Appellant and Sharma the second Accused were seen approaching Sharma's house from the direction where the deceased's body was later found—a distance of 27 to 31 chains from the house."

The appellant was the first of three accused, and he and the second accused were convicted but the third accused (who was alleged to have been present and aiding and abetting) was acquitted. The Crown's case was that the three accused in pursuance of a pre-arranged plan lay in wait for Davendra Sharma on the evening of 4th September 1968 with the intention of attacking him murderously and did in fact attack and kill him with malice aforethought near the No. 11 bridge on the Koronubu tramline soon after 11.00 p.m. It was also the Crown's case that the actual assailants were the appellant and the second accused, the appellant using a knife and the second accused using a vaivai stick.

The case against the appellant rested essentially on written and oral confessions alleged to have been made by him to the police on 11th September 1968. At the appropriate stage of the trial, objection was taken to the admissibility of the alleged confessions on the ground (*inter alia*) that they were not made voluntarily. The trial judge held a trial within a trial and ruled that the evidence was admissible.

In the course of the main trial Dr. Mangal Singh had given evidence that he had examined the appellant unclothed "from head to toe" in the evening of 11th September 1968 for at least ten to fifteen minutes: he said that it was a very thorough examination and that he found no fresh injuries on the appellant nor any signs indicative of recent violence upon him. Also in the course of the main trial Sergeant Rameshwar Prasad had said that on 11th September 1968 police officers from a number of stations were called to Ba to assist in the inquiry into the death of Davendra Sharma, and that there were senior officers present, including Mr. Sutton who was the officer-in-charge of the

Western Division. He also said that he and Detective-Constable Jese and Mahendra Singh, who was then a detective constable, formed one of the investigating or interrogating teams; and that they interrogated the appellant in a tent erected in the compound of the deceased Davendra Sharma; and that at one stage Mr. Sutton sat with them in the tent. When this witness began to give evidence of what the appellant had said in the course of the interrogation, the objection was taken and the trial within a trial began, and this witness continued to give evidence. The effect of his evidence was that the appellant having been cautioned said in answer to questions that he had not been near the house of the second accused on the night of the deceased's death and had spent that night sleeping at home: then the two Fijians were brought in and they described how they had seen the appellant and the second accused together on that night; having been confronted with the two Fijians the appellant admitted that he had been with the second accused as they had said: then the appellant made a statement, which was recorded initially on a yellow wireless form (Exhibit F) and after some oral questions and answers was transcribed on to an official statement form (Exhibit G); these forms were signed or initialled by the appellant in a number of places. This witness (Sergeant Rameshwar Prasad) also said that Inspector Muniappa Swamy came into the tent on some occasions, being part of a floating team to see how the interviews were going on. This witness said that the appellant was not subjected to any assault, torture, indignity, threats or inducement, and that he made the statements voluntarily. At one point in his cross-examination he said that Mr. Sutton "came into the tent to enquire if this sort of thing happened", but the meaning of "this sort of thing" is not clear from the transcript.

Similar evidence was given by Mahendra Singh and Inspector Muniappa Swamy as witnesses for the prosecution. They also denied that the appellant had been subjected to any assault, torture, indignity, threats or inducement. Mahendra Singh in cross-examination said that he saw the appellant's mother after the interview started in the compound, and from the interviewing tent he saw her going down towards the river, and he did not see her being led away towards the river but he did see a constable. He also said that Mr. Sutton visited the tent for about fifteen to twenty minutes; he could not remember whether the appellant spoke; Mr. Sutton did not speak. Muniappa Swamy also said that he saw the appellant's mother in the compound.

The appellant in the trial within the trial gave evidence to the effect that he never made the alleged statements and that they were fabrications to which he was forced to attach his signatures under threat, violence, torture and indignity. He called four witnesses to prove that he had made complaints:

(*a*) Shiu Devi, the appellant's mother, testified that on the morning of 11th September the police took her by the riverside and after a while, at about 11 a.m., she heard her son the appellant, yell out from a tent; she heard him saying "Somebody assaulting, save me."; she then yelled out herself "why are you people assaulting my son"; thereupon a constable came out and took her further away from the tent; she asked him why her son was being assaulted and he replied "It is usual to assault boys like that. Don't make noise."

(*b*) Mr. Govind, a Solicitor, said that he was acting for the appellant and he went to the police station between 8 and 9 p.m. on 11th September 1968 and saw the appellant, who complained to him that he had been ill-treated and assaulted by police officers when they were taking statements from him.

(*c*) Inspector Nadalo testified that he had been instructed to investigate complaints and that between 8 and 9 p.m. on 11th September 1968 the appellant complained to him that he had been assaulted by the police when making statements.

