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BARMANAND

v.

REGINAM

B [COURT OF APPEAL, 1968 (Hammett P., Gould J.A., Trainor J.A. 2nd, 30th May]

Criminal Jurisdiction

Criminal law—practice and procedure—evidence of confession—no objection by defence counsel to admissibility—cross-examination suggesting repudiation and threats by police—necessity for trial within a trial.

C

Criminal law—evidence—confession—trial within a trial—whether necessary when factum and not voluntariness is the issue.

At the trial of the appellant for murder evidence was given by police officers that the appellant made oral statements and pointed out certain places to them in what amounted to a full confession of the offence. Counsel for the appellant took no objection to the admissibility of this evidence but in cross-examination put questions to the police officers concerned indicating that the defence would be that the appellant had never made any confession or pointed out any places to them; counsel also suggested that the police had used some threats to the appellant. No trial within a trial was held and the evidence was admitted. After the close of the prosecution case the appellant gave evidence on the lines indicated in the cross-examination.

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Held: 1. Absence of objection by counsel for an accused person to the admissibility of evidence of an alleged confession may properly influence a judge but does not dispose of the question of admissibility completely; in spite of the absence of objection the trial judge should have held a trial within a trial when it became apparent from the cross-examination that the confession would be denied and that some circumstances of duress were alleged.

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2. The possibility of prejudice to the appellant by the failure of the trial judge to hold a trial within a trial could not be completely excluded.

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Quaere: Whether if the issue whether a statement was in fact made stands alone (and no question of voluntariness arises at all) the issue is properly one for the assessors.

Cases referred to: *Sparks v. Reginam* [1964] A.C. 964; [1964] 1 All E.R. 727: *R. v. Francis and Murphy* (1959) 43 Cr. App. R. 174: *Kinyori v. Reginam* (1956) 23 E.A.C.A. 480: *Mwangi v. Reginam* (1954) 21 E.A.C.A. 377:

H

Appeal from a conviction by the Supreme Court.

K. C. Ramrakha for the appellant.

B. A. Palmer for the respondent.

The facts appear sufficiently from the judgment of the court.

Judgment of the Court (prepared by GOULD J.A.): [30th May, 1968]—

The Appellant was convicted by the Supreme Court in Lautoka on the 2nd November, 1967, of the murder of Suresh Chand alias Sesu alias Mangru s/o Ramesh Chand. The three Assessors were unanimously of the opinion that the Appellant was guilty.

The deceased was a boy of eleven years who lived with his parents at Wailoku, Nadi: the Appellant, who is a young man, lived in the same settlement. The deceased was last seen on the afternoon of the 2nd May, 1967, and on the 11th May, his dead body was found in a sack held down by a stone in a creek at Wailoku, which is in the same area. The medical evidence showed that the deceased had been strangled, most probably by manual compression of the neck.

On the afternoon of the 2nd May Raj Pati, the mother of the deceased, saw the deceased leave their house with the intention of going to a hill, at some little distance, to get a horse. He did not return. About 3 p.m. the same afternoon she had seen the Appellant going in the same direction. About 5.30 p.m. on the same day, one Ram Kumari testified that she saw the Appellant walking towards his house following a track from the hills. These references to the whereabouts of the Appellant that afternoon are at variance with his own account of his movements, and that of a number of witnesses called for the defence. The vital evidence, and that upon which the conviction rests, was a complete confession which, according to police witnesses, was made by the Appellant on the 23rd May, 1967, in an interview at which notes of questions and answers were taken in writing, though they were not read back to the Appellant and he was not invited to sign them. Reference to the procedure will be made later, but at this stage we will set out the material content of the statements of the Appellant as given in evidence by Sergeant Balram Sharma. The Sergeant questioned the Appellant in a Landrover at the Appellant's own home and the first relevant passage of his evidence is recorded as follows —

> "At this stage he took deep breath, sweat on his forehead and then said —
>
> 'a: I am tired of my relatives or family. I was excited Sgt.'
>
> He then stopped for a minute. Then I put another question —
>
> 'q: Do you want to say anything?
> a: Yes, Sgt. I have made a great mistake.
> q: What type of mistake?
> a: Sesu, the same Suresh, I have killed him.'
>
> I then cautioned him as follows: 'You are not obliged to say anything concerning the death of Sesu but whatever you do say will be written down and may be given in evidence.'
>
> The Accused then said:
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> 'On Tuesday about the thrashing of paddy is false, on that day I killed him.'

