Privy Council Appeal No. 32 of 1979

Ragho Prasad (s/o **Ram Autar Rao**) – – – – *Appellant*

v.

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

FROM:

THE FIJI COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH NOVEMBER 1980

Present at the Hearing:

THE LORD CHANCELLOR
LORD DIPLOCK
LORD EDMUND-DAVIES
LORD RUSSELL OF KILLOWEN
LORD ROSKILL

[*Delivered by* LORD DIPLOCK]

At a trial in the Supreme Court of Fiji, held before Stuart J. and five Assessors Ragho Prasad (" the appellant ") was convicted of murdering his father, and sentenced to life imprisonment. He appealed to the Fiji Court of Appeal against his conviction, on the ground of various alleged errors and other defects in the Judge's summing up to the Assessors, whose unanimous opinion, with which the Judge concurred, was that the appellant was guilty of murder.

The Court of Appeal gave thorough and detailed consideration to these criticisms. They are dealt with in the judgment of the Court delivered by Gould V. P. who concluded by saying:

> " We have expressed some criticism of the summing up but do not consider, in the light of the whole, that the learned judge went beyond permissible limits in permitting his opinions of some facts to be seen, and do not find any of the other criticisms urged by counsel are justified to such an extent as would induce us to allow the appeal."

The practice of the Judicial Committee in the exercise of its appellate jurisdiction in criminal matters was authoritatively stated by Lord Sumner in *Ibrahim v. The King* [1914] A.C. 599 at pp. 614–5. The practice remains unchanged, and the whole passage bears repetition.

> ". . . 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* (1887) 12 App. Cas. 459. 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 upon 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* (1867) L.R. 1 P.C. 520."

To this their Lordships would only add that courts of appeal composed of judges more familiar than members of this Board can hope to be with local conditions and social attitudes, are in a better position than their Lordships to assess the likely effect of any misdirection or irregularity upon a jury or other deciders of fact in a criminal case. This is all the more so where, as in Fiji, the mode of trial is not the same as in England or Scotland. There is no jury; the trial is before a judge and assessors to the number of not less than four in capital cases. The judge sums up to them; each then states his individual opinion as to the guilt of the accused; although permitted to consult with one another they are not obliged to do so; and the ultimate decider of fact (as well as law) is the judge himself who need not conform to the opinions of the assessors, even though they be unanimous, if he thinks that their opinions are wrong. The field of comment upon evidence that is proper to a judge in summing up to a jury in a trial in which they are collectively the exclusive deciders of fact is not necessarily the same as in summing up to assessors whose function it is to help the judge in making up his own mind as the sole ultimate determiner of fact.

Adherence to their settled practice, as described in *Ibrahim* (above), makes it unnecessary in the instant case for their Lordships to do more than state in bare outline the case against the appellant, of which a full account is to be found in the judgment of the Court of Appeal.

On 27 July 1976, there had been a party attended by members of an extended Hindu family of which the deceased, the father of the appellant, was the head. It was held at premises in the compound where most of the extended family lived to celebrate the completion of the cane harvest by one of the appellant's brothers. The appellant, the deceased and some eight others were present, including one called Jai Raj. The deceased had left the party before it ended in order to go home to bed. His body was discovered some time later near a toilet in the compound. He had received some thirteen cuts from a sharp instrument of which four were very severe and were the cause of his death.

For reasons into which it is unnecessary to enter the only evidence of the appellant's guilt that was available at his trial was a confession. If he had made it and it was true, it was conclusive of his guilt. The prosecution's case was that he had made it to a Police Inspector when he had been confronted with Jai Raj who had said to the appellant:

"When grandfather went to sleep, after some time when the dogs started barking, you went and came back after ten to fifteen minutes."

When asked by the Inspector if what Jai Raj had said was true, the appellant replied:

a. "Yes, sir, now, this is true. My brother Sohan Lal said to get rid of this problem. My father went towards the house. A little after, I went and I was annoyed and struck him with a knife."

q. "How many times did you strike with a knife?"

a. "Three or four times."

q. "What did you do with the knife?"

a. "I kept the knife at home after washing it and the police took it from me."

This dialogue was recorded in the Inspector's notebook and initialled by the appellant.