(*d*) Billy Obed, a justice of the peace, testified that he had been called to the police station on the night of 11th September 1968 and saw the three accused, and that two of them complained to him that they had been assaulted and ill-treated by the police and that their statements had been made under pressure and they had been forced to sign them.

The trial judge ruled that the statements were admissible. In the course of his ruling he said:

> " . . . The prosecution has satisfied me beyond any reasonable doubt that the statements in question are not fabrication. I am therefore now in a position to deal with the next ground of objection namely that, if the Accused did make the statements, then he did so under threat of violence, actual violence, torture and certain indignities. . . . The disputed statements amounted to a confession and, to be admissible, they must be free and voluntary, and it is for the prosecution to show affirmatively that they were made without the prisoner being induced to make them by any pressure or force or by menace or violence or terror. I have had the advantage of hearing the evidence of not only the First Accused and his witnesses on the one hand but also the evidence of the police officers concerned on the other hand.
>
> The First Accused gave me the clear impression of giving fabricated evidence which he appeared to have rehearsed in detail. Similarly I found the evidence of his mother Shiu Devi suspect. On the other hand I was impressed by the evidence of Sgt. Rameshwar Prasad, Constable Mahendra Singh and Senior Inspector Muniappa who denied applying threat, pressure or force on the First Accused or of seeing anyone applying any threat, pressure or force on the First Accused. I am satisfied that the First Accused had no injuries on his person.
>
> The prosecution has satisfied me beyond any reasonable doubt that the statements in question by the First Accused were voluntary and free, and that they were not obtained from him by fear of prejudice or hope of advantage or by oppression. Nor do I find any cogent reasons why these statements should be rejected on grounds of any alleged unfairness."

After conviction, the appellant appealed to the Fiji Court of Appeal, the principal ground of appeal being that the trial judge was wrong in admitting the written and oral confessions alleged to have been made on 11th September 1968.

In giving the judgment of the Court of Appeal Hutchinson J.A. said that in the opinion of the Court the learned judge " fell into the error of endeavouring to assess the respective credibility of witnesses by their demeanour and the way they gave their evidence and by that alone ". He then said " This is wrong if it can be avoided. We adopt a passage from the judgment of the Court of Appeal of East Africa in *Uganda v. Khimchand Kalidas Shah & Ors.* (1966) E.A.30 at p.31.

> 'Of course, . . . a court should never accept or reject the testimony of any witness or indeed any piece of evidence until it has heard and evaluated all the evidence in the case. At the conclusion of a case, the court weighs all the evidence and decides what to accept and what to reject.'

We look then at the whole of what occurred on that day, the 11th September, 1968."

In the course of their review of the evidence they said:

> "At some stage in the morning, that is before 1 p.m., appellant, according to himself, asked for a senior officer to whom he could complain of the actions of the police. Mr. Sutton came in and was there for 15 minutes or thereabouts. Appellant said that he then complained to him that the police were assaulting him. It does not disprove this that one police officer should say that he did not think that appellant and Mr. Sutton talked during that 15 minutes and that another should say that he did not remember them talking. The way to disprove it would have been to call Mr. Sutton, and this was not done."

Having reviewed the evidence they said:

> "One would naturally, and should, look critically at the evidence given by the appellant; and the testimony of the doctor supports the case for the Crown. On the other hand, what really can a person facing a serious accusation do when surrounded by police while he is being interrogated, other than (*a*) call out, as he and his mother say that he did, or (*b*) ask for a senior officer to whom he could complain as he says he did, on both of which matters some facts appear to give him limited support, and what could such a person do afterwards other than complain at the first opportunity, as appellant did, that his statement was not a voluntary one but was forced from him?
>
> For ourselves, with all respect for the view taken by the learned trial Judge, we do not think that the evidence justified his ruling that the Crown had discharged the onus lying on it of showing that the main statement made by appellant was a voluntary one, and, in our opinion, on the case as presented it should have been ruled inadmissible. The statement attributed to appellant when charged with the crime should stand or fall with the earlier statement."
>
> Their conclusion was "It would be impossible to say that there was no miscarriage of justice when a piece of evidence so important as this was admitted when in our view it was wrongly admitted. The conviction is therefore quashed and a new trial is ordered."