He bowed his head and stopped talking. Then I questioned him —

A 'q: Where did you keep Sesu's body?'

After taking a deep breath he said —

'a: Let's go Sgt., I will show you the place.' "

Then the Appellant guided a police party and at a certain point he said —

> "I met Sesu here. He said 'Have you seen the horse?' I said 'Let
> B us go and search.' Then we went through this way."

They went further and in the vicinity of a sugar plantation the Appellant pointed to a spot and said "There." It appears from the plan in evidence that this point is at no great distance from the place where the body was found. The Appellant then said —

> C " 'This thing had not happened to me before Sgt. If I had not committed sodomy with Sesu he would not have died'. He kept quiet for minute at least. Then he said something to me. 'Sgt. when I was committing sodomy blood came out. Sesu appeared to be unconscious. I got excited. To save my reputation I choked his neck and he died. Now it is in God's hands. Come, I will show you the rope. The rope was in Sesu's hand. I tightened the neck with
> D the same rope.' "

The party continued under the guidance of the Appellant and further on he said "Sgt., I hid the rope there." A piece of rope was found at the spot. The Appellant said, "I wanted to hang the sala but it did not work out." The Appellant was asked what he had done with the body and said "The same night I came and I have tied the shoelace on the
E mark made by the rope. I thought nobody would know the mark made by the rope." Later the Appellant pointed out a hole on the bank of a stream where he said he had kept the body until two days before the body was found. Then he pointed to another hole in the stream where in fact the body had been found. The Appellant pointed to another spot where there was a "dent" and said he had lifted a stone from there and placed it on the sack. Sergeant Balram Sharma's evidence as to the
F statements and actions of the Appellant on this day was confirmed in substantial detail as to the later stages by the evidence of Sub-Inspector Atma Prasad and Detective Corporal Rameshwar Prasad, and as to that part of the proceedings which took place in the Landrover by Detective Corporal Mohammed Yakub Khan.

There was a substantial body of evidence which tended to confirm the
G truth of the details of the Appellant's confession. The opening conversation with the deceased about the whereabouts of the horse is confirmed by the evidence of the mother of the deceased that he had gone to get the horse. The horse was later found with a broken and shortened rope around its neck which may indicate how the deceased came to be carrying a piece of rope. The rope was found where the Appellant pointed and was similar in size and age to that on the horse. There was a smell
H emanating from the spot in which the Appellant said he had first placed the body. The body was found in the second place the Appellant indicated, in a sack weighted down by a boulder. The boulder weighed eighty-three pounds which could account for the crushing of the skull

of the deceased referred to in the medical evidence as having been caused after death. Th boulder was found to fit the indentation at the place from which the Appellant said he took it. The medical evidence also was that the presence of maggots in the body suggested that it had been out of the water for some unascertainable time before it was immersed. A shoelace was mentioned in the confession and one was found around the neck of the deceased's body. There is one other minor item of evidence — two witnesses said that the Appellant dissuaded a search party from continuing with a search in the direction where the body was later found, by saying that area had already been searched. When the Appellant was formally charged with murder he made a statement, the material content of which was — "Whatever I had to tell I have already told the Police."

The Appellant gave evidence on oath that on the day in question he had been thrashing paddy and filling paddy sacks all day. There had been a recital of the Ramayan at home about 1.30 to 2 p.m. He denied ever going north of his house on the 2nd May ("North" includes the area where the body was found). He denied ever meeting the deceased on that day. He admitted there was an interview with the police in a Landrover but denied that he had made any admission at all. He said that he had never at any time made the statements attributed to him by the police witnesses; nor did he take them to the places they had mentioned or point out any rope or place where he had picked up a stone or concealed a body. Three of the Appellant's brothers, Ram Nand, Ramendra Prasad and Lekhram, gave evidence in support of the Appellant's version of his movements on the day in question. Two other witnesses, Ravendra Nath and Ram Bhagat, called presumably in support of the alibi, gave evidence of no great cogency.

Counsel for the Appellant argued a number of grounds of appeal but, on the view we take of the case, we need only refer to ground (c) which reads —

> "(c) The learned trial Judge erred in law in not holding a "trial within a trial" to decide the initial admissibility of the alleged confession made by the appellant."