At the trial the admissibility of this confession was challenged on a *voire dire* before the Judge in the absence of the Assessors. The appellant gave evidence on oath. He alleged that what purported to be recorded in the note book was a complete fabrication; he had never said it, it had never been read over to him: he had been forced to initial it as a result of violence inflicted upon him by the police. The Judge disbelieved the appellant's evidence on the *voire dire*. He held the confession to be voluntary and admitted it in evidence. At the trial in the presence of the Assessors, the appellant again gave evidence on oath and made the same sort of allegations of fabrication and violence as he had made on the *voire dire*. Nevertheless the Assessors were unanimous in their opinion that he was guilty beyond reasonable doubt, and so was the learned Judge.

Of the complaints made in the Court of Appeal about the Judge's summing up, it was sought on behalf of the appellant to re-argue two before this Board.

The first was that the Judge did not sufficiently stress to the Assessors the danger of convicting on the evidence of the confession alone. Having admitted the confession on the *voire dire* he instructed the Assessors:

"It was suggested to you that you have to be satisfied that the confession is voluntary, but that is not so. All you have to consider is whether the accused made that statement and whether it is true."

He went on, however, to point out that if they thought that the appellant had been forced to make it they might think it was a very good reason why it was not true. The Court of Appeal were of opinion that the first sentence in the passage that their Lordships have reproduced verbatim correctly stated the law as laid down by this Board in *Chan Wei Keung v. The Queen* [1967] 2 A.C. 160, and that the summing up upon the confession and the weight to be attached to it when taken as a whole was adequate. Before their Lordships, however, it was contended that, since the decision of the Fiji Court of Appeal in the instant case, the Court of Appeal in England had decided in *R. v. McCarthy* [1980] 70 Cr. App. R.270 that the question whether a confession that had been admitted on the *voire dire* was voluntary was for the jury to decide.

Their Lordships have considered the passage in *McCarthy* that was relied upon. It consists of the few words italicised hereunder in a single sentence of the judgment (at p.272):

"If he [*sc.* the judge] allows the evidence to be given, then it is for the jury to consider whether or not there is an inducement *and whether or not it was voluntary*, and it is for the jury, after a proper direction, to assess its probative value."

Looked at in their context the words italicised may be equivocal, but the authorities cited for the proposition are *Chan Wei Keung* itself and *R. v. Burgess* [1968] 2 Q.B. 112, a decision of the Court of Appeal of England in which *Chan Wei Keung* was followed and applied. In their Lordships' view all that the words italicised should be understood to mean is that the jury should take into consideration all the circumstances in which a confession was made, including allegations of force, if it thinks they may be true, in assessing the probative value of a confession.

So, in their Lordships' view, there is no fresh authority in this particular field of criminal law that would justify this Board in re-examining the sufficiency of the summing-up as respects the reliability of the confession, since this is a matter that was peculiarly the province of the Fiji Court of Appeal.

The same applies to the criticisms advanced against the way in which the Judge in his summing-up permitted his own views of the credibility of the appellant and of other witnesses to become apparent to the Assessors.

Finally, their Lordships must deal briefly with a point on which they have not had the benefit of the views of the Fiji Court of Appeal, for the point was not taken before them. At an early stage in his summing-up, when he was in the course of narrating how the prosecution put their case, the learned Judge mentioned that they alleged that when the appellant rejoined the family party after 10 to 15 minutes' absence (during which he was alleged to have killed his father) he had changed his clothes. Jai Raj had in fact said this but not in the presence of the appellant. That Jai Raj had so informed the Police Inspector at a previous interview was extracted from the Inspector in the course of cross-examination on behalf of the appellant. It was, however, hearsay and did not constitute evidence to which the deciders of fact were entitled to have regard in determining the guilt of the accused. Apart from this passing reference the Judge never mentioned changing of clothes again. He never suggested that there was any evidence that the appellant had changed his clothes. He emphasised to the Assessors that the only evidence against the appellant was the alleged confession; and the only subsequent reference that he made to clothes of the appellant was to suggest to the Assessors that they did not help at all in determining whether or not the confession was true.

In their Lordships' view there is nothing in this fresh point. They are fortified in this view by the fact that despite what had obviously been a meticulous analysis of each sentence in the summing-up, it had never occurred to anyone to take the point in the notices of appeal (original and supplementary) to the Court of Appeal or at the hearing in that Court or even in the appellant's written case before this Board. It was advanced for the first time at the oral hearing.

Their Lordships will, accordingly, humbly advise Her Majesty that this appeal must be dismissed.

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