In opposition to the Crown's cross-appeal for restoration of the conviction of the appellant, the principal argument for the appellant was that the issues arising on this aspect of the case are not of such general application or such fundamental importance as to justify intervention, especially as this is a criminal matter and the petition is for restoration of the conviction. Well-known cases were cited. *Reg. v. Bertrand* (1867) L.R. I.P.C. 520, 529-31. *In re Dillet* (1887) 12 App. Cas. 459, 462 (J.C.) *Clifford and Others v. The King-Emperor* (1913) 40 Ind. Ap. 241 83 L.J.P.C. 152, 153. *Ibrahim v. R.* [1914] A.C. 599. In *Ibrahim v. R.* Lord Sumner said at pp. 614 615 "That must be left to a Court, which exercises, as their Lordships do not, the revising functions of a general Court of Criminal Appeal: *Clifford v. The King-Emperor*. Their Lordships' practice has been repeatedly defined. Leave to appeal is not granted 'except where some clear departure from the requirements of justice' exists: *Riel v. Reg.* (1885) 10 App. Cas. 675: nor unless 'by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done': *Dillet's case*. It is true that these are cases of applications for special leave to appeal, but the Board has repeatedly treated applications for leave to appeal and the hearing of

criminal appeals as being on the same footing: *Riel's case. Ex parte Deeming* [1892] A.C. 422. The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself: and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. Misdirection, as such, even irregularity as such, will not suffice: *Ex parte Macrea* [1893] A.C. 346. There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future: *Reg v. Bertrand.*"

On a first impression of this case it did seem that there might be in it something tending to divert the due and orderly administration of justice into a new course, which might afford an undesirable precedent. When a trial judge has held a trial within the trial to decide on the admissibility of alleged confessions, and the decision has turned on the credibility of witnesses and he, having had the advantage of seeing and hearing the witnesses giving evidence, has believed the evidence of the prosecution witnesses and disbelieved the evidence of the accused, his decision is not usually overturned by a court of criminal appeal basing their decision on a transcript of the evidence. But although such action by a court of criminal appeal is unusual, it is not necessarily wrong: the facts of the particular case have to be taken into account. Relevant authorities are *Hontestroon (Owners) v. Sagaporack (Owners)* [1927] A.C. 37, 47–8. *Powell v. Streatham Manor Nursing Home* [1935] A.C. 243, 249–51, 258–9, 263–8 and *Watt or Thomas v. Thomas* [1947] A.C. 484.

In the present case the Court of Appeal inferred from the terms of the learned judge's ruling that he " fell into the error of endeavouring to assess the respective credibility of witnesses by their demeanour and the way they gave their evidence and by that alone." That inference may be open to doubt, but at any rate it was a possible inference, and if the trial judge did what he was inferred to have done he was falling into error. On that assumption, the evidence as a whole had been insufficiently taken into account by the trial judge and it was quite in order for the Court of Appeal to do the best they could do by reviewing the evidence, as it appeared in the transcript, for the purpose of deciding whether the alleged confessions had been properly admitted in evidence. Thus the essential issue is whether or not the Court of Appeal were right in drawing the inference. That is a narrow issue and related only to the facts of this particular case. The decision of the Court of Appeal (who indeed had the advantage of knowing local conditions) ought not to be disturbed. This is not a proper case for intervention, and on that ground the cross-appeal could not succeed.

The appeal remains to be dealt with. It raised a short issue, whether it was right to order a new trial.

Section 23 (2) of the Court of Appeal Ordinance (Chapter 8 of the Laws of Fiji 1967) provides that " Subject to the special provisions of this Ordinance, the Court of Appeal shall, if they allow an appeal against conviction, either quash the conviction and direct a judgment and verdict of acquittal to be entered, or if the interests of justice so require, order a new trial."

The argument for the appellant was that the interests of justice do not require a new trial in this case. The only object of a new trial would be to enable the prosecution to make a new case or at any rate to fill gaps in their evidence. The alleged confessions have been held to have been wrongly admitted on the evidence given at the trial, and

without the confessions the prosecution had no case. In a second trial the confessions could not be admitted on the same evidence. Therefore the prosecution would have to bring other evidence either to fill gaps (for instance by calling Mr. Sutton) or to make a new case. It would not be fair to the appellant if the prosecution were given this opportunity of making a second attempt to secure his conviction. *Nemo debet bis vexari de una et eadem causa.*

There are decisions of the East African Courts which, though relating to different statutory provisions, afford support to the view that under the Fijian provision justice does not require a new trial for the purpose of enabling the prosecution to fill gaps in their evidence. *R. v. Dossani* (1946) 13 E.A.C.A. 150, 151 *R. v. Suke* (1947) 14 E.A.C.A. 134, 135 *Sumar v. Republic* (1964) E.A. 481, 482–3 where Duffus J.A. cited and applied unreported passages of the judgment in *Salim Muhsin v. Salim Bin Mohammed and Others* (1950) 17 E.A.C.A. 128.

In their Lordships' opinion the order for a new trial cannot be upheld.

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DELIVERED BY
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