We will set out the main features of the evidence so far as it relates to this ground of appeal. The circumstances of Sergeant Balram Sharma's interview with the Appellant, as adduced by the Crown, were perfectly fair. He was not in a police station, and had not been detained in any way. The interview took place in a Landrover one or two chains from his house, and his father called him for the purpose. The father was at a short distance throughout, and the tarpaulin being folded up, the occupants of the vehicle could be seen. Only one other policeman was present — Det. Cpl. Mohammed Yakub Khan. The learned Judge put the following questions to the Sergeant. —

> "Court — How did he come to be in the landrover?
>
> To Court — I asked his father where was the Accused, and the Accused then appeared and he came into landrover. I asked him to sit down.
>
> Court — He was quite happy about being questioned, and everything he said was entirely voluntary?

To Court — Yes.

Q: There was no question of him being in custody?

A A: No.

Q: These questions and answers that you wrote down, where did you write them down?

A: In my notebook.

Court — You had no reason whatsoever to suspect Accused of complicty in the murder of the boy at that time?

B To Court — No.

Q: You had no information whatsoever to connect him?

A: No.

Court — He was just another of the interviewers in the neighbourhood from whom you sought further information and he gave

C it freely?

To Court — Yes."

At first, during this interview, the accused maintained his account of having been thrashing rice, and then he appears suddenly to have broken down. We have already set out this passage from the Record, and it is to be observed that a catuion was immediately given to him. Det. Cpl.

D Mohammed Khan, who was present, gave evidence that no threat was made and no inducement held out.

When the learned Judge put the questions above recorded to Sergeant Balram Sharma it was obviously an appropriate moment for counsel for the defence to put forward any objection they may have had to the admissibility of the confession; indeed they should have advised counsel for the

E Crown earlier if they proposed to object. They did not do so. As the learned Judge no doubt considered that, *prima facie* at least, voluntariness had been proved, he permitted the examination of the witness to proceed.

The defence case was revealed in what was put in cross-examination to the police witnesses. It was put to Sub-Inspector Atma Prasad that the Appellant did not go with the police party and make the statements alleged or point out the places mentioned, but that the Landrover was

F driven straight to the police station. It was put to Det. Cpl. Rameshwar Prasad that his evidence on the same matters was completely fabricated. In relation to the confession said to have been made in the Landrover it was put to Sgt. Balram Sharma and Det. Cpl. Mohammed Yakub Khan that their evidence of such a confession was also completely fabricated. There are two passages in the cross-examination of Sgt. Balram Sharma,

G which might have foreshadowed a challenge to the voluntary nature of the confession; he was asked, in relation to the questioning of the Appellant in the Landrover — "What was the purpose of this verbal third degree?" and "Would you agree you kept on badgering him?"

The second passage is recorded as follows —

"Q: The Accused says you got off and said 'I want to take state-

H ment from you'?

A: No. I said 'I want to talk to you.'

Q: Accused said 'I have already given to Atma Prasad'?

A: It is not true.

Q: You said 'I will take you to the police station and take statement, get in or else I will take you and put you in the cell'?
A: That is not true."

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The following passage from the evidence in chief of the Appellant gives his version of what took place in the Landrover and afterwards —

"Q: What happened when the landrover arrived?
A: The landrover came to the sitting house and stopped, Yakub Khan came out and shook hands with my father.
Q: Who else was in the landrover?
A: Sgt. Balram.
Q: What happened then?
A: Yakub Khan called me.
"Q: What happend then?
A: He told me to give my statement.
Q: Who said that?
A: Yakub Khan.
Q: Then what happened?
A: I told him I had already given statement. He said you had better give your statement, if not you will be put in cell. I told him I would not give statement as I had already given statement.
Q: Then what happened?
A: They opened the door of the landrover and made me sit inside and then afterwards Sgt. Balram sat beside me.
Q: Which side?
A: Yakub was driving, I was in middle and Sgt. Balram said [sat] beside me.
Q: What happened after that?
A: He took landrover and stopped at Ramesh's house.
Q: What happend there?
A: Sgt. Balram got down, Atma Prasad came in and also another policeman came and sat in back.
Q: What happened then?
A: He drove landrover to police station.
Q: What happened at the police station?
A: In police station they made me sit there and they went away."

In the circumstances shown by the Record counsel for the Appellant submits that it was incumbent upon the learned trial Judge to hold a trial within a trial. If, in the absence of objection, he need not have done so at the stage when he satisfied himself that *prima facie* at least the evidence was admissible, he should have done so (or if it was necessary, withdrawn the case from the Assessors and started *de novo*) when the defence case that the confession was never made, was revealed by cross-examination.

The procedure of a trial within a trial is as well known in Fiji as elsewhere, and there is no need to set it out in detail. A short passage may be quoted from the judgment of the Privy Council in *Sparks v. Reginam* [1964] 1 All E.R. 727, 736 —

"The procedure to be followed when a question arises whether to admit a statement is well settled (see *R. v. Francis, R. v. Murphy* (1959) 43 Cr. App. R. 174). If objection is made to admissibility

A it is for the judge to hear evidence in the absence of the jury and then to rule whether an alleged confession should or should not be admitted. He ought not to admit it if, on the view which he forms of the circumstances of the making of a confession, he does not consider that it was a voluntary one."

How the procedure ought to operate is set out in the judgment of the Court of Appeal of East Africa in *Kinyori v. Reginam* (1956) 23 E.A.C.A. 480, 482 —

B "If the defence is aware before the commencement of the trial that such an issue will arise the prosecution should then be informed of that fact. The latter will therefore refrain from referring in the presence to the assessors to the statement concerned, or even to the allegation that any such statement was made, unless and until it has been ruled admissible. When the stage is reached at which the C issue must be tried the defence should mention to the Court that a point of law arises and submit that the assessors be asked to retire."

It will be observed that in both of the passages quoted there is reference to objection by the defence, and in the present case counsel for the Crown has submitted that it is necessary for the issue of admissibility to be raised before it becomes correct procedure for the assessors to be sent out of court. While we think that the attitude of the defence may D properly influence a judge who has ascertained that, *prima facie*, evidence is admissible, we do not consider that the absence of objection disposes of the matter completely. If, even after evidence has been admitted, it becomes apparent that facts relevant to admissibility are disputed it may become the duty of the judge to examine the matter afresh, and, if the evidence is found to be inadmissible, to determine whether a clear direction to the assessors will suffice, or whether the case should be tried E *de novo*.

The Crown has also submitted that the issue of whether a confession has been made voluntarily so as to be admissible in evidence, is quite different from the question whether a confession has in fact been made. To hold otherwise is to confuse admissibility with probative value.

F There is a decision of the Court of Appeal of Eastern Africa which is contrary to this submission. In *Mwangi v. Reginam* (1954) 21 E.A.C.A. 377, it was held that the question whether a statement tendered in evidence was or was not made by an accused person is a question of fact affecting the admissibiilty of the statement. The court based itself upon a passage in *Phipson on Evidence*, 9th Edn. p.11, but did not examine the question in any greater depth. With respect, we would reserve our G opinion whether, if the issue of whether the statement was in fact made stands alone, and no question of voluntariness arises at all, this is not properly a question for the jury.

In practice, however, these issues can seldom be completely severed. It frequently happens that an accused person says that he made and signed a statement under threat, but did not in fact say all that it pur-H ports to contain. In the present case the Appellant has denied making the statement at all but at the same time has made some assertions which could have a bearing on the issue of admissibility, if he did in fact make the confession.

We think that the way in which the trial was conducted by the learned Judge was largely due to the attitude of counsel for the defence who would appear to have decided to rely entirely upon the Appellant's repudiation of the confession. At the same time we are of the opinion that in spite of the absence of objection from counsel, the learned Judge should have held a trial within a trial as soon as it appeared from the cross-examination of Sergeant Balram Sharma, that the confession was going to be denied and that some circumstances of duress were alleged. If the confession had been held by the learned Judge to be inadmissible that would have been an end to the prosecution case; if he held the contrary no harm would have been done, as the assessors were entitled to hear all the evidence again.

The next question which arises is whether the Appellant in fact or law suffered any prejudice from the procedure actually adopted. It has been said that the failure to hold a trial within a trial in the absence of the jury deprives the accused of his right to a ruling by the judge alone and his right to give evidence on the voir dire, and may affect his decision whether or not to give evidence before the jury. In view of the order we intend to make we do not propose to discuss this matter in relation to the circumstances of the present case but confine ourselves to saying that we are unable completely to exclude the possibility of prejudice to the Appellant by the failure to hold a trial within a trial.

For these reasons we allow the appeal and quash the conviction and sentence. It is, however, in our opinion a case where there is substantial evidence against the Appellant if it is held to be admissible, and clearly a case in which we should exercise our power to order a new trial. There will be a new trial of the Appellant accordingly.

Appeal allowed; new trial ordered.